NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 18 SUMMER 2022 NUMBER 3

A DIFFERENT CURSE: IMPROVING THE ANTITRUST DEBATE ABOUT "BIGNESS"

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Over one hundred years ago, Louis Brandeis explained his views on antitrust law in an essay titled "A Curse of Bigness." Now, a progressive movement, inspired by Brandeis and thus dubbed the "Neo-Brandeisians," challenges the status quo in American antitrust law. Yet, the response from establishment antitrust scholars has been remarkably inhospitable. Unfortunately, the current debate about Bigness is thus "cursed" by close-minded and unproductive criticism.

This Note's purpose is not to assert that reform ideas are beyond reproach but to move the legal and policy debate into more productive territory. Part I outlines the current debate. Part II clarifies the often misunderstood or overlooked tenets of the Neo-Brandeisian movement of antitrust reform. Part III examines three common criticisms of the reform movement, describing each and then responding with why each is unproductive. Part IV advocates for a more substantive and legally focused debate over "Bigness" in antitrust. This Note closes with optimism by promoting examples of scholarship that seem to be heading in a more fruitful direction.

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INTRODUCTION

Over one hundred years ago, legal scholar and future Supreme Court Justice Louis Brandeis explained his views on antitrust in an essay titled *A Curse of Bigness*: "The evil of the concentration of power is obvious; and as combination necessarily involves such concentration of power, the burden of justifying a combination should be placed upon those who seek to effect it."[1]

Now, a progressive movement, inspired by Brandeis and thus dubbed the "Neo-Brandeisian" movement, challenges the status quo in American antitrust law.[2] In this "battle for the soul of antitrust," Neo-Brandeisian ideas have already won in-

1. Louis D. Brandeis, *A Curse of Bigness, in* OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 120–133 (Melvin I. Urofsky, ed., 1995) (originally published in *Harper's Weekly* on Jan. 10, 1914).

2. *See infra* Part II for a detailed explanation of the content of Neo-Brandeisians' suggestions for reform. *See infra* Appendix, Exhibit B for a summary and categorization of Neo-Brandeisian proposals.

fluence and allies in government.[3] Reformers now occupy powerful roles in the executive branch,[4] and lawmakers have included Neo-Brandeisian ideas in proposed amendments to antitrust laws, several of which have bipartisan co-sponsors.[5]

However, despite this quick uptake of their ideas in the executive and legislative branches, establishment antitrust scholars' reception of these reformers has been inhospitable.[6]

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3. *Cf.* Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. 917 (1987) (stating that intellectual battles over the soul of antitrust are not unprecedented); *see also infra* notes 26–27.

4. President Biden appointed progressive reform-minded lawyers to influential roles: Tim Wu as National Economic Council advisor, Lina Khan as Chair of the FTC, and Jonathan Kanter as Assistant Attorney General for Antitrust. Jim Tankersley & Cecilia Kang, *Biden's Antitrust Team Signals a Big Swing at Corporate Titans*, N.Y. TIMES, (July 24, 2021), https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html. While Kanter did not publicly comment much when in private practice, Khan and Wu have articulated their views. *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018); Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO/MEDIUM (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7; Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, COMPETITION POL'Y INT'L 2018.

5. *See, e.g.*, American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021) (sponsored by Rep. David Cicilline (D-RI) with several Republican co-sponsors); Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021) (sponsored by Rep. Joe Neguse (D-CO) with several Republican co-sponsors); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021) (sponsored by Hakeem Jeffries (D-NY) with a few Republican co-sponsors); Open App Markets Act, S. 2710, 117th Cong. (2022) (sponsored by Sen. Blumenthal (D-CT) with several Republican co-sponsors). While outside this Note's scope, reformers in the E.U. have succeeded in passing the Digital Markets Act, significantly altering competition law. *See* Press Release, Deal on Digital Markets Act, Eur. Parliament (Mar. 24, 2022), https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users.

6. *See, e.g.*, Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861 (2020); Mark Jamison, *Proponents of Hipster Antitrust Fail to Understand Economic History and Business Realities*, AM. ENTER. INST. (Aug. 6, 2019), https://www.aei.org/technology-and-innovation/proponents-of-hipster-antitrust-fail-to-understand-economic-history-and-business-realities/. This "just say no" approach is reminiscent of the "inhospitable" tradition of antitrust law from an earlier era; *see What More Should Antitrust Be Doing?*, THE ECONOMIST (Aug. 6, 2020),

Thus, this debate over "Bigness" is suffering from a different curse: many scholars are unfairly criticizing Neo-Brandeisians, rather than debating the legal and policy merits of their ideas.[7] Unfortunately, smart people are talking past each other.

So, when change seems likely, or at least possible, a failure to thoughtfully engage in this current debate enhances the risk that antitrust law will proceed in a poorly considered direction or become politically polarized. The consequences of an improperly scoped or enforced antitrust law can be severe.[8] And, as with many other collective action problems, political

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https://www.economist.com/schools-brief/2020/08/06/what-more-should-antitrust-be-doing ("Donald Turner, America's top trustbuster in the mid-1960s, saw antitrust law as benefiting from an 'inhospitable' tradition: on many matters its default response was to say no."); *see also* Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 1–2 ("I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law.") (coining the "inhospitable tradition" phrase in the sense of enforcers reflexively nipping monopoly problems in the bud). This Note argues that establishment scholars are unhelpfully and unsuccessfully attempting to do the same thing to the Neo-Brandeisian reform movement.

7. In general, by unfair, I mean that these criticisms are either inapt, distortional, unproductive, or all three. *See infra* Part III for greater discussion of these criticisms and my responses.

8. To conservatives, over-enforcement errors are a greater risk: over-enforcement errors violate principles of freedom and perversely hamper rather than help the free-market economy that it is meant to protect. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 20–21 (1978) ("The struggle between economic freedom and regulation also reflects and reacts upon the tension in our society between the ideals of liberty and equality. Neither of these can be an absolute, of course, but the balance between them *and the movement of that balance* are crucial.") (emphasis added). Additionally, lost upside potential of well-functioning capitalism also poses a risk. Daron Acemoglu & James A. Robinson, *Is This Time Different? Capture and Anti-Capture of U.S. Politics*, 9 THE ECONOMISTS' VOICE 1, 2 (2012) ("The consequences of these inclusive institutions were that the U.S. became one of the most prosperous and technologically dynamic societies in the world."). Alternatively, progressives generally perceive that under-enforcement errors pose a greater risk: under-enforcement errors may result in a vicious cycle where citizens lose control of government to a nefarious entity that unifies political and economic power. *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 78–80 (2018) (explaining how monopolies enabled and sustained the Nazi Party's fascist priorities); Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSPS. 113, 115 (2017) ("That [the East India Company's] 15-year monopoly right lasted 233 years is a harsh reminder of how dangerous the commingling of economic and political power can be."); *id.* at 120 ("The

partisanship can risk harmful ossification and irresponsible tinkering with the law, both of which should be avoided.[9]

This Note's purpose is not to assert that these reform ideas are beyond reproach but to move the legal and policy debate into more productive territory.[10] Several problems frustrate the current antitrust legal debate. One problem is that many people are rejecting Neo-Brandeisian theory without first seeking to understand it on its own terms. To that end, this Note summarizes and explains the main tenets of Neo-Brandeisian thinking, which have been clear for years[11]: Anti-Bigness, reducing or eliminating pro-defendant biases in antitrust law, enhancing enforcement, and reforming problems with the Consumer Welfare Standard (CWS).[12]

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fear is of a 'Medici vicious circle,' in which money is used to gain political power and political power is then used to make more money.").

9. Take as an example the problematic ossification and polarization of American immigration law. Congressional inaction has led to outdated law and creative exercises of Executive power in both Republican and Democratic administrations. *See* Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. AM. PROGRESS (July 22, 2019), https://www.americanprogress.org/article/restoring-rule-law-fair-humane-workable-immigration-system/; David J. Bier, *Why the Legal Immigration System is Broken: A Short List of Problems*, CATO INST. (July 10, 2018), https://www.cato.org/blog/why-legal-immigration-system-broken-short-list-problems. Given the increased congressional dysfunction and decline of public lawmaking over the past few decades, the same problem is arguably happening in many other areas of law. *See* Ezra Klein, *Congressional Dysfunction*, VOX (last updated May 15, 2015), https://www.vox.com/2015/1/2/18089154/congressional-dysfunction (see charts showing declines in productivity and increases in party polarization and use of the filibuster).

10. More debate should focus on law and policy, as opposed, in particular, to macroeconomic trends, which I partially address in Part III under the establishments' critiques about "History." *See infra* Part III. While a fuller discussion is outside the scope of this Note, my view is that the discussion over what empirical economic data mean can and should *inform* but cannot and should not *answer* antitrust law's central legal and policy questions. This Note advocates for more substantive discussion of the latter in the context of the reform agenda.

11. *See infra* Appendix, Exhibit B for a summary of the Utah Statement, which is an articulation of Neo-Brandeisian values and proposals for reform; Wu, *supra* note 4.

12. For more background on the meaning of the Consumer Welfare Standard *see* Herbert J. Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, CONCURRENTIALISTE (Jan. 17. 2020) ("[T]he consumer welfare principle in antitrust should seek out that state of affairs in which output is maximized, consistent with sustainable competition. Viewing the con-

Another overarching problem is that the debate's scope is too broad, attempting to draw conclusions about history, economics, and politics. The debate over Bigness would benefit from a narrower focus on the legal and policy substance of reform proposals and their potential consequences. To generalize, a substantial amount of criticism of Neo-Brandeisian ideas has failed to substantially engage with reform proposals in three main ways.

First, legal scholarship often overvalues irrelevant historical context at the expense of substantive analysis. Rather than engage with the current proposals, establishment scholars complain that reformers apparently "ignore that over fifty years ago, antitrust law debated the same proposals that they are raising anew today."[13] Critics argue that the reformers would agree with the status quo if they just took the time to fully understand and appreciate why antitrust law took such an economically conservative, pro-defendant turn over the past fifty or so years.[14] However, these arguments about history distract from substantively analyzing the reformers' proposals in the current context, rather than the circumstances of a half-century ago.[15]

Second, rather than engage with nuance, critics have often mischaracterized Neo-Brandeisian thinking as being antithetical to certain values imbued in current antitrust standards. For example, assume that the current CWS's main goal

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sumer welfare principle as output maximization has the effects of (1) protecting the consumer interest in low prices; (2) protecting intermediaries all the way down the distribution chain because high output tends to benefit all of them; (3) protecting competitive labor and other supplier markets, because these are also best off when output is maximized and wages are unrestrained.").

13. Dorsey et al., *supra* note 6 at 862.

14. *Cf.* Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

15. *See* JONATHAN B. BAKER, THE ANTITRUST PARADIGM 3, 5 (2019) ("Today's antitrust paradox is not Bork's. . . . [There are] four competitive problems new to the information economy or exacerbated [by] it: algorithmic coordination; exclusionary conduct by dominant platforms; threats to innovation; and harm to users on all sides of platforms—suppliers as well as customers.").

is low prices[16] and that Neo-Brandeisians disagree with it because it is biased toward defendants and difficult to administer.[17] Establishment thinkers then mischaracterize reformers' disagreement with the CWS by substituting that nuanced disagreement with some inversion of the CWS. Thus, anyone who disagrees with the CWS must therefore believe that the goal of antitrust is instead to raise prices and harm end-consumers.[18] This approach ignores the nuance of reformers' positions and attacks straw man arguments when reformers are actually making different points.

Third, establishment scholars, accustomed to the CWS, are frustrated that Neo-Brandeisians' proposals do not look like the CWS, accusing them of vagueness.[19] And beyond vagueness, some critics also accuse reformers of hiding the

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16. *Cf.* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 108 (2020) (summarizing that the standard that federal antitrust agencies apply in evaluating mergers is "simply whether price is likely to go up or down–much simpler than an inquiry into general welfare effects.").

17. *See infra* Part I.B for a discussion of the Neo-Brandeisians' proposals to reform the CWS.

18. Assume the premise: "If you believe in the Consumer Welfare Standard, then the goal is low prices" (If $X \rightarrow Y$).
The logical error is accepting the inverse premise as true when they are not logically equivalent:
Inverse: "If you do not believe in the Consumer Welfare Standard, then the goal is not low prices." (If $\sim X \rightarrow \sim Y$).
Rather, the contrapositive, a much less insightful statement, is logically equivalent:
"If the goal is not low prices, then you do not believe in the Consumer Welfare Standard." (If $\sim Y \rightarrow \sim X$).
Thus, it still remains necessary to figure out what reformers actually think.

