

Book Review

Heroes and Villains of Antitrust

Tim Wu

The Curse of Bigness: Antitrust in the New Gilded Age
2018

Reviewed by Thomas B. Nachbar

It is hard to argue that any book about antitrust is essential reading for non-academics, but Tim Wu's *The Curse of Bigness*¹ is that book.

In this divided political climate, disdain for large corporations and the power they wield may be the one thing that unites right and left, with daily news stories about a possible executive order by the President, the potential for hearings and legislation in Congress, and proceedings at the Federal Trade Commission, all focused on the size, power, and overreaching of big companies, especially big tech. There is a nascent populist movement aligned against large firms, many of which are in high-technology businesses.² This book is an accessible and compelling story that explains some of the intuitions underlying that movement.

Wu's book is not a dry treatment of markets and monopoly prices. As explained in the book's introduction, the book is about today's political climate, where polarization and demonization are rampant. Today's economy, one in which wealth and economic power have been concentrated in a small number of large firms, "represents a profound threat to democracy itself."³ A new approach to antitrust is necessary to avoid returning to a world of "widespread popular anger and demands for something new and different" that leads to "a return to the politics of outrage and of violence."⁴ It is a time with direct parallels to the economic disenchantment that led to the rise of fascism and communism. Wu claims to present a version of antitrust that offers a way back to a better time, when antitrust law protected us and our economy from the kinds of concentrations of wealth and power than endangered not only the economy but the political system. This is a story of that time and how we've lost our way.

As enjoyable and edifying as it is, though, in the end Wu's book fails to deliver on its promise. Wu misdiagnoses the ills of today's antitrust while failing to demonstrate either that his vision of antitrust is any more workable today than it was when it was rejected or, for that matter, that yesterday's antitrust still makes sense to solve so many problems for which we have other, modern regulatory solutions. In the end, Wu has become caught up in his story, losing sight of the limits of storytelling for solving modern problems.

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¹ TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

² See Nizan Geslevich Packin, *Breaking Up Is Hard To Do, But That May Be Where Big Tech Is Heading*, FORBES (Nov. 16, 2018) ("It is hard to imagine that Senator Elizabeth Warren and President Donald Trump agree on much. . . . But when it comes to the largest U.S. tech companies, the Trump administration and Senator Warren appear to share the same intuition: these entities might just be too big.").

³ Wu, *supra* note 1, at 15.

⁴ *Id.* at 22.

A story cannot be told without characters, and like any compelling storyteller, Wu provides both heroes and villains. Among the heroes Wu counts trust-busting presidents and attorneys general, such as Theodore Roosevelt and Thurman Arnold. Also heroic are the Federal Trade Commission and, to a lesser extent, the Department of Justice, agencies that brought “big cases” against industrial behemoths like AT&T and IBM, realizing the promise of antitrust law and transforming industries (for the better) in the process.⁵

But Wu’s principal hero is Louis Brandeis, from whom Wu takes the title of his book. Brandeis, “advocate, reformer, and Supreme Court Justice,”⁶ is one of the most famous lawyers of the last hundred years. As understood by Wu, Brandeis’s views on the economy were formed by a childhood lived in Louisville, Kentucky, “a place of industrial freedom and openness to competition, yet with an economy that yielded adequate spoils for all.”⁷ After high school and study in Germany, Brandeis “achieved famously high grades at Harvard Law School . . . developed a passion for canoeing and horseback riding,” and “built a distinguished legal practice” in Boston.⁸

Although content to live a quiet life in practice, Wu’s Brandeis was “stirred to action” by the rise of the trusts, which were engaged in an “economic eugenics movement” (or alternatively a “pogrom”) against small businesses, many of which happened to be Brandeis’s clients.⁹ So aroused, Brandeis stood up to J.P. Morgan’s plan to consolidate much of the area’s transportation companies into the monopolistic New Haven Railroad, and although Brandeis failed (he was, after all, “just one man against Morgan and his resources”¹⁰), the episode served to crystalize his understanding of the economy, and specifically of the close relationship between government and the economy: “A good country and a good economy . . . would be one that provided to everybody sufficient liberties and adequate support to live meaningful, fulfilling lives,” a matter of not only economic, but constitutional, import.¹¹

Most importantly, Brandeis realized the connection between theoretical freedom and economic reality. After all, an individual with freedom on paper cannot realize it if living in economic bondage. This was a critical point for Brandeis, highlighting restrictions on freedom not only by government but also by private interests.¹² Following Brandeis, Wu examines the potential for private interests to restrict personal freedoms by virtue of their economic power, with antitrust law a primary means to prevent it.