19. *See, e.g.*, Daniel Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531, 531 (2019) ("Nonetheless, to skeptics of the movement like myself, the lack of a significant body of work articulating the movement's views creates a framing difficulty—how does one critique a movement without a canon of literature or, to date, any tangible political or judicial achievements?"); *Consumer Welfare Standard*, ANTITRUST EDUC. PROJECT, https://www.antitrusteducationproject.org/consumer-welfare-standard.html (last accessed Nov. 4, 2021) ("Vague New Notions: Legislators are advancing new theories of antitrust that would address poorly defined ideas about 'equity' and 'values' that would uncouple this body of law from its beneficial economic effects."). Advisory Board members of the Antitrust Education Project include the Hon. Judge Douglas Ginsburg and Professors Joshua D. Wright, Daniel A. Crane, Thom Lambert, Geoffrey A. Manne, Alan J. Meese, Donald Kochan, Alden Abbott, & Kenneth G. Elzinga. *Staff &*

ball, purportedly because the reformers know their ideas are unpopular.[20] Whether implicit or explicit, this expectation that a new standard must look exactly like the CWS is misguided. Neo-Brandeisians rebut this expectation as flawed because it accepts the erroneous premise that the CWS is clear, objectively neutral, and easy to administer.[21]

Neo-Brandeisian proposals are imperfect and should be rigorously debated. Accordingly, this Note concludes by addressing three related critiques that deserve more attention. First, how do reformers plan to address antitrust law's classic administrability challenges? Second, which standard, if any, do the reformers prefer? Third, what is the reformers' stance on the proper extent and role of economic evidence and economists in antitrust law? Scholars should prioritize these challenging topics because both practitioners and the academic debate would benefit from further clarification and analysis.

This Note proceeds as follows. Part I begins by providing a very brief background of antitrust law and summarizing the nature of the current dispute over legal standards. With this context, Part II then explains the Neo-Brandeisian reform movement, including its values, doctrinal proposals, enforcement priorities, and concerns with the current legal standard. Part III then turns to criticisms of the Neo-Brandeisian movement, describing three frequent criticisms and explaining why they are unproductive or otherwise unfair. In closing, Part IV advocates for a more substantive and legally-focused debate over "Bigness" in antitrust and provides examples of more productive criticisms.

Board, ANTITRUST EDUC. PROJECT, https://www.antitrusteducationproject.org/staff.html (last accessed May 23, 2022).

20. *See* Hovenkamp, *supra* note 16, at 130 ("A neo-Brandeis approach whose goals were honestly communicated would never win in an electoral market, just as it has never won in traditional markets."); Christine S. Wilson, *The Chair's Showcase: The Future of Antitrust*, 35 ANTITRUST 4, 23 (2021) ("Herbert Hovenkamp said that if the Neo-Brandeisians were clear in the outcomes that they are seeking, these ideas would not get traction—and I think that is true.").

21. *See infra* Part I.B. for an explanation about what problems Neo-Brandeisians have with the CWS.

I.
PROGRESSIVE REFORMERS ARE CHALLENGING THE STATUS QUO IN ANTITRUST LAW

This part provides background on the current debate in antitrust law. First, this part describes the Sherman Act—America's first antitrust law—and two important judicial interpretations of the law. It then explains the ideas and logic of antitrust law's current CWS and explores how and why Neo-Brandeisian reformers oppose it.

Since the Sherman Act was passed in 1890,[22] its scope has been vigorously debated.[23] The Act's prohibitions are simple and short:

> [Section One:] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
> [Section Two:] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [* * *].[24]

Congress' original intent remains vigorously debated,[25] and scholarly analysis of its legislative history provides no clear consensus as to its intended scope.[26] Thus, against this background, the interpretation of the Sherman Act and, consequently, American antitrust law, was left to the judiciary, most

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22. 15 U.S.C. §§ 1–38 (1890).

23. *See infra* notes 26–27, 35–40.

24. 15 U.S.C. §§ 1–2 (1890).

25. *Compare* Robert H. Bork, *Legislative History and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (antitrust law is a delegation to the courts was constrained by the "consumer welfare" policy and wealth redistribution questions are irrelevant), *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871 (1999) (purpose was to prevent redistribution from consumers to monopolist producers).

26. *Compare* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956) (passage was a populist reaction requiring a radical change to status quo), *with* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY (1954) (passage was merely formalizing English common law without any intent for radical change from status quo).

notably the Supreme Court. While the Court's interpretative history is a winding road, only two turns are relevant here.[27] In both cases, the Court significantly narrowed the statute's scope.

First, in *Standard Oil v. United States*, the Supreme Court read a reasonableness requirement into the statute, finding that the text must not literally mean what it says.[28] Simply, the Sherman Act's assertion that "Every contract . . . in restraint of trade . . . is declared to be illegal" is too broad to be taken literally. Because all contracts restrain trade in some manner, the Sherman Act, taken literally, would essentially proscribe all of contract law. To avoid this absurd outcome, the Court adopted what became known as the "rule of reason," which reads a reasonableness element into the Sherman Act.[29] So, under this interpretation, the Sherman Act only prohibits contracts that *unreasonably* restrain trade.[30] But that begged another question: What constitutes reasonableness or, said differently, fair competition?

Second, eighty years later, the Court tried to definitively answer this question in *Reiter v. Sonotone*.[31] In *Reiter*, the Court

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27. This Note argues that, in the current debate, overemphasis on history is problematic because participants too often invoke history to reject reform proposals rather than analyze them in the present context. *See infra* Part III.

28. 221 U.S. 1, 60 (1911) (Congress "intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the [Sherman Act] was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.") (emphasis added).

29. *Id.* at 66 ("If the criterion by which [liability under the Sherman Act] is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the *rule of reason* becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct.") (emphasis added).

30. *Id.* at 59, 63–68.

31. 442 U.S. 330 (1979). In the intervening eighty years, the Court expounded the rule of reason by setting forth standards for particular types of anticompetitive conduct or effects, but it rarely rejected *as a matter of law* entire categories of arguments. *See generally*, Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 279–302 (1990) (critically tracing the history of the Supreme Court's rule of reason jurisprudence from 1911 in *Standard Oil* to adoption of the "price theory" or some variation of the CWS by the 1980s).

found that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[32] In doing so, the Court attempted to clarify what constitutes reasonableness by narrowing the standard to behavior that, on net, does not harm "consumer welfare."

What the Court meant by "consumer welfare" was somewhat unclear. But, by adopting the CWS as the *only* acceptable gloss on reasonableness, the Court clearly signaled that a subset of *economic* evidence and arguments would now carry *exclusive* weight in antitrust law.[33] As discussed below, under the CWS, arguments about why misconduct unreasonably harmed competition in any other sense (i.e., aside from consumer welfare) would no longer suffice. Dissenters lost this argument.[34]

A. *The status quo: the CWS*

The status quo is the CWS, which reflects the legal embrace of economic analysis and laissez-faire thinking.[35] The CWS is a collection of legal rules and analytical methods informed by economic theory.[36] Its basic premise is that antitrust law's goal is to pursue a specific sense of economic efficiency meant to benefit "consumers."[37] Further, it guides courts to

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32. 442 U.S. at 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

33. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978).

34. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("The issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale, but rather whether they had any role to play at all, and if so, how they should be defined and measured. . . . It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.").

35. *See* Maurice E. Stucke & Ariel Ezrachi, The Rise, Fall, and Rebirth of the U.S. Antitrust Movement, HARV. BUS. REV. (Dec. 15, 2017) (explaining how "the Chicago School's assumptions of self-correcting markets" is the "status quo" currently being challenged by the Neo-Brandeisians).

36. Hovenkamp, *supra* note 12 (explaining the evolution of the CWS and reconceptualizing it as a normative goal "in antitrust [to] seek out that state of affairs in which output is maximized, consistent with sustainable competition.") (emphasis removed).

37. *But see* Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77, 88 (Robert Pitofsky ed., 2008) ("The Efficiency Paradox is that, in the name of efficiency, economically conservative

use economic analysis to make legal decisions instead of leveraging other legal decision-making tools. Thus, other non-economic, or "political," considerations are irrelevant in antitrust legal analysis.[38]

The CWS holds that antitrust law *over*-enforcement poses a greater threat than *under*-enforcement.[39] In other words, the CWS accepts the assumption that enforcing the antitrust laws too aggressively is more harmful than enforcing them too leniently. CWS adherents claim that economic analysis and empirical data show that consumers benefit from allowing companies to achieve and maintain monopolies, as long as the monopolists do not abuse their power.[40] Two examples, one from each of the Sherman Act's sections, demonstrate how courts have narrowed the scope of antitrust liability by applying the CWS's bias toward free markets.

First, consider the deference that courts grant to defendants in the context of Sherman Act Section One, which addresses multilateral conduct.[41] When defendants' agreements to restrain trade seem to produce benefits for consumers, the Supreme Court has held that antitrust law gives the benefit of

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U.S. antitrust law protects inefficient conduct by dominant and leading firms and thus protects inefficiency."); John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 89, 90 (Robert Pitofsky ed., 2008).

38. Non-economic considerations are pejoratively referred to as "political" and have been rejected from antitrust analyses as irrelevant. *See, e.g.*, Robert H. Bork, *Legislative History and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 42–43 (1966) ("[I]t is impossible to find even colorable language suggesting most of the other broad social or political purposes that have occasionally been suggested as relevant to the application of the Sherman Act."); *accord* FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) ("The social justifications . . . for the restraint . . . do not make it any less unlawful.") (rejecting First Amendment arguments to justify a price-fixing-related boycott).

39. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 16 (1984) (arguing that it is better to assume that over-enforcement errors are more frequent and costly than under-enforcement errors).

40. *See* Trinko, 540 U.S. at 407 ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.") (citing nothing).

41. Vexingly, *uni*lateral conduct is covered in Sherman Act Section *Two*. *See* 15 U.S.C. § 2.

the doubt to defendants, even when the conduct would otherwise constitute a clear violation.[42] Economic evidence suggests that, because joint ventures can produce efficiencies that may result in lower prices or enhanced output, which may benefit end-consumers, antitrust claims against joint venturers require more scrutiny to evaluate a constraint's reasonableness than those of unaffiliated competitors.[43] So, defendant joint venturers may avoid liability by offering valid business justifications,[44] even though antitrust law usually finds that price-fixing for labor (or colluding to suppress wages) is per se unlawful and unjustifiable.[45]

For example, the National Collegiate Athletics Association (NCAA), a joint venture of amateur athletics programs, has benefitted for decades from this background legal presumption.[46] To simplify slightly, NCAA organizations collude to

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42. *See* Copperweld Corp. v. Independ. Tube Corp., 467 U.S. 752, 768 (1984) (Usually, "[c]oncerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. . . . [But, o]ther combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.") (citations omitted).

43. *See* NCAA v. Alston, 141 S. Ct. at 2141 (2021) ("There's no question, for example, that many 'joint ventures are calculated to enable firms to do something more cheaply or better than they did it before.'") (citing 13 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶2100c, at 7 (4th ed. 2019)).

44. *See* Broadcast Music Inc. v. Columbia Broadcasting Syst., Inc., 441 U.S. 1, 20–22 (1979) (rejecting application of the per se rule to activity accurately characterized as price-fixing in a literal sense because "[h]ere, the whole is truly greater than the sum of its parts; [the joint venture's effect] is, to some extent, a different product."); *see also* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501 (2019).

45. *E.g.*, Mandeville Island Farms v. Am. Crystal Sugar, 334 U.S. 219 (1948); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

46. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 99–102 (1984) (noting that even though "[a] restraint of this type has often been held to be unreasonable as a matter of law," the court declined to do so because the horizontal restraint was "essential if the product [wa]s to be available at all."); Alston, 141 S. Ct. at 2166 (2021) (Kavanaugh, J., concurring) (noting that "with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny").

limit the pay their employees: college athletes.[47] This is collusion to suppress wages that courts should theoretically treat as per se illegal.[48] The NCAA has maintained that the benefits to consumers from college sports reasonably outweigh the anticompetitive harms of its coordinated agreement to not pay college athletes.[49] However, the CWS grants this type of rebuttable presumption *to the defendant*, reflecting how the standard influences antitrust law to narrow the scope of liability. The fact that the NCAA has withstood antitrust scrutiny for almost forty years since its first visit to the Supreme Court shows how deferential to defendants the courts can be when interpreting the antitrust laws under the CWS.[50]

Second, consider how difficult it is for a plaintiff to prove that a monopoly has abused its market power in the Sherman Act's Section Two context, which covers unilateral conduct. The Supreme Court has held that certain "monopolization" theories require plaintiffs to allege unique factual circumstances to distinguish impermissible conduct from what may otherwise be procompetitive conduct, like in predatory pricing claims.[51] In theory, monopolization claims require plaintiffs to

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47. *See* Alston, 141 S. Ct. at 2149–50 (Gorsuch, J.) (explaining the recent state of its pay rules).

48. *See No More No-Poach*, U.S. DEP'T OF JUST. (last updated Apr. 10, 2018) ("Naked no-poach and wage-fixing agreements are per se unlawful because they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers."); Mandeville Islands Farms, 334 U.S. 219; Texaco Inc., 547 U.S. at 5. In the most recent challenge to the NCAA's restraints on paying student-athletes, Justice Kavanaugh noted that the "NCAA's business model would be flatly illegal in almost any other industry in America." Alston, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (Slip Op. at 3).