Wu also supplies villains aplenty, starting with Morgan himself along with his “anointed lieutenant” Charles Mellon, a “charismatic charmer” who duped the public and the press into supporting the New Haven.¹³ Predictably, the villains get their comeuppance. Although justice was delayed in the case of the New Haven, it does eventually come, when it is revealed that the monopoly had been hiding “gross inefficiencies with [its] size”¹⁴ and it is dismantled by Morgan

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⁵ *Id.* at 93–97 (on AT&T); *id.* at 110–13 (on IBM).

⁶ *Id.* at 33.

⁷ *Id.* at 34.

⁸ *Id.* at 35.

⁹ *Id.*

¹⁰ *Id.* at 36.

¹¹ *Id.* at 39–40.

¹² *Id.* at 40–41.

¹³ *Id.* at 35–36.

¹⁴ *Id.* at 38.

under threat of antitrust lawsuit by federal regulators, but only after years of wrecks, derailments, delays, injuries, and deaths. Also featured is John D. Rockefeller, who, in addition to performing numerous bad acts, Wu suggests suffered from a “dual morality” that included a “split personality characteristic” that enabled and even self-justified his (along with Morgan’s) bad conduct.¹⁵ That side of the cast is filled out with a number of industrialists and presidents (such as McKinley and George W. Bush) who were weak on antitrust.

The philosophy of men like Rockefeller, Morgan, and other supporting members of the “Trust Movement,” as Wu names it, was laissez-faire and Social Darwinism, which justified “a kind of industrial eugenics campaign.”¹⁶ The monopolists’ campaign (which mirrored Rockefeller’s own belief in eugenics) was to realize perfection in the form of centralized, industrial control of the economy.¹⁷

Although the historical villains are cast against Brandeis, the book is primarily concerned with modern villains of antitrust, who are not genocidal monopolists but rather a group of seemingly harmless academics, proponents of what has become to be known as the “Chicago School” of antitrust, and most especially one member of the Chicago School: Robert Bork. Wu’s backstory for Bork is less distinctive than his account of Brandeis’s idyllic childhood. Bork grew up in the suburbs, “made an effort to join the Marines at the end of the Second World War,”¹⁸ and “declared himself a socialist” in his youth before experiencing a “religious conversion” (the latter being Bork’s words, not Wu’s) to libertarianism. That conversion came at the hands of another member of the Chicago School, Aaron Director, who in turn was “neither a lawyer, nor an economist with a PhD,” but rather was “a mysterious Socrates-like figure who left behind few written works”¹⁹ but whose influence has been felt through those he educated at the University of Chicago.

One might wonder why Bork would garner such attention from Wu, especially when antitrust has so many colorful villains to offer. As it happens, Bork’s nefarious act, akin to Morgan and Rockefeller’s deceitful scheming, was to popularize the idea that antitrust courts should focus on “consumer welfare” (scare quotes Wu’s, not mine), an argument he perfected in his famous (at least among antitrust lawyers) book, *The Antitrust Paradox*.

The consumer welfare standard directs courts to examine the legality of a trade restraint based on the degree to which the restraint harms consumers. This was something of a shift in the antitrust law at the time. In the 1960s, the Court had increasingly looked at trends in industry structure to prohibit practices before they lead to any harm to consumers—to act “when the trend to a lessening of competition in a line of commerce was still its incipiency.”²⁰ The consumer welfare standard argues that the best way to measure effects on competition (the protection of which is the ostensible object of the antitrust laws) is to look at the effect on consumers rather than in some other way, for instance by seeing how it affects the number or vitality of competitors. Wu does not overstate the case when he says that the consumer welfare standard has come to dominate American antitrust doctrine—it has.

¹⁵ *Id.* at 61.

¹⁶ *Id.* at 28.

¹⁷ *Id.*

¹⁸ *Id.* at 87. On this score, Wu appears to be mistaken. Bork apparently did serve in the Marines. Twice. Al Kamen & Matt Schudel, *Robert H. Bork, Conservative Judicial Icon, Dies at 85*, WASH. POST. (Dec. 19, 2012), www.washingtonpost.com/local/obituaries/judge-robert-h-bork-conservative-icon/2012/12/19/49453de4-c5da-11df-94e1-c5afa35a9e59_story.html?utm_term=.c96caedd5c50.

¹⁹ Wu, *supra* note 1, at 87.

²⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

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According to Wu, Bork justified use of the consumer welfare standard by arguing that it had been part of the original intent behind the Sherman Act.²¹ That historical claim legitimized the consumer welfare standard, allowing it to capture antitrust doctrine. The consumer welfare standard was based in economics, albeit the kind of simplified economics that appeals to judges, who “can become anxious when asked to decide complex and challenging cases”²² and who, reeling from attacks of judicial activism in the late '60s and '70s, latched on to the historically fortified consumer welfare standard, “as a tool of judicial restraint (not unlike ‘originalism,’ another of Bork’s favorites)” (scare (internal) quotes again Wu’s).²³ Bork did not invent the consumer welfare standard (that was Director), but he did “weaponize”²⁴ it against antitrust.

According to Wu, having been historically legitimized by Bork, the consumer welfare standard was like a virus that, once injected into antitrust doctrine, turned the doctrine on itself, destroying its capacity to control big business. By offering this simplified form of economics with a purported historical basis, Bork’s “radically narrow reading of the Sherman Act”²⁵ that was initially considered “absurd and even insane”²⁶ eventually took hold, leading to a “not merely pruned but enfeebled”²⁷ antitrust doctrine. The implication of Bork’s work was not that the Sherman Act should be read narrowly; it was that regulation really had no place at all. “The belief that really mattered was that the market enjoyed its own sovereignty and was therefore necessarily immune from mere democratic politics.”²⁸

At this point in the story we can all see what’s coming: the demise of antitrust and the return of the ideology of the robber barons. The consumer welfare standard “was really *laissez-faire* reincarnated, without the Social Darwinist baggage.”²⁹ It’s the return to the Gilded Age promised by the book’s title.

One would think that a story of the modern gilded age would focus on modern captains of industry. Bill Gates makes an appearance (“the archetype of the evil nerd,” head of Microsoft, an “aggressive, cunning, and often abusive machine”³⁰), but there’s no mention of others like Steve Jobs (whose attitudes toward vertical integration, one might think, Wu would find most troubling) or Jeff Bezos. But Wu has picked his characters for a reason, and his attacks on robber barons like Morgan and even on Bork himself are something of a sideshow, for the real villain in Wu’s story is the consumer welfare standard itself.

In taking on the consumer welfare standard, Wu has picked quite a fight. The consumer welfare standard is hugely popular in antitrust doctrine. Rhetorically irresistible (after all, who could be against consumer welfare?) and analytically powerful, it is at the core of almost every major modern Supreme Court antitrust case. It is favored by Supreme Court Justices of all stripes. The consumer welfare standard is antitrust’s version of middle-class tax cuts. Everyone (at least among Justices) claims to be in favor of it.

²¹ Wu, *supra* note 1, at 88.

²² *Id.* at 91.

²³ *Id.* at 90.

²⁴ *Id.* at 86.

²⁵ *Id.* at 89.

²⁶ *Id.* at 88.

²⁷ *Id.* at 103.

²⁸ *Id.* at 92.

²⁹ *Id.* at 91.

³⁰ Wu, *supra* note 1, at 98.

But, regardless of its popularity, for Wu the consumer welfare standard must go. The reason has less to do with its lack of historical basis than with its implications for very modern arguments about antitrust advanced by Wu and other proponents of what he styles “a broader neo-progressive revival”³¹ and what has been less-generously referred to as “hipster antitrust.”³² For these neo-Brandeisians, which includes people like Lina Khan, who shares Wu’s broader, neo-Brandeisian agenda³³ and whose student-authored law review article about Amazon garnered about as much media attention as a law review article could,³⁴ the consumer welfare standard represents a considerable barrier to their academic agenda. They would have antitrust enforcers focus on the business practices of large companies, while the consumer welfare standard focuses the antitrust inquiry on the effects of practices on consumers. According the neo-Brandeisians, future benefits are likely to come from a robust number of competitors, whose welfare is largely ignored by the current analysis.³⁵

The consumer welfare standard requires theorists like Wu and Khan to demonstrate how Amazon’s (to take Khan’s example) business practices, such as using data gleaned from the distribution it performs for other sellers to come up with competing products and services, harms consumers. Khan’s argument has an intuitive appeal. Amazon’s conduct looks bad on the surface; those other sellers are Amazon’s customers for distribution, and so it hardly seems fair to use data acquired from serving them to compete with them.³⁶ Although an attractive theory aimed at an attractive target, the case against Amazon looks questionable on its facts. There is little evidence that Amazon’s practices are actually having much effect on *anything*.³⁷ But the more fundamental problem from the perspective of antitrust as applied through the consumer welfare standard is that practices like Amazon’s don’t seem to hurt consumers; consumers are generally better off for Amazon’s collection of information if Amazon uses that information to develop services and products that consumers want. It may seem untoward, but that kind of untoward, elbow-knocking competition is the kind of conduct antitrust not only permits but encourages—the “paradox” of Bork’s title, a paradox embodied in the consumer welfare calculus and a paradox virtually universally accepted in antitrust doctrine.