49. Alston, 141 S. Ct. at 2152 (Gorsuch, J.).

50. *See* Alan Meese, Requiem for a Lightweight: How NCAA Continues to Distort Antitrust Doctrine, WAKE FOREST L. REV., (forthcoming) (manuscript at 2) (last updated June 7, 2021) ("Failure to condemn the restraints before it as unlawful *per se* also distorted the Court's pronouncements regarding how to conduct rule of reason analysis."); Sandeep Vaheesan, Antirust Law is the Key to Making the NCAA pay Student Athletes, WASH. POST (Apr. 1, 2021).

51. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221, 224–26 (1993) (Technically the plaintiff's cause of action in *Brooke Group* arose from the Robinson-Patman Act, but the court noted that "the type alleged here[ ] is of the same general character as a predatory pricing claim under § 2 of the Sherman Act.") (noting the recoupment requirement). The Court has also developed and applied these principles in the

demonstrate (1) that the defendant has power to control prices or output in the relevant market and (2) purposefully acquired or maintained this monopolistic power in an anticompetitive manner.[52]

For example, a predatory pricing claim contemplates a monopolist abusing its market power and often its vast resources by driving prices so low for so long that it forces a less well-resourced competitor to exit the market.[53] Because low prices generally benefit consumer welfare, however, courts have held that predatory pricing claims require alleging additional elements: below-cost pricing and recoupment of supracompetitive profits.[54] These additional elements are meant to distinguish price wars that are good for consumers from those that are not. As a result of these enhanced requirements, plaintiffs rarely succeed in proving predatory pricing claims.[55] Some CWS adherents are so skeptical of this theory of harm that they think it should be per se legal.[56] Embedding such a degree of skepticism in law has drawn criticism that these enhanced requirements unfairly preclude meritorious claims.[57] This skepticism toward the predatory pricing theory of harm

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Section One context; *accord* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007) (holding that "proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action").

52. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

53. Brooke Grp., 509 U.S. at 225.

54. *Id.* at 224–26. *See also* United States v. AMR Corp., 335 F.3d 1109 (rejecting many different and valid proxies for below marginal cost pricing).

55. *See Predatory or Below Cost Pricing*, FED. TRADE COMM'N (last visited Oct. 13, 2021), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost ("Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare").

56. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 333–37 (1981) (arguing "Why Not Per Se Legality?" for predatory pricing allegations).

57. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1718 (2013) ("By assuming that the length of both the predation and the recoupment periods must be substantial, courts put plaintiffs in an impossible bind.").

again reflects how the CWS has influenced antitrust law to narrow the scope of liability.

B. *The reformers' challenges to the CWS*

The progressive challengers disagree with this legal status quo because its exclusively "economic" approach is ideologically biased and logically flawed. First, reformers disagree with the conclusions that CWS-adherents have drawn from empirical economic data.[58] While explaining the economic fundamentals of this disagreement is outside the scope of this Note, the reformers' most essential disagreement is that the CWS too often and too quickly assumes that the market will self-correct and therefore little to no intervention is necessary.[59] This conservative economic assumption serves as the foundation for the CWS's preference for under-enforcement and the ideolog-

58. Explaining this disagreement is out of this Note's scope, but the recent dispute over the FTC's Vertical Merger Guidelines (VMGs) is illustrative. *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FED. TRADE COMM'N (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines [hereinafter Press Release, Fed. Trade Comm'n]. *Compare* Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Verger Mergers?* PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/, *with* Hal Singer & Marshall Steinbaum, *Missing the Forest for the Trees: A Reply to Hovenkamp and Shapiro*, PROMARKET (Sept. 27, 2021), https://promarket.org/2021/09/27/ftc-vertical-mergers-guidelines-hovenkamp-shapiro-singer-steinbaum-response/.

59. *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 974 (2018) ("The [CWS's] preference for false negatives [and belief that the market tends to self-correct] is offered as a way to guide enforcers through uncertainty. . . . Consumer welfare weds analysis to an inquiry that ultimately proves indeterminable, and that indeterminacy is then used as justification for under-enforcement. But this indeterminacy is not inevitable."); *see also* Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1852 (2020) ("The economic literature has come down solidly against the key early assumption of the Chicago thinkers that markets will self-correct. To the contrary, the evidence demonstrates that eliminating antitrust enforcement likely results in monopoly prices and monopoly levels of innovation in many markets."). Notably, however, Prof. Hovenkamp does not seem to consider himself a Neo-Brandeisian. *See* Christopher S. Yoo, *Herbert Hovenkamp as Antitrust Oracle*, Faculty Scholarship at Penn Law, 1, 19–20 (2021) (noting Prof. Hovenkamp's "critique of Neo-Brandeisianism" and his "rejection of neo-Brandeisian antitrust.").

ical bias that is now embedded in law.[60] Reformers want to eliminate this conservative, pro-defendant bias from antitrust law.

Second, reformers doubt that a consumer-welfare-focused economic analysis can or should be the only way to evaluate antitrust legal claims.[61] One issue is that the economic underpinnings of the CWS rely significantly on unobservable economic phenomena, like willingness-to-pay or marginal costs and revenues.[62] Obviously, this evidentiary issue is a problem for all economic analysis, not just the CWS. But the CWS's demand that antitrust law rely primarily on economic evidence exacerbates these evidentiary problems. And, because the plaintiff bears the burden of proof, these problems accrue to the defendant's benefit, further entrenching a pro-defendant bias into the law.

Also, the subsequent legal doctrine suffers from slippery terms (e.g., "market power" and "consumer welfare") and logically flawed or often misunderstood analytical methods (e.g., market definition; balancing procompetitive benefits with anticompetitive harms).[63] Most problematic are the indeterminacy of the words "consumer welfare," the CWS's assumptions about how low prices and high output tend to benefit everyone, and the ambiguities still plaguing its administration.[64]

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60. *See* Khan, *supra* note 59, at 974–75 (explaining why antitrust law's "embedded preference for under-enforcement" is problematic).

61. Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495 (2019), https://journals.sagepub.com/doi/pdf/10.1177/0003603X19875038.

62. Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, 19–21 (2006) (working paper).

63. *See* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 438 (2010) (explaining antitrust law's overreliance on the flawed logical circularity of the analytical method of market definition); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929, 947–50, 987 (explaining the "judicial anxiety about balancing" and offering an alternative while recognizing that it is "subject to significant limitations."); Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. ANTITRUST ENF'T 459 (2018) (demonstrating that perhaps generalist judges and expert economists do not always have a meeting of the minds and highlighting the fact that the judge retains discretion to set aside expert testimony).

64. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

Again, a full explanation of the logical flaws with and administrability challenges arising from the CWS is outside this Note's scope, but the point is that reformers want to fix the problems that they see with the CWS and what it has wrought.[65] And beyond addressing these shortcomings, reformers have other ideas for how to administer antitrust law that are not captured within an exclusively economic paradigm.

II.
The main tenets of Neo-Brandeisian antitrust reform

The main tenets of progressive antitrust reform are (1) Anti-Bigness, (2) burden rebalancing, (3) effective enforcement, and (4) legal rule and standard reform. This part aims to summarize the movement's general themes, but, in doing so, must simplify and gloss over some important points of disagreement.[66] As with any movement, the Neo-Brandeisian movement is not monolithic.[67] Nevertheless, this Note argues that Neo-Brandeisians are not merely unguided partisans; they have a coherent, if not yet comprehensive, theory of antitrust reform.[68]

To that end, this part begins by briefly addressing the utility of taxonomies, the often pejoratively used term "populist," and why debate over labels, including this one, can be un-

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65. *See, e.g.*, Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 Antitrust Bull. 479 (2019) ("First, consumer welfare antitrust is built on false history and a rewriting of legislative intent. Second, it relies on a false conception of the market and submerges the state construction of the economy. Third, it depends on, and is informed by, false assumptions about business conduct.").

66. Notably, Neo-Brandeisian scholars have not yet formed consensus over the proper legal standard, the extent to which antitrust law should accommodate or accomplish economic redistribution, and economic theory's role in antitrust. *See infra* Part IV for more discussion of potential legal rules and standards Neo-Brandeisians propose.

67. Many scholars have supported this intellectual movement, even if these individuals would not self-identify as Neo-Brandeisians or always agree with each other, such as Jonathan Baker, Mark Glick, Hiba Hafiz, Lina Khan, Amelia Miazad, Fiona Scott Morton, Matt Stoller, Zephyr Teachout, Sandeep Vaheesan, and Tim Wu.

68. This Note argues that a substantial body of Neo-Brandeisian scholarship already exists and presents a coherent view for how antitrust law and policy should be reformed. *See infra* Appendix, Exhibit C (providing a selected list of scholarship that the author considers to intellectually support the Neo-Brandeisian reform ideas).

helpful. Next, it turns to the values and principles underlying the Neo-Brandeisian reform movement. With this background, this part then discusses how those ideas could be put into practice through doctrine and enforcement and then closes with a discussion of what changes to the current legal standard reformers want. Overall, Neo-Brandeisians want to reduce or eliminate antitrust's conservative bias and adopt a more democracy-protective approach to regulating the American "free" market.[69]

Antitrust jargon may do more harm than good.[70] In general, rather than assigning labels to ideas, antitrust scholars should explain why certain ideas would have good or bad outcomes. Currently, some scholars' pejorative labeling of reformers as "populist" sheds no light on why the scholar disagrees with the idea other than that it is presumably different in some way from the currently accepted framework. While certain efforts to explain the "populist" label have some utility,[71] a brief glance at any antitrust law textbook suggests that shorthand labels and jargon can obfuscate as much as (or more than) elucidate.[72] So, acknowledging that the attempt to label a collection of ideas can be counterproductive, this part does not explore the "Neo-Brandeisian" label or what constitutes "populism."[73] Rather, the point is to explain how the reform agenda proceeds logically from a coherent set of beliefs—the most im-

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69. *See* Sandeep Vaheesan, The Chair's Showcase: The Future of Antitrust, Address at ABA's 69th Antitrust Law Spring Meeting, 4, 15 (Mar. 26, 2021) (referring to the idea of free markets as "a false and mythical dichotomy. Every market is a government-designed market; property, contracts, corporations are products of government design and action. Property is just another name for entitlements to things, tangible and intangible, that are backed by the coercive power of the government.").

70. "We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and true." Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

71. *See, e.g.*, Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014); Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J.L. BUS. & FIN. 131 (2020).

72. *See also* Edwin S. Rockefeller, THE ANTITRUST RELIGION 16 (2007) (To become a modern Antitrust Lawyer requires "learning to speak of vocabulary of meaningless or ambiguous terms—with authority.").

73. This Note uses these terms interchangeably: "Neo-Brandeisians," "progressive reformers," or just "reformers."

portant of which is the Neo-Brandeisian concern over "Bigness" and its relationship to the purpose of antitrust law.

A. *The first and most important tenet: "Anti-Bigness" as a guiding principle*

The first and most important tenet of Neo-Brandeisian antitrust reform is that antitrust law should recognize "Anti-Bigness" as a guiding principle. Coined in a series of essays about antitrust concerns that Louis Brandeis wrote in the lead-up to President Wilson's election and the subsequent creation of the Federal Trade Commission, "Bigness" is a concept *distinct* from "monopoly" and means *something different* from size or a high market share.[74] As Brandeis used it, Bigness "connotes large firms exerting power and influence over politicians on one side and smaller merchants on the other."[75] Justice Douglas explained:

> *The Curse of Bigness* shows how size can become a menace . . . . For all power tends to develop into a government in itself. Power that controls the economy should be in the elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized . . . . That is the philosophy and command of the Sherman Act.[76]

Thus, the concern of Bigness is how the unity of concentrated economic and political power poses threats not just to the economy, but to democracy and society as well. Perhaps the term "Anti-Domination" more clearly reflects the concern than "Anti-Bigness."[77]

The major cleave with the CWS is over the extent to which one believes that markets tend to self-correct. CWS adherents believe that markets tend to self-correct and antitrust over-en-

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74. Louis D. Brandeis, *New England Railroad Situation*, BOSTON J. (Dec. 13, 1912) ("Excessive bigness often attends monopoly; but the evils of excessive bigness are something distinct from and additional to the evils of monopoly.").

75. Adi Ayal, *The market for bigness: economic power and competition agencies' duty to curtail*, 1 J. ANTITRUST ENF'T 221, 222–23 (2013).