And therein lies a problem for Wu’s account, for the consumer welfare standard’s appeal reaches far beyond historical or intentionalist understandings of the Sherman Act. Lewis Powell, author of *Continental T.V. v. GTE Sylvania*, the case that brought the consumer welfare standard firmly into antitrust law was no intentionalist, and although he cites Bork in that case, it’s not for the historical basis of the consumer welfare standard.³⁸

³¹ *Id.* at 145.

³² See Nitasha Tiku, *Don’t Mistake Orrin Hatch for #HipsterAntitrust*, WIRED (Aug. 3, 2017), www.wired.com/story/orrin-hatch-antitrust-hipster-antitrust/ (describing Orrin Hatch’s derisive use of the term “hipster antitrust,” following that of Prof. Joshua Wright).

³³ See Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, J. EUR. COMPETITION L. & PRACTICE (2018).

³⁴ Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017). On the media coverage of Khan’s article, see Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, ATLANTIC (June 12, 2018), www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/.

³⁵ Wu, *supra* note 1, at 136–38; Khan, *supra* note 34, at 804–05.

³⁶ Khan, *supra* note 34, at 782–83.

³⁷ Juozas Kaziukenas, *Amazon Private Label Brands*, MARKETPLACE PULSE, www.marketplacepulse.com/amazon-private-label-brands (demonstrating that Amazon’s private label products, which Amazon has developed using information from its marketplace, are generally poor market performers and account for little of Amazon’s business).

³⁸ *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 (1977). *But cf. id.* at 69 & n.9 (White, J., concurring) attacking Bork and citing the *Legislative History* article. The Court had cited Bork’s historical account of the consumer welfare standard earlier, but it had done so in service of expanding the coverage of the antitrust laws, not restricting them, and in a case unconnected to price theory or to the Chicago School more broadly. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

Wu is greatly overstating the role of Bork's historical argument in securing the place of the consumer welfare standard, at least if one looks at the cases.

Indeed, the Court seems to have largely ignored legislative intent in its interpretation of the Sherman Act, focusing more on practical economic realities than any particular understanding of what Congress envisioned in 1890. Justice Scalia, dean of another historical methodology, originalism (which gets a sidelong glance from Wu³⁹), considered himself freed from 1890 understandings of competition or consumer welfare by the Sherman Act's vague language.⁴⁰ Perhaps the greatest proponent of the consumer welfare standard on the Court was Justice Kennedy, who invoked it both in revising the Court's approach to predatory pricing⁴¹ (a primary focus of Bork's) and overruling the per se prohibition on resale price maintenance,⁴² and no one would mistake him for an antitrust intentionalist. Wu is greatly overstating the role of Bork's historical argument in securing the place of the consumer welfare standard, at least if one looks at the cases.

In the end, Wu's historical attack on Bork resembles a strawman, because although Wu emphasizes the historical element, history was hardly the central part of Bork's argument for the consumer welfare standard. Bork did make the historical argument, and I'm not going to defend it, but his argument was much broader than that. To quote a summary from *The Antitrust Paradox*: "The language of the antitrust statutes, their legislative histories, the major structural features of antitrust law, and considerations of the scope, nature, consistency, and ease of administration of the law all indicate that the law should be guided solely by the criterion of consumer welfare."⁴³ That's much more than history, and the vast majority of the book's 341 pages are devoted to economic analysis of current practices, not the intent of Congress in 1890.

Rather, Bork's primary contribution was not his recitation of the history but his successful connection between productive efficiency and allocative efficiency.⁴⁴ Bork's argument was that the types of restraints outlawed by the Court (such as vertical integration, in which a manufacturer would operate its own retail outlets instead of using independent dealers) would increase the productive efficiency of the firm. Bork argued that such gains in efficiency were likely to be passed on to consumers because of "the obvious fact that more efficient methods of doing business are as valuable to the public as they are to the businessmen."⁴⁵ When he did that, there arose a reason for the Court to be careful about outlawing particular business practices—there was a real downside to aggressive antitrust enforcement because the effects of limiting business practices might go beyond the big businesses and harm individual consumers.

You can agree or disagree with Bork's argument—indeed, whether efficiency gains will be passed on to consumers is likely to vary from market to market—but that was the claim. The inter-

³⁹ See Wu, *supra* note 1, at 90.