76. United States v. Columbia Steel Co., 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting).

77. *Cf.* K. Sabeel Rahman, *Anti-Domination as Regulatory Strategy, in* DEMOCRACY AGAINST DOMINATION 116, 116–18 (2017).

forcement poses bigger risks than under-enforcement.[78] In contrast, Anti-Bigness adherents believe that monopolies pose an unacceptable risk of Bigness to the economy and democracy and that *under*-enforcement poses bigger risks than *over*-enforcement.[79]

The modern sense of Anti-Bigness reflects similar concerns yet differs from older conceptions in at least two important ways. First, the modern sense of Anti-Bigness more willingly accepts that economies of scale from large private entities *could* widely benefit Americans.[80] So, the modern idea of Anti-Bigness does not mean "Pro-Smallness"—merely equating Neo-Brandeisian Anti-Bigness concerns with economic structuralism is a misread.[81] Notably, while Brandeis is often characterized as disliking companies because they were large,[82] the better understanding is probably that he perceived the mo-

78. *See supra* notes 8, 14, 40 and accompanying text.

79. *E.g.*, Geoffrey Manne & Dirk Auer, *Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins*, 28 GEORGE MASON L. REV. 1279, 1297 (2021) (Monopolists' "power feels like 'a kingly prerogative, inconsistent with our form of government' in the words of Senator John Sherman, for whom the Sherman Act is named.") (quoting TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 89 (2018) (quoting 21 Cong. Rec. 2457 (1889) (statement of Sen. John Sherman)); *see also infra* Exhibits A & B (explaining reformers' enforcement goals in the Utah Statement).

80. *See* Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO/MEDIUM, (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7 (noting that Bigness has "become a threat to the basic idea of representative democracy. The simple premise of anti-monopoly revival is that concentrated private power has become a menace, *a barrier to widespread prosperity*, and an indefensible division of the *spoils of progress and economic security* that yields human flourishing.") (emphasis added).

81. Structuralism and industrial organizational economics were popular pre-CWS forms of economic analyses. *E.g.*, Khan, *supra* note 57, at 718 (2014) ("Broadly, economic structuralism rests on the idea that concentrated market structures promote anticompetitive forms of conduct."); *see also* Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1666–77 (2020) (explaining the theoretical evolution from structural industrial organization economics to present and the empirical *and normative* Neo-Brandeisian critiques thereof).

82. *See, e.g.*, Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 608 (2012) ("Justices Louis Brandeis and William Douglas believed absolute corporate size was a public evil and weaved such a narrative into their extrajudicial writings and opinions.").

nopolies of his time to widely suffer from *dis*economies of scale.[83] Disentangling size and efficiency is crucial: Brandeis did not ignore efficiency in his analysis of monopolies.[84]

Second, modern Anti-Bigness perceives the Bigness problem as primarily a private sector issue, not a public sector issue.[85] Perhaps this is because Neo-Brandeisians perceive that the scale of the private sector Bigness problem requires big government. Still, the better view is that they are not concerned with big government because it is a legitimate vehicle for the People's will.[86] Bigness is about the risk that monopolies can *illegitimately* drain political power from the People.[87] From this animating concern follows a roadmap for how antitrust law should change. To restore antitrust's Anti-Bigness goals, Neo-Brandeisians want to correct the law's pro-defendant bias, improve enforcement, and develop a better legal standard. Each of these tenets will be discussed in turn.

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83. Louis D. Brandeis, *A Curse of Bigness, in* OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 186–88 (Frederick A. Stokes Company 1914) (making recommendations about how to end Bigness issues in the railroad monopolies but not recommending limits on firm size or scale and rather concluding that "We shall also escape from that inefficiency which is attendant upon excessive size.") (much turns on one's reading of the word "attendant").

84. *See id.* at 139–49 (explaining, in a chapter titled "The Inefficiency of the Oligarchs," how issues like management obsession with stock price and divided attention in large corporations can lead to inefficiency).

85. *See* Crane, *supra* note 19, 533–34 (helpfully contrasting Louis Brandeis and Thomas Jefferson with progressive figures like Franklin D. Roosevelt and Elizabeth Warren, who were and are more comfortable with big government than Brandeis was). This is not to say that the private sector problem cannot affect the public sector—it can and does, through institutional and political capture—but rather that the problem arises in the private sector.

86. *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 (2013) ("The institutional aspects of today's antitrust enterprise, however, are increasingly out of balance, threatening the democratic, economic, and political goals of the antitrust laws. The shift . . . has led to an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability. Some of this professional control is inevitable . . . . But antitrust is also public law designed to serve public ends.").

87. United States v. Columbia Steel Co., 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting) ("Power that controls the economy should be in the elected representatives of the people, not in the hands of an industrial oligarchy.").

B. *The second tenet: rebalancing burdens to correct pro-defendant bias*

The second tenet of Neo-Brandeisian antitrust reform is rebalancing burdens to correct antitrust law's current pro-defendant bias. As discussed above, Neo-Brandeisians think that the CWS has enshrined a conservative economic bias into antitrust law by making it increasingly more difficult for plaintiffs to prove a violation.[88] Reformers have several ideas to address this imbalance: (1) override unfavorable precedent, (2) adjust procedural burdens and standards of proof, and (3) adopt presumptions.

First, reformers identify many opinions that go too far in narrowing the scope of antitrust liability. For example, reformers call for overturning decisions that overly narrow legitimate theories of liability, such as predatory pricing (and mirror-image predatory bidding)[89] and monopoly leveraging.[90] They also call for overturning decisions that overly broaden immunity, such as implied regulatory preemption[91] and the govern-

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88. *See supra* text accompanying notes 33–57.

89. *See* Ari Lehman, *Eliminating the Below-Cost Pricing Requirement from Predatory Pricing Claims*, 27 CARDOZO L. REV. 343 (2005) (criticizing the predatory pricing test announced in Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)); Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81 (2015) (criticizing the *Brooke Group* test for predatory pricing and its application in the predatory bidding context under Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., 549 U.S. 312 (2007)).

90. *See* Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2081 (1999) ("Defensive leveraging theory shows that the Chicago school is wrong because it fails to consider changes in the structure of the primary market. When these changes are considered, leveraging that damages competition is neither a white tiger nor a unicorn. It is just a plain old work horse in a monopolist's field."). For illustration, compare Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979) (a preferable standard for monopoly leveraging), with Spectrum Sports v. McQuillan, 506 U.S. 447, 459 (1993) (a vaguer and narrower standard) (holding that Section Two "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so").

91. *See* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 732 (2011) (arguing that Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) "weakened that important relationship between antitrust and regulation. Until the balance is restored, regulators will face difficult choices between overregulation and underregulation, with consequences potentially far more costly

mental petitioning defense.[92] And specifically, reformers often call for overturning judicial acceptance of the CWS narrative of antitrust legislative history on which these judicial decisions often rely.[93] By targeting these precedents, Neo-Brandeisians seek to simplify and restore antitrust liability to a more neutral playing field. Reformers want to ensure that factually meritorious arguments are not dismissed as a matter of law.

Second, reformers suggest reducing the number of procedural pro-defendant biases that they argue the CWS has built into antitrust law. The proposals about burden-shifting and standards of proof range widely. For example, Senator Klobuchar introduced a bill that proposes lowering the Clayton Act's standard for what constitutes an anticompetitive merger from one "substantially to lessen" competition to one that "create[s] an appreciable risk of materially lessening" competition.[94]

Third, reformers argue in favor of adopting legal presumptions to protect against Bigness. Reformers want to and have begun to rescind certain pro-defendant presumptions in law enforcement, such as the recently rescinded vertical merger guidelines[95] and other similarly self-restraining resolutions.[96] Reformers also want to introduce presumptions that

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than those that would have arisen from errors in antitrust enforcement in the regulated markets at issue.").

92. *See* Tim Wu, *Antitrust & Corruption: Overruling* Noerr 3 (Columbia L. Sch. Pub. L. Working Paper No. 14–663, 2020) ("Congress could do what this article calls for, namely, return the immunities granted political speech and petitioning to their Constitutional limits, while reaffirming the purposes of the antitrust laws."). Wu criticizes R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

93. *See, e.g.*, Vaheesan, *supra* note 65, at 480 ("[The Supreme Court and the executive branch] have reinterpreted the antitrust laws based on the false historical analysis of Robert Bork.").

94. *See* Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 4(b)(3) (2021) (proposing to amend Clayton Act Section 7, 15 U.S.C. § 18).

95. *See* Press Release, Fed. Trade Comm'n, *supra* note 58.

96. *See* Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act*; Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/

would make it easier to legally prove certain violations when facts suggest that a high risk of antitrust misconduct or Bigness is likely, such as when a company possessing a very high market share wants to acquire a nascent competitor or when employers abuse non-compete agreements.[97]

These proposals are meant to strip away the procedural and legal presumptions in favor of defendants that the CWS's adoption has encouraged over the past few decades. Through various means, reformers point out how the purportedly "objective" architecture of antitrust law is significantly biased toward narrowing the scope of liability. And beyond rebalancing the legal framework, reformers argue for more effective enforcement.

C. *The third tenet: more effective regulatory and law enforcement*

The third tenet of Neo-Brandeisian antitrust reform is more effective regulatory and law enforcement. Reformers argue that the growth of the American economy and the evidence of Bigness issues merit greater resources for antitrust law enforcers. For example, in 1985, six years after the adoption of the CWS in *Reiter*,[98] the FTC had 1,201 employees, and the U.S. GDP was around eight trillion dollars.[99] In 2021, U.S. GDP was almost twenty trillion dollars, but the FTC had 61 fewer employees, only 1,140.[100] Beyond resource limitations, reformers point to empirical evidence demonstrating lax antitrust enforcement[101] and worryingly concentrated market

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news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

97. *See, e.g.*, C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2019); Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381 (2019); ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 108–13 (2021).

98. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). *See supra* notes 31–32 and accompanying text for background on the case.

99. FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2022, at 4 (2021); Real Gross Domestic Product, FED. RSRV. ECON. DATA, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/GDPC1 (Oct. 28, 2021).

100. FED. RSRV. BANK OF ST. LOUIS, *supra* note 99; FED. TRADE COMM'N, *supra* note 99.

101. *Antitrust Enforcement Data*, THURMAN ARNOLD PROJECT AT YALE, YALE SCH. OF MGMT., https://som.yale.edu/centers/thurman-arnold-project-at-yale/antitrust-enforcement-data (last visited Nov. 14, 2021) ("Without re-

power.[102] In addition, reformers think enforcers have (1) poorly strategized governmental priorities, (2) underutilized or ignored existing tools, and (3) refrained from bringing important cases. Each of these is addressed in turn.

In mid-to-late 2021, the Biden administration, likely guided by Neo-Brandeisian Tim Wu, and the FTC, chaired by Neo-Brandeisian Lina Khan, announced new priorities for competition law. President Biden issued an Executive Order on "Promoting Competition in the American Economy," taking a "whole-of-government" approach to more rigorous antitrust and fair competition law enforcement.[103] Likewise, the FTC re-prioritized its agenda to focus on areas reflecting Anti-Bigness concerns, such as "Common Directors and Officers and Common Ownership" and "Monopolization Offenses."[104]

Reformers also argue for the use of long-dormant tools that will assist in achieving their goals.[105] One example is the FTC's authority to promulgate rules about what constitutes "unfair methods of competition."[106] As Rohit Chopra and Lina Khan have pointed out, "[t]he FTC has issued an antitrust rule

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gard for good research or scientific evidence—as the literature review below shows—today, many continue to claim a benefit for consumers from a limited enforcement agenda. The experiment of enforcing the antitrust laws a little bit less each year has run for 40 years, and scholars are now in a position to assess the evidence.") (providing charts demonstrating the decline of anti-monopoly enforcement over time since the adoption of the CWS). *See also* FED. RSRV. BANK OF ST. LOUIS, *supra* note 99; FED. TRADE COMM'N, *supra* note 99.

102. Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH, Mar. 20, 2017, at 1, 4, https://equitablegrowth.org/market-power-in-the-u-s-economy-today/. See *infra* Appendix, Exhibit D for economic research supporting Neo-Brandeisian concerns about Bigness.

103. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

104. Press Release, Fed. Trade Comm'n, FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload (Sept. 14, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable.

105. Sandeep Vaheesan, Unleash the Existing Anti-Monopoly Arsenal, AM. PROSPECT (Sept. 24, 2019), https://prospect.org/day-one-agenda/unleash-anti-monopoly-arsenal/.

106. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45. The FTC Act grants the FTC authority over both antitrust law, via the words "unfair methods of competition" (§ 45(a)(1)), and consumer protection, via the words "unfair and deceptive acts or practices" (§ 45(a)(2)).

only once in its history."[107] However, the FTC can more easily promulgate rules about antitrust than those about consumer protection. They explain:

> [A] common misconception is that this authority is extremely limited because FTC rulemaking is subject to the extensive hurdles posed by the Magnuson–Moss Warranty–Federal Trade Commission Improvements Act ("Magnuson–Moss"). In reality, Magnuson–Moss governs only rulemakings interpreting "unfair or deceptive acts or practices." For rules interpreting "unfair methods of competition," the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed this authority, and the Appendix lays out further background on and discussion of it.[108]

The FTC could also make greater use of Part 3 administrative proceedings, which provide an alternative tribunal to hear antitrust or consumer protection matters before an administrative law judge.[109] These proceedings benefit the Commission by providing more favorable procedural conditions for factfinding (among other procedures).[110]

Similar changes at the DOJ are likely once Jonathan Kanter, President Biden's nominee for Assistant Attorney General for the Antitrust Division, settles in.[111] Aggressive and novel use of these tools will enable new rules and increase the likelihood of success in establishing favorable precedent (or at

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107. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 369 n.54 (2020).