⁴⁰ See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); see generally Alan Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013 (2017).

⁴¹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). Bork argued the case for Brown & Williamson. *Id.* at 211.

⁴² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

⁴³ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 57 (1978).

⁴⁴ E.g., Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 83–84 (1982); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1238 (1989). Bork didn't originate that idea, either (that was Oliver Williamson, see Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 22–23 (1968)), but he put it together in a comprehensive package with the rest of his analysis in *The Antitrust Paradox*.

⁴⁵ BORK, *supra* note 43, at 4.

est in productive efficiency is why Bork was less concerned about shifting antitrust thinking about “horizontal” restraints among competitors (such as cartels) than he was with regard to “vertical” restraints that run down the supply chain, like the exclusive dealership at issue in *Sylvania*. The relationship between productive efficiency and allocative efficiency—what Bork called “consumer welfare”⁴⁶—was the powerful claim of Bork’s work, not the discovery of some hidden volume that revealed John Sherman and Teddy Roosevelt had been price theorists all along.⁴⁷

The relationship between productive efficiency and allocative efficiency—what Bork called “consumer welfare”—was the powerful claim of Bork’s work, not the discovery of some hidden volume that revealed John Sherman and Teddy Roosevelt had been price theorists all along.

The connection to price theory, which is a central character in Wu’s story but goes undescribed, has to do with the harm caused by these practices. The problem for antitrust is that it’s hard, just looking at a practice, to determine whether that practice is likely to harm or benefit competition. Let’s say a pizza parlor wants to buy a delivery company so the pizza parlor can deliver its own pizzas. Does that help competition (by enabling cheaper pizza delivery) or harm it (by removing the delivery company from the market for delivery services or by keeping other pizza parlors from using the same delivery company to deliver *their* pizzas)? It’s hard to know, but price theory tells us that practices that harm competition will raise prices (and reduce output). If the combined price of pizza and delivery goes up, then the restraint is likely harmful; if it goes down, not so much. Higher prices, combined with reduced output, is a way to detect whether a restraint is harmful, and price theory’s application to antitrust is a response to concerns over the ability to separate beneficial from harmful business practices.

Thus, the consumer welfare standard is less a theory about how antitrust must work or what John Sherman thought than it is a theory of measurement—a theory about how to *detect* harmful business practices. Much of the Court’s preference for the consumer welfare standard is prompted not by original intent or Progressive Era understandings about antitrust—it has to do with the possibility and costs of errors in antitrust enforcement.⁴⁸ And that leads to what is a critically important but missing character in Wu’s story: regulatory skepticism and its effect on the Court’s understanding of antitrust.

Consumer welfare was not the only game going in the 1970s and ’80s. At the same time Bork was developing the consumer welfare standard for antitrust, another series of theories were rising, challenging the role of regulation and regulatory agencies like the FTC *everywhere* in law. Deep regulatory skepticism exploded at the same time as the Court was revising its approach to antitrust,⁴⁹ a broad regulatory skepticism that reached far beyond antitrust, forming the core of what was Ronald Reagan’s, and has become the Republican party’s, deregulatory agenda.⁵⁰ This wasn’t just an era of *The Antitrust Paradox*; it was the era of *The Prophets of Regulation*⁵¹ and *The Calculus of Consent*.⁵²

⁴⁶ Kenneth G. Elzinga & David E. Mills, *Antitrust Predation and The Antitrust Paradox*, 57 J.L. & ECON. 181, 183 (2014).

⁴⁷ See, e.g., George L. Priest, *The Abiding Influence of The Antitrust Paradox*, 31 HARV. J.L. PUB. POL’Y 456 (2008) (describing Bork’s contributions, none of which were historical).

⁴⁸ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 17 (1985) (describing estimation of consumer harm as a “filter” to prevent erroneous imposition of antitrust liability).

⁴⁹ See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

⁵⁰ See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION* (1991); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1316 (1986).

⁵¹ THOMAS McCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* (1986).

⁵² JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

If you can't trust anyone, you might as well decentralize your distrust. Verizon and AT&T may be big, but at least when they mess up, there's a possibility for correction; not so when the federal government makes a similar mistake. That skepticism is readily apparent in the Supreme Court's modern antitrust doctrine.

That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets.⁵³ Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct—the practice once outlawed would remain outlawed.⁵⁴ And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers—not to mention the treble damages that the liable antitrust defendant would have to pay.