108. *Id.* at 369–70. *See also id.* app. at 375–79 (explaining the mechanics of the FTC's antitrust rulemaking authority).

109. *See* 16 C.F.R. §3.42 (2021).

110. For background on Part 3 litigation, see Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623 (2016). While the author raises questions about this process, she provides a very good background and overview of how it works.

111. *See* Brent Kendall, Senate Confirms Jonathan Kanter as Justice Department Antitrust Chief, WALL ST. J. (Nov. 16, 2021), *https://www.wsj.com/articles/senate-confirms-jonathan-kanter-as-justice-department-antitrust-chief-11637104400*; *see also* Bryan Koenig, In Kanter, DOJ Would Get an Aggressive Antitrust Enforcer, LAW360 (July 22, 2021), https://www.law360.com/articles/1405654/in-kanter-doj-would-get-an-aggressive-antitrust-enforcer.

least in heightening the sense of urgency for new legislation in the case of repeated losses in the courts).

Reformers also think that enforcers have failed to address the Bigness issues that now plague the economy.[112] Most notably, FTC Chair Khan has written about Amazon's predatory pricing tactics and antitrust issues with platform providers.[113] Others have made the arguments for antitrust cases against Facebook[114] and Google.[115] Further, the neglect toward labor markets is another significant area of Neo-Brandeisian concern.[116] Reformers point out that the exclusive and relentless focus on *consumers* has been to the neglect and detriment of *employees* as victims of anticompetitive harms, like suppressed wages and collusive agreements not to hire competitors' employees.[117] Thus, reformers argue that antitrust should be used in new ways to address areas of concern traditionally ignored by enforcers due to the CWS's influence.[118]

Due to President Biden's appointments of Neo-Brandeisian thinkers, reform ideas have been most fully embraced in the federal executive branch. However, the federal government is not the only player. State, commonwealth, and territory attorneys general have played a significant and growing

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112. Substantial controversy exists about why. To a large extent, the reform enforcement agenda seems not to care about these reasons and is more focused on pursuing Anti-Bigness priorities and, ideally, outcomes, despite risks of losing, the popularity of defendants, or the theory of the case's novelty.

113. *See, e.g.*, Khan, *supra* note 57; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

114. *See* Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERKELEY BUS. L.J. 39 (2019).

115. *See* Fiona M. Scott Morton, The Antitrust Case against Google, YALE INSIGHTS: FAC. VIEWPOINTS (June 8, 2020), https://insights.som.yale.edu/insights/the-antitrust-case-against-google.

116. *See, e.g.*, Hafiz, *supra* note 97; POSNER, *supra* note 97, at 3.

117. *See, e.g.*, Sandeep Vaheesan & Matthew Buck, Antitrust's Monopsony Problem, PROMARKET (Feb. 3, 2020), https://www.promarket.org/2020/02/03/antitrusts-monopsony-problem/. *See also* Ioana Marinescu & Eric A. Posner, A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony (Dec. 21, 2018) (unpublished working paper) (on file with Roosevelt Institute) (arguing for statutory clarification).

118. *See, e.g.*, Zephyr Teachout, How Biden Can Break the Stranglehold of Amazon and Other Monopolies, THE NATION (Jan. 4, 2021), https://www.thenation.com/article/economy/monopoly-policy-biden/.

role in the enforcement of competition laws.[119] Notably, large coalitions of attorneys general played important roles in developing the cases against Facebook and Google in federal courts.[120] They have also had successes in pursuing cases in state courts.[121]

Despite this emphasis on regulatory enforcement, litigation is where the future of antitrust law truly lies. As Joshua Soven, an experienced practitioner and former enforcer, elegantly explained: "The reality (unsettling for some) is that these strategies, and how well they are executed, could have a greater impact on the outcomes of future antitrust enforcement actions than will changes to the antitrust laws."[122]

D. *The fourth tenet: the development of a better legal standard*

The fourth tenet of Neo-Brandeisian antitrust reform is the development of a better legal standard that addresses Anti-Bigness concerns. As explained above, reformers have many problems with the CWS on its own purportedly "objective" and economic terms. The CWS supporters tout that it is coherent, objective, and administrable,[123] but reformers challenge these assertions.[124] In addition to pointing out how the CWS's legal presumptions favor defendants and discourage enforcement actions, reformers point to issues of economic scientism,[125]

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119. *See* Antitrust, STATEAG.ORG, https://www.stateag.org/policy-areas/antitrust (last visited Dec. 6, 2021) (collecting news about State AG antitrust actions); Renata B. Hasse, Acting Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the American Bar Association Fall Forum: Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement (Nov. 17, 2016), https://www.justice.gov/opa/speech/file/911166/download.

120. John D. McKinnon, These Are the U.S. Antitrust Cases Facing Google, Facebook and Others, WALL ST. J., https://www.wsj.com/articles/these-are-the-u-s-antitrust-cases-facing-google-facebook-and-others-11608150564 (Dec. 17, 2020).

121. *See generally* State Antitrust Litigation and Settlement Database, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/antitrust/state-antitrust-litigation-and-settlement-database/ (last accessed Dec. 6, 2021).

122. Joshua H. Soven, *What Happens Next to Antitrust—in 6 Questions*, ANTITRUST, Summer 2021, at 75, 79.

123. Dorsey et al., *supra* note 6, at 879.

124. See *supra* notes 61–65 and accompanying text for greater discussion of reformers' challenges to the CWS.

125. *See e.g.*, Kaplow, *supra* note 63 (explaining antitrust's overreliance on the flawed logical circularity of the analytical method of market definition).

overreliance on outdated assumptions,[126] and difficulties in proper judicial administration.[127] But, these critiques of the CWS are not new.[128] The Neo-Brandeisians' animating concern is not merely that the CWS *inadequately addresses* Anti-Bigness concerns. Instead, Neo-Brandeisians also find the CWS problematic because it *rejects as invalid* Anti-Bigness concerns.

To Neo-Brandeisians, the CWS adherents' most important and problematic belief is that markets will self-correct. In the CWS framework, Anti-Bigness concerns are essentially overblown figments of imagination.[129] Neo-Brandeisians think this is folly. While consensus has not yet coalesced around a new, fully fleshed-out legal standard for antitrust, many proposals have been proffered.[130] Neo-Brandeisians want a new standard that addresses Anti-Bigness, among other concerns. The depth of this fundamental disagreement may explain the inhospitable welcome that Neo-Brandeisian ideas have received from status quo scholars.

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126. *See* Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 494–95 (2021) ("To the extent that courts, including the Supreme Court, have erred in recent years, it has been in ways that favor nonenforcement. . . . At the same time, changes in both economic theory and economic methodology have strengthened the case for intervention on economic grounds.").

127. *See* Salop, *supra* note 63.

128. *See, e.g.*, Pitofsky, *supra* note 34; David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 865–66 (1989) ("The response of current antitrust enforcers and pro-efficiency commentators is that social and political goals of antitrust are too vague, too mushy, and too unstructured to be appropriate for consideration. . . . A more rigorous response to the policy problem would be to consider how analysis of nonefficiency goals might be structured to make it more susceptible to the powerful analytical tools available."). *See generally* ROBERT PITOFSKY ET AL., HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

129. Dorsey et al., *supra* note 6, at 911 (rejecting a mischaracterized version of Neo-Brandeisian concern that "economic power leads to political power. . . . [T]his purported causal relationship has already been rejected as having no basis in reality; and no new evidence suggests otherwise.").

130. *See infra* Part IV (discussing proposed legal standards).

III.
UNFAIR CRITIQUES—A DIFFERENT "CURSE"—AND THE RESPONSES TO THEM

The main unfair or unproductive critiques of progressive antitrust reform are that reformers (1) fail to understand history, (2) propose vague ideas, and (3) want bad things for American consumers. This part begins with a few caveats about the scope of its argument. With those qualifications, it addresses these three thematic critiques that have been frequently raised against the Neo-Brandeisian reform movement. In turn, each criticism will be described, illustrated, and then rebutted. Before engaging with these criticisms, three caveats are warranted.

First, this Note does not present an exhaustive literature review. Second, this Note does not argue that Neo-Brandeisian proposals are perfect nor undeserving of criticism. Third, this Note does not imply broad disagreement with the critics cited below. Instead, this Note argues that the cited examples represent a larger, problematic trend, thus "cursing" the current scholarly debate about Bigness in antitrust law and policy. In doing so, this part hopes to move the current debate to more productive territory, as this Note will discuss below in Part IV.

A. *The History Critique*

The first unhelpful criticism is about history. This criticism challenges the various premises from which Neo-Brandeisians draw their conclusions. The criticism goes, if the reformers got the facts straight, then they would see the law correctly and agree with the status quo. Essentially, the criticism is that reformers fail to understand, explain, or appreciate antitrust law's historical development. This criticism is primarily applied in three areas: legislative-judicial, scholarly, and economic history.[131]

131. *See, e.g.*, Christine S. Wilson & Pallavi Guniganti, *Before We Tear Down the Fence: Understanding the Past and Building the Future of Antitrust Law*, ANTITRUST, Summer 2021, at 57, 57 ("Before tearing down antitrust precedents, however, reformers should understand the historical context that led the judiciary to its present interpretation of the Sherman and Clayton Acts."); Hovenkamp, *supra* note 16, at 119, 121 ("At least up until this writing, the New Brandeis writers simply restate these positions and do little to engage revisionist critics from the 1960s and after. . . . In sum, the neo-Brandeis movement hardly reflects new thinking on these issues."); Nicholas Short,

The legislative-judicial history criticism is that Anti-Bigness cannot be a value in antitrust because that is inconsistent with congressional intent. Critics marshal evidence from the late 1800s to demonstrate that the Sherman Act was merely an intentional delegation to the courts to develop further the common law of unfair competition.[132] This intentional delegation, combined with (1) the subsequent judicial adoption of the CWS and (2) the lack of congressional override, means to critics that the congressional intent is clear: Anti-Bigness was rejected, and that is what Congress and the courts wanted.

The scholarly history criticism is that the reformers inaccurately characterize how and why the CWS was adopted. Often, reformers place the blame entirely on conservatives and sometimes solely on Robert Bork.[133] But, critics assert, this is an inaccurate understanding of history because the deregulatory movement leading to the adoption of the CWS had liberal allies and other influential theoretical contributors.[134] Thus, critics point out that the CWS is not merely a conservative ideology masquerading as economics, as Neo-Brandeisians may claim, but was a bipartisan agreement to avoid the same mistakes made in the mid-to-late twentieth century.

Antitrust Reform in Political Perspective: A Constructive Critique for Neo-Brandeisians (Sept. 3, 2021) (unpublished working paper) (on file with Harvard University) ("But reformers fail to explain why the consumer welfare standard gained legitimacy throughout the 1970s, when Democrats controlled Congress, and why it became a central pillar in antitrust analysis after Ronald Reagan's victory in 1980, when the House . . . remained under Democratic control."); *id.* at 3 ("Specifically, the reformers tend to both understate and overstate the role of the conservative ideology in producing and maintaining the current antitrust regime.").

132. *E.g.*, Thorelli, *supra* note 26. *But see* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 180 (2021) (arguing that the goal "suggested by the legislative history is to *disperse economic coordination rights*").

133. Robert Bork was a conservative antitrust scholar, and subsequently Solicitor General and a judge on the U.S. Court of Appeals for the D.C. Circuit. He wrote *The Antitrust Paradox*, which was cited by the Supreme Court in *Reiter* when it adopted the CWS. Thus, he is often credited as the leader of the "Chicago Revolution," which advocated for the adoption of more rigorous economic analysis in antitrust law and the CWS. Bork was one of many conservative scholars advocating this approach during his time at University of Chicago, hence the "Chicago School." For more background, see MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019).

134. *See e.g.*, Short, *supra* note 131, at 3–4.

The economic history criticism can be applied to essentially any period but is most relevantly argued about recent empirical data during the early 2000s. Some critics claim that reformers are disregarding economic data entirely.[135] Reformers rebut that they are drawing conclusions from economic data showing extreme wealth and income inequality, wage stagnation, and industrial concentration.[136] But other critics reply that reformers infer causation where only correlation is clear and express doubt that antitrust is the proper tool to address the perceived issues.[137] Thus, the critics draw the opposite conclusions as reformers do or assert that uncertainty is the only conclusion one may reasonably draw from mixed data.[138] They say that reformers' conclusions reflect either reliance on flimsy data or overconfidence relative to what the available data justify. Other variations doubtlessly exist, but these examples summarize the most frequently levied history-related criticisms.

1. *The responses*

The strongest response to these arguments is that they distract from the substance of legal proposals. The issue with most of these arguments is a failure to offer a compelling comparison to the present circumstances. Even if the same arguments were raised in the 1880s, 1960s, or 2007, the issue is that American society, politics, and economics look very different now. As discussed above, the legislative history is vague, and the scholarly history is mostly irrelevant. Neither helps us understand the present or why the current reform proposals are right or wrong. Recent economic history is more important.

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135. *See* Dorsey et al., *supra* note 6, at 867 ("These virtues [from empirical economics] are precisely the target of the new populist antitrust movement, which seeks to reject economics in favor of mere supposition in order to achieve decidedly political, not economic, ends.").

136. *See infra* notes 141–46 and accompanying text.

137. *See* Robert D. Atkinson, *How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine*, INFO. TECH. & INNOVATION FOUND. (Mar. 10, 2021), https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new (discussing correlation versus causation); Dorsey et al., *supra* note 6, at 905 (challenging the need for increased antitrust enforcement in combating inequality).

138. *See, e.g.*, Dorsey et al., *supra* note 6, at 862; Atkinson, *supra* note 137, at 6–11.

Perhaps a good response to criticisms that reformers misunderstand economic theory, data, and history is that reasonable minds may disagree about the implications of unclear evidence.[139] Given the importance of economics in antitrust law, proper analysis and interpretation are critical to proper administration. But that is very difficult to do in the short- to medium-term. However, sufficient and growing economic evidence now supports the reformers' concerns, even if not incontrovertibly so,[140] and the perception of comfortable consensus with the status quo has increasingly frayed, unlike perhaps a decade ago.[141]

A better response is that Neo-Brandeisians are aware of the history and empirical evidence but have drawn different conclusions.[142] Neo-Brandeisians think that the Gilded and Progressive Eras from the late 1800s through the early 1900s are a more apt comparison to the present moment than the 1960s are. But, regardless, technology and the American economy are so different from the 1960s that comparisons between the rejected antitrust thinking from that time and modern Neo-Brandeisians are inevitably inapt. So, endlessly debating history is not a productive exercise, and nit-picking Neo-Brandeisian characterizations distracts from the more important work of analyzing and critiquing their ideas.

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139. *See* Crane, *supra* note 19, at 539 ("In other words, are the neo-Brandeisians genuinely open to fact-based, empirical antitrust, regardless of its outcomes? The answer may well be 'of course we are, with the caveat that we are likely to interpret the empirical outcomes differently than you do.' Fair enough.").

140. *See infra* notes 142–47.

141. *Compare* William A. Galston & Clara Hendrickson, *A policy at peace with itself: Antitrust remedies for our concentrated, uncompetitive economy*, BROOKINGS INST. (Jan. 5, 2018) ("[M]ultiple analyses, using a variety of measurements, reveal that rising market concentration is a troubling, economy wide phenomenon.") *with* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS i–ii, 9 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (concluding that "the state of the U.S. antitrust laws [i]s 'sound,' [and] that new or different rules are [not] needed to address so-called 'new economy' issues.").

142. *See, e.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); WU, *supra* note 8; Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179 (2018); STOLLER, *supra* note 133.

Further, a growing body of empirical economic evidence supports the Neo-Brandeisian concerns about "Bigness."[143] Many, if not most, American markets are growing more concentrated.[144] Income and wealth inequality are extremely high.[145] And evidence of the harms of the CWS's bias can be quantified: Thomas Philippon calculated that from the late 1990s to 2019, "the lack of competition has deprived American workers of $1.5 trillion of income."[146] While this Note makes no claims about causation, the Neo-Brandeisians seem to be winning the argument about problems arising from recent economic history.[147]

In sum, while it is helpful to understand economic signals and noise, antitrust law should not be a reactionary pendulum that swings back and forth; it should be unbiased, easily administrable, and sustainable for the long term. Debates about economics can only inform, not decide, debates over law and policy. So, overemphasizing debate over even recent economic history sacrifices needed debate over the substance of antitrust legal proposals: how do we craft a dynamic legal standard with long-term sustainability? Antitrust legal scholars should direct less attention to history and more to explaining why reform

143. *See infra* Appendix, Exhibits C, D (assembling scholarship that supports the Neo-Brandeisian reform movement).

144. Marc Jarsulic, *Antitrust Enforcement for the 21st Century*, 64 ANTITRUST BULL. 514, 514 (2019) ("Measures commonly used by economists to evaluate firm-level economic performance now indicate that many firms have market power and are earning profits above competitive levels. The expected response–the entry of new firms that want to earn a share of those higher returns in those markets–has not happened.").

145. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1, 16 (Arthur Goldhammer trans., Harvard Univ. Press 2014) ("When the rate of return on capital exceeds the rate of growth of output and income, as it did in the nineteenth century and seems quite likely to do again in the twenty-first, capitalism automatically generates arbitrary and unsustainable inequalities that *radically undermine the meritocratic values on which democratic societies are based*. . . . For far too long, economists have neglected the distribution of wealth . . . .") (emphasis added).

146. THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 293 (2019).

147. *See* Hovenkamp, *supra* note 126, at 489 ("[T]he progressive wing of antitrust does a better job of identifying the problems that the competitive economy faces, [even though] some of its proposed solutions are calculated to make them worse.").

proposals are good or bad in the present and future economy *and* society.[148]

B. *The Vagueness Critique*

The second unhelpful criticism is that Neo-Brandeisian reform proposals are vague, intentionally or not. According to critics, reformers fail to (1) clearly articulate their ideas or (2) present their ideas honestly because they know the ideas are unpopular. For example, critics point out the lack of Neo-Brandeisian consensus surrounding a new replacement theory for the CWS[149] and that many questions still remain about how reformers would handle certain issues.[150] To critics, the reformers' generalized frustration with the status quo is insufficient to warrant abandoning the current framework.[151] Especially given the clarity, coherence, and constraining objectivity that the CWS brings to antitrust analysis, adjustments from the status quo are not justified to critics.[152] And without the ability

148. See *infra* Part IV for this Note's argument as to where the debate over Bigness in antitrust scholarship should go.

149. *See, e.g.*, Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Remarks for the ABA Antitrust Law Section's 2021 Fall Forum: The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC (Nov. 9, 2021) ("Instead of devising new solutions for their concerns, they are resurrecting past policy mistakes."); John O. McGinnis, The Rotten Roots of Neo-Brandeisian Antitrust, L. & LIBERTY (June 10, 2020), https://lawliberty.org/forum/the-rotten-roots-of-neo-brandeisian-antitrust ("Neo-Brandeisian antitrust puts old wine into old wineskins.").

150. *See, e.g.*, Crane, *supra* note 19 ("[T]o skeptics of the movement like myself, the lack of a significant body of work articulating the movement's views creates a framing difficulty–how does one critique a movement without a canon of literature or, to date any tangible political or judicial achievements?").

151. Either because the status quo is correct, to those who William E. Kovacic calls "traditionalists," or because further reform would go too far, a view held by the "expansionists"–those who propose "significant extensions in competition policy, but [reject] the restoration of an egalitarian goals framework and broad application of structural remedies to deconcentrate the American economy." William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, ANTITRUST, Summer 2021, at 46, 47 (citing examples of each).

152. *See, e.g.*, Dorsey et al., *supra* note 6, at 868 (arguing against "unsupported populist antitrust reforms," a traditionalist viewpoint); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, ANTITRUST, Summer 2021, at 33, 33 (arguing for "strengthening antitrust enforcement, but [not] . . . changing the mission of antitrust," an expansionist viewpoint) (emphasis omitted).

to evaluate the reformers' claims, it is incumbent on reformers to explain their proposals in greater detail, so the critique goes.

Some critics take this line of argument further, arguing that this vagueness is intentional. Perhaps, critics say, this is because the ideas are unpopular and would be rejected if the reformers were honest about them.[153] Perhaps the vagueness is intended to gain more advantageous territory in the political debate.[154] Or perhaps it is because the reformers' ideas are unprincipled, unserious and mere partisan complaints.[155] The overarching theme of these critiques is that it is effectively impossible to engage with or evaluate reform proposals because the proposals are too general, incoherent, or nonexistent.

2. *The responses*

These vagueness critiques have three main problems. First, they reflect an unawareness or disregard of existing Neo-Brandeisian literature that explains and proposes a concrete agenda. Indeed, in 2019, responding to this criticism from Professor Crane, reformers wrote and published the Utah Statement.[156] The Utah Statement provides a set of beliefs, doctrinal proposals, and enforcement priorities for antitrust

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See generally Kovacic, *supra* note 151 (providing the "traditionalist" and "expansionist" labels).

153. Hovenkamp, *supra* note 16, at 94 ("[A] neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.").

154. *See* Atkinson, *supra* note 137, at 13 ("[T]here is no convincing case for a change of antitrust laws since adaptation to new market realities has been inherent to the practice of the Sherman Act. But neo-Brandeisians know this, which is why they work so hard to perpetuate myths, define many markets as monopolies, and call for a new 'public interest' standard. Before policymakers go down such a transformative path, they should stop and carefully assess the evidence behind the neo-Brandeisian case.").

155. *See id.* at 2 ("The neo-Brandeisian project is not about efficiency, innovation, consumer benefits, or American competitiveness; it is about 'values.' The core value is deconcentration for the sake of it–almost always without tangible benefits, and with a certainty of considerable costs and stifled innovation.").

156. Wu, *supra* note 4 (The Utah Statement "was authored by a group of participants at 'A New Future for Antitrust,' [on] Oct 25, 2019, and edited thereafter," being published by Wu in a blog post on Medium on Nov. 19, 2019).

law and policy.[157] In addition to this statement, a significant body of scholarly work now exists, articulating what reformers propose and why.[158] These writings and ideas can and should be analyzed. Whether these ideas can be properly administered is a separate and important question.

The second problem is that the critiques too often start from the assumption that the only valid comparison for clarity, coherence, and objectivity is the CWS. It is not.[159] Analysis that accepts this framing usually is shallow, merely explaining why some proposal is not the CWS and concluding that it is therefore wrong. The CWS is not objective truth. And arguing to maintain it is not a neutral position.

Antitrust scholars should seek first to understand the principles of Neo-Brandeisian theory and respond to the proposals that logically follow. For students of antitrust, this important debate remains largely unspoken and unwritten. This scholarly closed-mindedness is a curse. It harms the debate about Bigness by depriving it of the clarity, analysis, and theoretical development that establishment scholars have an ability—and this Note argues, a *duty*—to deliver.

The third problem is the unrealistic expectation that the Neo-Brandeisian movement should have a fully formed legal standard by now. Developing a legal standard takes time. Given that the CWS took at least two decades to be adopted and required a great deal of doctrinal refinement, these criticisms seem unfair. The early thought leadership that eventually created the CWS began in the 1950s.[160] The Supreme Court adopted it in 1978.[161] And, in 2021, we still are unsure

157. *See infra* Appendix, Exhibits A, B (presenting the Utah Statement and explaining how it corresponds to the aforementioned core tenets of Neo-Brandeisian thinking).

158. *See infra* Appendix, Exhibit C.

159. The CWS has many problematic ambiguities. *See supra* notes 63–65 and accompanying text.

160. *See* STOLLER, *supra* note 133, at 236–41, 249 (discussing how Aaron Director headed the Antitrust Project at University of Chicago in 1953, setting the stage for Robert Bork to rise to prominence).

161. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978).

what it means[162] or how to administer it properly.[163] A further issue with this critique is that it hypocritically ignores the ambiguities and legal fictions in the current paradigm. Judges are prone to make errors in economic thinking, even at the Supreme Court.[164] And, if they want to, judges can simply ignore economic experts.[165]

C. *The Anti-Consumer Critique*

The last unhelpful criticism is that by rejecting the CWS, Neo-Brandeisians want absurd policy goals: smallness, high prices, low output, slow innovation, and inefficiency.[166] Essentially, critics think that reformers are endorsing the *opposite* of the CWS's goals. If the critic accepts that the CWS stands for maximizing consumer welfare, then any deviation from the CWS is necessarily suboptimal, at least in aggregate. And, if the critic accepts the further premise that we are all consumers, then any deviation from the CWS is suboptimal for us all.

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162. *See* Hovenkamp, *supra* note 16, at 68–79 (explaining the ambiguity of the term "Consumer Welfare," and what it meant when Robert Bork discussed it).

163. *See* Kaplow, *supra* note 63, at 440, 517 (explaining the logical circularity problems involved with antitrust law's dependence on market definition). Notably, the analytical method of market definition is often dispositive. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992) ("Because market power is often inferred from market share, market definition generally determines the result of the case.") (citing Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806–13 (1990)).