Importantly, there would be no way to correct the error. The intuition underlying that broader regulatory skepticism has a particular resonance for antitrust, reflecting antitrust's own misgivings about monopoly while recognizing that the only true monopoly is government itself. If you can't trust anyone, you might as well decentralize your distrust. Verizon and AT&T may be big, but at least when they mess up, there's a possibility for correction; not so when the federal government makes a similar mistake. That skepticism is readily apparent in the Supreme Court's modern antitrust doctrine.⁵⁵

While courts and commentators were (re)discovering government failures, the consumer welfare standard offered a two-part corrective to an antitrust doctrine that many had agreed had gone awry based on a misunderstanding about both the wisdom of government intervention and the resilience of markets. The consumer welfare standard both provided a way to clearly identify a point at which intervention was beneficial and emphasized the potential benefits consumers might reap from business practices. For instance, under the consumer welfare standard, the inter-brand competition enabled by the vertical restraints in *Sylvania* was seen as helping give consumers a choice—the Court saw them as enabling Sylvania to break into a market and to offer competition against RCA, which had 60–70 percent of the market at the time.⁵⁶ And if it didn't work—if consumers didn't like Sylvania's exclusive dealerships—the only party that would suffer would be Sylvania, since consumers could always go to RCA if they didn't like Sylvania's terms. But if consumers were harmed, as evidenced by an increase in prices for televisions combined with a reduction in sales, then we would know the restraint was both harmful and successful and intervention was warranted.

Regulatory skepticism emphasized the likelihood and cost of government error at the same time that the consumer welfare standard emphasized the value of innovative business practices,

⁵³ Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 82 (2013).

⁵⁴ Easterbrook, *supra* note 48, at 3 (“[J]udicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”).

⁵⁵ See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 284 (2007) (“In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (“It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”) *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

⁵⁶ *GTE Sylvania*, 433 U.S. at 38 n.1.

even ones that had the potential to be harmful. Although perhaps not rising to the significance of the consumer welfare standard, growing regulatory skepticism (which accompanied the rise of political economics, which emphasized the likelihood that the regulatory process could be subverted to illegitimate ends) dramatically shifted the Court's appetite for risk in aggressively applying the antitrust laws, a diminished appetite it retains today. That regulatory skepticism is only likely to grow on a Court in which Anthony Kennedy has been replaced by Brett Kavanaugh.⁵⁷

Focusing on the consumer welfare standard and ignoring the role of regulatory skepticism is an understandable choice for Wu's storytelling, for regulatory skepticism is a far more diffuse enemy, more of a fog that blurs the landscape of regulatory reform than the polarizing Bork and the singular consumer welfare standard. But focusing on Bork and the consumer welfare standard as villains blinds Wu not only to the subtleties of both but also to a variety of objections to his agenda, most of which have less to do with the substance of antitrust law than the fallibility of the institutions that will apply it, a fallibility that underlies that self-same regulatory skepticism. Wu unsurprisingly has little to say about regulatory efficacy, other than to applaud what he considers to be a forgotten era of "big cases" and to apologize for a period of widely acknowledged antitrust overreaching by both the Department of Justice⁵⁸ and the Federal Trade Commission⁵⁹ in the 1960s and '70s. At the same time Wu argues for expanded power for the FTC in what is one of the less convincing parts of the book. The climax of Wu's story is the rejection of the consumer welfare standard, but his failure to identify and respond to the Court's regulatory skepticism is arguably fatal to the story's resolution, since rejecting the consumer welfare standard does not necessarily lead one to embrace the "Neo-Brandeisian" order he advocates.

And this is the second major failing of the book, although it is an understandable one: Although Wu recognizes the overreaching that provided a theoretical opening for the consumer welfare standard to take hold, he does nothing to explain how he would alter the failed antitrust policies of the 1960s in order to respond to the criticisms that led to the rise of the consumer welfare standard. While he apologizes for what he agrees was overreach in cases like *Von's Grocery*,⁶⁰ just a few pages later, he endorses the "incipiency" standard from *Brown Shoe* that formed the bulwark of *Von's Grocery*.⁶¹

Bork rightly saw the incipiency standard that drove cases like *Von's Grocery* as an open invitation to judges to imagine any number of potential horrors that might or might not arise any number of years in the future, and the consumer welfare standard constrains such speculation. Neither Wu nor other neo-Brandeisians to date have even tried to explain how they would apply their version of the incipiency standard in a way that would not lead to more *Von's Grocery*-like decisions. Wu's failure to see the consumer welfare standard as part of a larger movement to constrain regulators leads him to ignore these other objections, and what is left is really no more than a plea to bring back incipiency or something like it, with all its faults. Indeed, other than *Von's Grocery* and

⁵⁷ See Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL ST. J. (July 9, 2018), www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402.