164. For a case notable for an error in economic reasoning that the majority opinion accepted, see United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394–401 (1956). *See* George W. Stocking & Willard F. Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29, 53–57 (1955); Philip Nelson, Monopoly Power, Market Definition, and the Cellophane Fallacy, U.S. DEP'T OF JUST. (June 25, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2007/03/27/222008.pdf (explaining how to avoid the cellophane fallacy); *see also* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 20–21 (2011) (finding empirical support that the answer to the question posed by the title of that article is yes).

165. *See, e.g.*, Salop, *supra* note 63, at 460–61.

166. *See, e.g.*, Atkinson, *supra* note 137 ("Progressives now argue: 1) Big firms are bad; 2) market power harms economic welfare; 3) antitrust should protect competitors, especially small business; 4) the goal is promoting the 'public interest' (however progressives definite [sic] it).").

In simplified economic terms, the CWS guides that antitrust law should seek outcomes that result in low prices and high output for consumers.[167] Especially given Neo-Brandeisians' aversion to "Bigness," critics reason that reformers want smallness, high prices, and lower output. Or, even if reformers do not want these outcomes, the outcomes are an inevitable consequence of abandoning the CWS.[168] And, because CWS adherents seem to accept that non-economic concerns are irrelevant to antitrust law, the beneficial trade-offs from a different standard are either presumably irrelevant or already accounted for in the CWS's economic analysis.[169]

3. *The responses*

Three responses demonstrate why this criticism is unfair and unhelpful. First, as discussed above, this process of imputing certain unpopular beliefs to Neo-Brandeisians is logically flawed.[170] Second, in doing so, it mischaracterizes and obfuscates actual Neo-Brandeisian thinking and proposals.[171] Third, this anti-consumer critique ignores the trade-offs that the CWS makes by rejecting them as irrelevant rather than discussing them and imagining how antitrust law could be different.[172]

As discussed above, this imputation of anti-consumer beliefs to Neo-Brandeisians is logically flawed because it attempts to flatten all legal thinking into a binary choice about the CWS: pro-consumer or anti-consumer. This is wrong as a mat-

167. *See* Hovenkamp, *supra* note 16, at 66.

168. *Id.* at 67, 82, 92 ("On the left is an emergent 'neo-Brandeisian' approach that often regards low prices as the enemy, at least when they come from large firms at the expense of higher cost rivals. The neo-Brandeisian approach is also redistributive, tending to redistribute wealth from larger to smaller firms, particularly when larger firms have lower costs. It also redistributes wealth away from consumers and toward these smaller producers. . . . While the word 'Luddite' is probably too strong, the neo-Brandeisians exhibit strong ambivalence about innovation, particularly when firms who engage in it become large. They show similar antipathies toward cost savings.").

169. *See, e.g.*, Atkinson, *supra* note 137, at 2 ("The neo-Brandeisian project is not about efficiency, innovation, consumer benefits, or American competitiveness; it is about 'values.' The core value is deconcentration for the sake of it—almost always without tangible benefits, and with a certainty of considerable costs and stifled innovation.").

170. *See infra* notes 173–75 and accompanying text.

171. *See supra* Part II (explaining Neo-Brandeisian proposals).

172. *See infra* Part III.

ter of basic logic.[173] As explained above, Anti-Bigness is not necessarily Pro-Smallness.[174] The grounds for disagreement with the CWS are a vast continuum that exists not solely along an economic plane.

This critique is unhelpful because it mischaracterizes Neo-Brandeisian views and distracts from the substantive policy dispute. As discussed above, the Neo-Brandeisian beliefs and proposals, while deeply informed by economics, stem from values and concerns about power and governance.[175] Neo-Brandeisians' goals are not low prices and high output, but neither are they high prices and low output. To interpret its proposals in only these economic terms is to make them too narrow to understand them properly.

In fact, the goals of low prices and high output are not necessarily in conflict with Neo-Brandeisan thinking. Like any good lawyer, a Neo-Brandeisian practitioner would argue that the value of sub-optimizing consumer welfare depends on the circumstances. For example, Lina Khan's argument about Amazon's predatory pricing is both that the consumer welfare model fails to account for this behavior's negative consequences fully and that pursuing maximal consumer welfare is not worth the harmful non-economic consequences for our society.[176] Reformers criticize that the status quo ignores how the economy shapes our society as irrelevant "political" considerations, but these are real trade-offs. Currently, critics ignore

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173. *See supra* note 18; *see also* Daniel Freeman, *Discrete Math: Lecture 3*, ST. LOUIS UNIV., 3, https://mathstat.slu.edu/~freeman/Discrete_Lecture_3.pdf (last accessed Oct. 8, 2021) ("A conditional statement and its inverse are NOT logically equivalent.").

174. *See supra* Part II.a. The point is that Neo-Brandeisian concerns about Bigness exist on a distinct plane from the Consumer Welfare Standard's economic analysis of firm behavior as pro- or anti-consumer.

175. *See supra* Part II.

176. *See* Khan, *supra* note 57, at 743 ("Focusing antitrust exclusively on consumer welfare is a mistake. For one, it betrays legislative intent, which makes clear that Congress passed antitrust laws to safeguard against excessive concentrations of economic power. This vision promotes a variety of aims, including the preservation of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control. Secondly, focusing on consumer welfare disregards the host of other ways that excessive concentration can harm us—enabling firms to squeeze suppliers and producers, endangering system stability (for instance, by allowing companies to become too big to fail), or undermining media diversity, to name a few.").

the trade-offs inherent in using the CWS as antitrust law's guiding value. The substantive legal and policy debate that should be happening is about these trade-offs.

As Robert Pitofsky so cogently put it: "The issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale, but rather whether they had any role to play at all, and if so, how they should be defined and measured."[177] He articulated three specific and related non-economic concerns: (1) "a fear that excessive concentration of economic power will breed antidemocratic political pressures," (2) "a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all," and (3) the concern that "if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs."[178] Now, the Neo-Brandieisans again ask: when does the drive to maximize "consumer welfare" undermine democracy, fair competition, or indeed, long-term efficiency?

* * *

In sum, these criticisms mislead rather than elucidate the nature of the current disagreement in antitrust law. This is the "curse" in the debate over Bigness. Neo-Brandeisian reform proposals should be evaluated in economic terms. However, the fundamental disagreement between Neo-Brandeisians and the status quo is about the capacity of the market to self-correct. And further disagreement arises from the societal consequences of this belief, broader than mere economics. Happily, some better examples exist of how the debate over antitrust reform should proceed and which subjects of debate deserve more attention.

177. Pitofsky, *supra* note 34, at 1051.
178. *Id.*

IV.
NEXT STEPS: HOW SCHOLARS CAN "BREAK THE CURSE" IN THE DEBATE ABOUT "BIGNESS"

The current debate about Bigness in antitrust is cursed by scholars' closed-mindedness toward, and unproductive criticisms of, Neo-Brandeisian proposals. Like with all new ideas, scholars should first seek to thoroughly understand Neo-Brandeisian proposals, which are more nuanced than some scholars seem to acknowledge. Again, however, this Note acknowledges that Neo-Brandeisians certainly are not perfect. But the way to break this curse is by engaging in difficult and unresolved questions facing antitrust. This part proposes three such questions.

The first is about Anti-Bigness as an idea and the extent of its utility as a guiding principle in antitrust law. After understanding Neo-Brandeisian values, the second question is to seriously evaluate their proposed reforms for antitrust rules and standards. The third, final, and overarching question is about the proper role of economics, economists, and evidence in antitrust law and policy. After exploring these questions, this Note concludes with optimism, recommending research that moves the debate into more productive territory. This Note argues that more energy should be dedicated to these types of efforts.

A. *Analyze Anti-Bigness as a value*

Scholars should seriously revisit antitrust law's sanguine relationship with monopoly. As discussed in Part II, Neo-Brandeisians' concerns with Bigness have less to do with market share and more to do with unchecked power. It bears repeating that Anti-Bigness is not Pro-Smallness. Instead of endlessly debating inconclusive economic data or historical narratives, scholars should invest time analyzing how or if Anti-Bigness could fit into antitrust. Is Anti-Bigness incompatible with the current iteration of the CWS, or do they actually converge on the need for an unbiased approach to economic analysis that makes fewer assumptions?

Likewise, Neo-Brandeisians should clarify how far they want to go with Anti-Bigness as a value. Is the movement's goal to develop a sustainable, unbiased economic method that mostly maintains the existing legal apparatus after scrubbing

away the stain of CWS's conservative bias? Or is the movement's goal more ambitious? The existing scholarship points to the latter.

Neo-Brandeisians seem to want to dispense with the legal fictions currently clouding the CWS and engage in open debate about what reductions in "efficiency" or "consumer welfare" may be warranted and when.[179] This evaluation of tradeoffs need not be unprincipled or merely a partisan desire for redistribution. It could be guided by economics. Part of the curse in this debate is presuming there is no middle ground.

This Note argues that there is room for a new consensus to develop that reconciles the benefits that the CWS brought to antitrust law with the benefits that Neo-Brandeisian proposals could bring. That proposition begs the next question: what are the Neo-Brandeisian proposals?

B. *Analyze reformers' proposed rules and standards*

All choices between legal rules or standards require tradeoffs.[180] Further, the law's recognition of any decision-making paradigm, including the CWS, reflects substantive tradeoffs.[181] While "consumer welfare" may seem to carry the benefits of a rule (coherent, objective, and easily administrable), that view may simply reflect the comfort that scholars have with the concept by virtue of spending so much time thinking about it. Often, establishment scholars seem to presume both (1) that antitrust law must have an overarching legal standard and (2) that any workable legal standard must resemble the

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179. *See* Khan, *supra* note 57, at 743. *Cf.* Nancy Scola, Lina Khan Isn't Worried About Going Too Far, N.Y. MAG.: INTELLIGENCER (Oct. 27, 2021), https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html ("Khan took her arguments directly to her natural critics. On Fox News, she laid out a case for treating Amazon the way the country long ago decided to treat railroads: requiring that third-party sellers get equal access to its e-commerce platform. *Wouldn't that be a political decision?* the host asked. 'I think all decisions are political,' Khan shot back.").

180. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

181. Hovenkamp, *supra* note 12, at 2 (explaining the influence of Oliver Williamson's "welfare tradeoff" model on the CWS and its subsequent theoretical developments, eventually settling on the more modern idea that "antitrust should seek out that state of affairs in which output is maximized, consistent with sustainable competition," while also acknowledging that "antitrust analysis is not generally concerned with macroeconomics.").

current "consumer welfare" concept. A clear and administrable antitrust standard is a worthy goal, but it may be more like a Holy Grail—nice in theory but impossible to attain in practice.

In Part II, this Note presented only a small sample of the explosion of proposed progressive reforms to antitrust law and policy.[182] For all the critiques that have been leveled at Neo-Brandeisians, the scholarship that takes the ideas seriously and evaluates them thoughtfully is problematically thin. Even if establishment scholars ultimately conclude that these ideas are, in fact, misguided, that does not excuse them from their duty of demonstrating how or why.

Neo-Brandeisians have pointed out the antitrust problems in today's society, which antitrust law, as currently conceived, fails to address.[183] They have also proposed rule changes and new laws to address the alleged problems.[184] If establishment scholars agree or disagree with these proposals, they should at least test these hypotheses. If Amazon's market power is imaginary or new entrants will emerge to unwind its dominance, explain why. If Senator Klobuchar's bills would either not solve today's antitrust problems or would create new ones, explain why. If removing pro-defendant biases and rebalancing burdens will throw courts and the economy into disarray, explain how.

As for standards, reformers offer a variety of proposed replacements for the CWS. One option is abandoning the idea of a legal standard for antitrust law entirely. Without a guiding standard for decision-making, antitrust law could foreseeably go in at least two directions: an instrumental approach or a rule-based approach. The former is what many scholars seem to fear most, the idea that antitrust becomes untethered from economics and becomes, like many other areas of administrative law, a means to effect a political policy end.

Often, this approach is derided as "partisan" or "populist" because, without constraints on prosecutorial or judicial discretion, the problematic influence of personal animosity, lob-

182. *See infra* Appendix, Exhibits C, D (presenting further reformist scholarship).

183. *See supra* Part I.

184. *See supra* Part II.

byist capture, and crony capitalism creeps in quickly.[185] While the CWS doubtlessly does constrain decision-making, many scholars go too far by conflating this anti-corruption norm with the need for the CWS. But adopting the CWS does not eliminate the risks of corruption, politically motivated enforcement, or unethical behavior. Furthermore, these risks can be avoided without using the CWS.

As for a rules-based approach, it is certainly possible to craft much more specific rules and regulations than the Sherman Act. With Lina Khan now leading the FTC, the federal administrative agencies seem poised to craft antitrust rules.[186] However, it remains unclear how relatively specific rules could entirely cut back on the CWS's influence, especially if they are eventually challenged in courts that may or may not choose to grant interpretative deference to the FTC. Rather, if the movement opts for a new standard, the reformers must coalesce around a champion. The two leading contenders for replacement standards in Neo-Brandeisian theory are the Abuse of Dominance and the Protection of Competition Standards.

The Abuse of Dominance Standard (ADS) largely accepts the economic mode of analysis and theories of harm of the CWS but embraces a broader scope of antitrust liability.[187] Conceptually, the ADS's central legal inquiry is about the actions of the antitrust defendant, as opposed to the CWS's focus on the behavior's consequences for consumers. The European Union has adopted this standard for its competition law.[188]

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185. *See* Seth B. Sacher & John M. Yun, *Twelve Fallacies of the "Neo-Antitrust" Movement*, 26 GEO. MASON L. REV. 1491, 1514–19 (2019). For examples of this negative behavior, even under the current CWS regime, *see, e.g.*, William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014); James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line*, 79 ANTITRUST L.J. 577 (2014).

186. *See supra* notes 106–08.

187. James Keyte, Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge, ANTITRUST, Fall 2018, at 113, 113–14 (explaining the differences between American and European competition law).

188. *Antitrust Overview*, EUR. COMM'N.: COMPETITION POL'Y, https://ec.europa.eu/competition-policy/antitrust/antitrust-overview_en (last accessed Oct. 13, 2021) ("Article 102 of the Treaty prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers."). *See also* Control of Abusive Practices, BUNDESKARTELLAMT (German Competition Authority), https://www.bundes

Most Neo-Brandeisians would probably think that adopting the ADS was a step in the right direction but may also think it is still insufficient to address their concerns, particularly non-economic ones about the use of antitrust as a bulwark to protect democracy.[189]

Another alternative is the Protection of Competition Standard (PCS), which centers on the competition process as the potential victim of antitrust violations rather than consumers.[190] As Tim Wu explains, the PCS endorses returning antitrust analysis to a simpler line of inquiry:

> Given a suspect conduct (or merger): Is this merely part of the competitive process, or is it meant to 'suppress or even destroy competition?' This standard actually already forms a part of antitrust doctrine. What changes is eliminating 'consumer welfare' as a final or necessary consideration in every case.[191] Thus, the PCS endorses a reasonableness inquiry applied to the antitrust laws without the concept of 'consumer welfare' as the guiding principle or rule of decision-making.

Finally, reformer consensus may develop around a legal standard that does not yet exist. This Note offers the Neo-Brandeisian idea of Anti-Bigness as a starting point for another alternative that adopts the best economic wisdom of the CWS but broadens its scope, probably most similarly to the ADS and PCS. Rather than treating the CWS as the "end of antitrust

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kartellamt.de/EN/Abusecontrol/abusecontrol_node.html (last accessed 2021).

189. *Compare* Keyte, *supra* note 187, *with* Appendix Exhibit A. Comparing the differences between the CWS and ADS with the breadth of the Utah Statement, the ADS would probably help address the doctrinal concerns and some but not all of the belief and enforcement concerns. For instance, it remains unclear the extent to which the ADS addresses Neo-Brandeisians concerns about how antitrust should protect democratic infrastructure and address concerns of monopsony and labor market issues, especially given cultural and constitutional differences between American and European law.

190. Wu, *supra* note 4.

191. *Id.* at 2 (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

history," scholars should embrace greater intellectual curiosity and analytical rigor toward Neo-Brandeisian proposals.[192]

C. *Analyze the role of economic evidence and economists in antitrust law*

Neo-Brandeisians should clarify their position on this subject. As Professor Crane has helpfully pointed out, a problem arises from their claim that (1) antitrust over-relies on economic analysis and yet (2) they are inheritors to Brandeis' intellectual mantle:

> The paradox for the neo-Brandeisians is this: to be a genuine Brandeisian means to be an empiricist, to prefer inductive fact-based reasoning to a priori generalization or deduction. Today, antitrust empiricism is owned by an economics profession that deploys complex tools on which most lawyers are not qualified to opine and judges outcomes based on welfarist criteria. Therefore, to be a contemporary, Brandeisian on empiricism is to cede the field straight back to the very economists who supposedly have been asleep at the wheel for the last forty years and are unlikely to be sympathetic on average to Brandeisian social and political ideology. . . . Are the neo-Brandeisians genuinely open to fact-based, empirical antitrust, regardless of its outcomes?[193]

Perhaps this is a genuine paradox. Or perhaps Neo-Brandeisians would not perceive this as a paradox because they argue that economic data is not the only relevant evidence in a legal proceeding. Given their broader Anti-Bigness concerns, Neo-Brandeisians would not so cavalierly toss out categories of evidence that the CWS tends to disregard.[194] Re-

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192. Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656 (2020) (book review) (citing FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992)). Khan also noted that "[n]ot all antitrust scholars adopted this 'end of history' view of the field." *Id.* at 1656 n.6. For example, some predicted that "that deconcentration will reemerge as a significant policy concern in antitrust's second century." *Id.* (quoting William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1110 (1989)).

193. Crane, *supra* note 19, at 538–39.

194. *See e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1069, 1077–78 (10th Cir. 2013) (Gorsuch, J.) (discussing why Microsoft CEO Bill Gates's

gardless, this questioning of where Neo-Brandeisian thinking leads or should lead is very useful.

This is the most challenging question to formulate and address. Essentially, scholars should assess the utility of economic analysis and economists in reaching the correct legal answer in antitrust cases. Neo-Brandeisians and progressive scholars have raised valid questions about the capacity of conservative economic analysis to address excess market power adequately. However, if one is convinced by those questions, it prompts further unpacking: is the problem with the conservative bias or the economic analysis, or, as Neo-Brandeisians suggest, both? Perhaps the academy's influence can correct an ideological bias in economic analysis (but one might ask just how long that will take). However, the more unsettling question is, what if the problem is with antitrust law's reliance on economic analysis itself? And, if there is a problem with antitrust law's reliance on economics, is it with the theory or the practice? Many scholars may prefer to think that antitrust law *is* economics, but how well has the legal system coped with the supposed economic and analytical rigor promised by the CWS? Do judges and enforcers tend to analyze economic evidence correctly when presented with it?[195] How would we know? This question interplays with all the others and should receive more direct attention.

CONCLUSION

The current debate about Bigness in antitrust law has been cursed by closed-mindedness toward and unproductive criticism of Neo-Brandeisian proposals. Scholars should break this curse by understanding neo-Brandeisian proposals and testing these hypotheses through application to present and foreseeable antitrust problems. Happily, this Note ends with optimism because the antitrust bar is full of brilliant and respectful thought leaders who assuredly can meet the challenge of breaking this curse.

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emails discussing his strategy to foreclose technologically Microsoft's rivals was not probative to the elements of a monopolization claim.); *see also* Marina Lao, *Reimagining Merger Analysis to Include Intent*, 71 EMORY L.J. (forthcoming 2022).

195. *See* sources cited *supra* note 164.

In closing, this Note points to three examples of encouraging scholarship from more establishment-leaning sources that helped move the debate into more productive territory. First, Professor Crane deserves recognition for his efforts to push the Neo-Brandeisians to produce the Utah Statement and for his work analyzing the possible contradictions that are raised by adopting Brandeis's mantle and applying those ideas to present debates.[196] Second, antitrust scholars are recently engaging in productive debate about the acquisition of nascent competitors as a monopolization theory of harm, which will inform today's debate about digital platforms and dominance.[197] Third, scholarly projects like the Thurman Arnold Project and the Stigler Committee on Digital Platforms are engaging in important debates about how antitrust law can, should, or fails to address anticompetitive abuses in our economy *and society* today and in the future.[198]

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196. Paul Gabrielsen, What is the "Utah Statement?", @THEU, THE UNIV. OF UTAH (Jan. 2, 2020), https://attheu.utah.edu/facultystaff/what-is-the-utah-statement/ ("In October 2019, the U convened a conference titled 'A New Future for Antitrust?' that included judges, law professors, attorneys and economists from around the country, including many from Utah. In one panel session, moderated by [University of Utah economist Marshall] Steinbaum, University of Michigan law professor Daniel Crane challenged panelists to move beyond criticism of current antitrust policies and begin outlining a positive path forward, including actions that could restore the power of antitrust laws. In response, Steinbaum joined with Tim Wu and Lina Khan, both of Columbia University, to write the 'Utah Statement.'"); *see also* Crane, *supra* note 19.

197. *See, e.g.*, C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2019); John M. Yun, *Potential Competition and Nascent Competitors*, 4 CRITERION J. INNOVATION 625 (2019); Colleen Cunningham, Florian Ederer, Song Ma, 129 J. POL. ECONOMY 649 (2021); A. Douglas Melamed, *Mergers Involving Nascent Competition*, Stanford Law & Economics Olin Working Paper No. 566 (Last revised Apr. 6, 2022).

198. *See generally* THURMAN ARNOLD PROJECT AT YALE, YALE SCH. OF MGMT., https://som.yale.edu/centers/thurman-arnold-project-at-yale (last accessed Dec. 7, 2021); STIGLER COMM. ON DIGIT. PLATFORMS, GEORGE J. STIGLER CTR. FOR THE STUDY OF THE ECON. AND THE STATE, FINAL REPORT (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms—committee-report—stigler-center.pdf?la=EN&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E.

Appendix

Exhibit A. *The Utah Statement* (Excerpted)
Tim Wu, The Utah Statement, Medium: OneZero (2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7.

[Preamble/Beliefs:] We believe that:

(1) Subjecting concentrated private power to democratic checks is a matter of constitutional importance;

(2) The protection of fair competition is a means to a thriving and democratic society and an instrument for both the creation of opportunity and the distribution of wealth and power;

(3) Excessive concentration of private economic power breeds antidemocratic political pressures and undermines liberties; and

(4) While antitrust is not an answer to every economic distress, it is a democratically enacted and necessary element in achieving these aims. [***]

Doctrine [Section A]

1. Vertical coercion, vertical restraints, and vertical mergers should enjoy no presumption of benefit to the public;

2. By rule or statute, non-compete agreements should be made presumptively unlawful;

3. The *Trinko* doctrine of implied regulatory preemption should be overruled;

4. The *Brooke Group* test for predatory pricing and *Weyerhaeuser* test for predatory bidding should be overruled;

5. The *Berkley Photo* standard for establishing monopoly leveraging should be restored;

6. The essential facilities doctrine should be reinvigorated for dominant firms that deny access to critical infrastructural services;

7. Structural presumptions in merger review should be restored;

8. The *LinkLine* doctrine holding that price squeeze allegations fail as standalone Section 2 claims should be overruled;

9. *Noerr-Pennington* should be overruled and replaced by a First Amendment defense and appropriate statutory protections for workers; and

10. The Clayton Act's worker exemption should be extended to all who labor for a living [***]

EXHIBIT A. *The Utah Statement* (Excerpted) (cont'd)

METHOD AND ENFORCEMENT PRACTICE [Section B]

1. It is not true that "Congress designed the Sherman Act as a 'consumer welfare prescription'";

2. Antitrust rules should be created through case development, agency rule-making, and legislation;

3. The States, the laboratories of economic experimentation, are a critical vanguard of enforcement efforts;

4. Private enforcement is a critical complement to public enforcement;

5. The markets for labor — and in particular problems caused by labor market monopsony — should be subject to robust antitrust enforcement, and enforcers should treat business structures that restrict alternatives for or coerce working Americans as suspect;

6. The broad structural concerns . . . including due concern for the economic and political dangers of excessive industrial concentration, should drive enforcement of Section 7 of the Clayton Act;

7. Anticompetitive conduct harming one party or class should never be justifiable by offsetting benefits to another party or class. Netting harms and benefits across markets, parties, or classes should not be a method for assessing anticompetitive effects;

8. False negatives should not be preferred over false positives, and the costs of erroneous lack of enforcement should not be discounted or assumed harmless, but given appropriate weight when making enforcement decisions;

9. Structural remedies are to be preferred;

10. Harms demonstrated by clear and convincing evidence or empirical study should never be ignored or discounted based on theories that might predict a lack of harm;

11. Clear and convincing evidence of anti-competitive intent should be taken as a presumptive evidence of harm;

12. Mergers should be subject to both prospective and retrospective analysis and enforcement practice; and

13. The determination by the antitrust agencies of relevant market definitions should receive judicial deference.

EXHIBIT B. Collapsing *The Utah Statement* into Four Neo-Brandeisian Tenets

Neo-Brandeisian Tenets	***The Utah Statement*'s Labelling**		
	Preamble/ Beliefs	**Doctrine (Section A)**	**Method and Enforcement Practice (Section B)**
Anti-Bigness	1, 3, 4	1, 3	1, 2, 8, 9
Rebalancing Burdens	-	1–10	5, 7–9, 11–13
Effective Enforcement	-	2, 6, 10	2–6, 12, 13
A Better Legal Standard	2	2, 7	1, 2, 5–8, 10, 11, 13

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