⁵⁸ Wu, *supra* note 1, at 104.

⁵⁹ *Id.* at 113.

⁶⁰ *Id.* at 104.

⁶¹ *Id.* at 127–28; see *United States v. Von's Grocery Co.*, 384 U.S. 270, 278–79 (1966) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962)). Footnotes 12–14 of *Von's Grocery* are dedicated to the incipiency theory of *Brown Shoe* along with a host of other cases that today are widely considered to be both wrongheaded and wrongly decided.

the FTC cereal investigation,⁶² it's not clear which cases from that era Wu doesn't like and therefore it's hard to see how his proposed standard would work differently, or really at all.

Just as Wu has been selective in his choice of villains, he's been selective in his choice of heroes, and Wu's Brandeis has been idealized to suit Wu's purpose. Brandeis, portrayed as an advocate for an economy of small (probably local-sourced) businesses, had a much broader vision of power politics in industrial relations, one more focused on balance than size. He was happy with huge concentrations of power so long as they were equally balanced between employer and labor.⁶³ Brandeis's vision of "industrial democracy" emphasized the role of workers, not consumers.⁶⁴ Wu's history misplaces Brandeis's economic vision as agrarian decentralization resembling Louisville, when he was equally comfortable with the labor-centric industrialization of big business and big labor resembling Pittsburgh.⁶⁵

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Some of Wu's policy proposals are more workable than others. Wu's proposal for a "market investigation" law would allow the FTC to break up any industry that is concentrated and stagnant (which Wu, following Donald Turner, defines as ten years)⁶⁶ is rife with problems of administrability. In today's markets, it's hard enough to identify a discrete industry at any given moment, much less over the period of a decade. Is Facebook's industry stagnant? And what is Facebook's industry? Social media? Advertising? Communications? Nor has the FTC shown itself capable of carrying out such a task. Wu's suggestion for substantive merger law, following Einer Elhauge, would arbitrarily draw the concentration line at 4, seemingly regardless of industry structure,⁶⁷ which would be a major step backward.

But some of Wu's suggestions are both workable and too easily ignored. Wu's call for greater transparency in the merger process⁶⁸ is both sensible and cognizant of a problem with current merger review procedure: It's designed largely for the convenience of the merging parties. Wu is right to point out that large mergers are matters of public import—huge firms control enormous resources, and the public has an interest in how those resources are going to be deployed. Given the degree of openness required by modern securities law—in which analyst calls are a staple—the degree of secrecy in current merger review is an anachronism.

Given his concern about the capture of antitrust by economics, some of Wu's suggestions are just puzzling. I could not agree more that antitrust has lost something through academics' singular a focus on economics.⁶⁹ Wu's cure for the bad economics of the Chicago School is to apply

⁶² Wu, *supra* note 1, at 113–14. See *Kellogg Co.*, 99 F.T.C. 8 (1982).

⁶³ Louis D. Brandeis, *Shall We Abandon the Policy of Competition*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 107–08 (Osmond K. Fraenkel ed., 1934) ("The only right claimed by the labor unions is that of collective bargaining, and this right employers also should have and exercise. It would be perfectly proper for independent competing employers to form employers' organizations, and to deal with the labor unions upon exactly the same footing as is the case with the unions—that is collectively."). See also *Nachbar*, *supra* note 51, at 67; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting) (arguing that § 20 of the Clayton Act was designed to "equalize before the law the position of workingmen and employer as industrial combatants").

⁶⁴ Louis D. Brandeis, *On Industrial Relations*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 83 (Osmond K. Fraenkel ed., 1934) (describing "industrial democracy" as "a position through which labor may participate in management").

⁶⁵ Brandeis did have his theories about the limits of economies of scale, see Louis D. Brandeis, *Competition*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 117 (Osmond K. Fraenkel ed., 1934), but he seemed comfortable with agglomerations of industrial power so long as labor had a seat at the table in managerial decisions. Brandeis, *supra* note 62, at 83.

⁶⁶ Wu, *supra* note 1, at 134.

⁶⁷ *Id.* at 129.

⁶⁸ *Id.* at 129–30.

⁶⁹ *Nachbar*, *supra* note 53, at 65–66.

different economics, but that does little to address the problem of how an overly academic approach to economics has led antitrust away from practical realities. Wu's move mirrors a larger movement in antitrust scholarship away from so-called static neoclassical economic models of behavior inherent in the consumer welfare standard and toward the "dynamic" approaches of industrial organization theory.⁷⁰ Never mind that the rise of the Chicago School itself was in response to the failings of earlier attempts to use the models of industrial organization.⁷¹ Attempting to apply that kind of planned economic thinking to industries as *dynamic* as today's technology industries is likely to become an exercise in tail-chasing. By the time the industry has been modeled and managed, it likely will have changed.

Similarly, applying Brandeis's thinking seems a poor fit to so many aspects of the modern economy. Brandeis wrote in an era of low labor mobility and practically no industry or consumer regulation. Today we live in a time of extremely high labor mobility and a universe of regulation unheard of at the time of the original *Curse of Bigness*, regulation that specifically responded to many of the ills Brandeis complained of in that tome, such as the Occupational Safety and Health Act, the Employee Retirement Income Security Act, minimum wage laws, and even the Clean Air Act, Social Security, and Medicare. A single legislative event—the National Labor Relations Act—answered many of Brandeis's concerns, the majority of which were consumed with harms to laborers, not consumers.⁷² Many of the problems Brandeis himself was seeking to solve by attacking the power of industrialists have been solved in other ways. It's not clear that even Brandeis would have thought that enhancing antitrust would be the way to solve the remaining ones. Such has generally been antitrust's answer to specific bad conduct: regulation prohibiting it, regardless of whether it *also* presents a threat to competition.⁷³

In the end, it's not clear either that Wu has accurately channeled Brandeis (who had views far more complex than Wu acknowledges) or that we could return to the vision of antitrust that Wu attributes to Brandeis, partly because the world where that vision resided no longer exists. Rather, Wu's quest to return to Brandeis's antitrust, much like populist longing for a time when manufacturing was the core of the American economy with General Motors at its epicenter, is an exercise in wistful historicism. There's no going back to that time, and if we could, we wouldn't want to. It is tempting to criticize the neo-Brandeisians' efforts to reconstruct antitrust in Louis Brandeis's image as bad antitrust policy,⁷⁴ but the real problem is that they're hopelessly nostalgic.

Even if the book doesn't perfectly connect to the Brandeis of 100 years ago, there is no disputing its connection to today's debates about the proper role of antitrust enforcement (and regulation more generally) in government, industry, and academia. In more ways than Wu may like to admit, this book is a mirror of *The Antitrust Paradox*, although about 100 times more readable. Wu's writing represents a critical movement not unlike Bork's own. In Bork's case, it was in response to the "incipiency" theory that he had seen capture the Warren Court of the 1960s. And like Wu, Bork saw his work in antitrust as reaching beyond antitrust to larger issues of government

⁷⁰ Wu, *supra* note 1, at 138.

⁷¹ Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 930 (1979).

⁷² See *supra* the text accompanying note 63.

⁷³ *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

⁷⁴ See, e.g., Richard A. Epstein, *'The Curse of Bigness' Review: Revisiting the Gilded Age*, WALL ST. J. (Dec. 2, 2018), www.wsj.com/articles/the-curse-of-bigness-review-revisiting-the-gilded-age-1543786330; Alec Stapp, *Tim Wu's Morality Play: A Review of "The Curse of Bigness"*, SALON (Jan. 8, 2019), niskanecenter.org/blog/tim-wus-morality-play-a-review-of-the-curse-of-bigness/.

and constitutional order.⁷⁵ More than anything, what unites Bork's and Wu's work is that they are both writing against what they consider to be an unwise and illegitimate movement that has captured antitrust.

And so we return to Wu's opening admonition about the relationship between antitrust and the larger political climate. In the end, Wu's book is not a cure for today's political climate as much as it is a symptom of it. Wu has taken sides,⁷⁶ and that choice is reflected in the story he tells. Wu wants to turn back the clock—to return to a time when he thinks enforcers took antitrust more seriously. But that impulse has led Wu to blame Bork's admittedly weak historical arguments for what Wu sees as weak antitrust doctrine. As with so many attempts to identify a singular and poorly defended cause (a scapegoat) for what is in reality a complex set of policies and historical developments, Wu has missed the larger movement in which the consumer welfare standard has operated to remake antitrust over the last 40 years. Informative and entertaining as it is to read, one can't help concluding that the primary lesson to be drawn from Wu's story is that—as reflected in too many of today's policy debates—if we need to be careful when picking our heroes, we need to be doubly so when picking our villains. ●

⁷⁵ BORK, *supra* note 43, at 10.

⁷⁶ Editorial Board, *Timothy Wu for Lieutenant Governor*, N.Y. TIMES (Aug. 27, 2017), www.nytimes.com/2014/08/28/opinion/timothy-wu-for-lieutenant-governor.html (describing Wu's political interests and endorsing Wu in the Democratic primary for Lieutenant Governor of New York).