

THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE

(TIM WU)

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As the ideological tectonic plates shift in America, many apparently settled matters have become unsettled. This creates, at the same time, both conflict and strange bedfellows, though I suspect the latter will become used to each other soon enough. Such once-settled matters include hot-button cultural matters like nationalism, but also dry, technical matters of little apparent general interest that are of profound actual importance. Among these are the place in our society of concentrations of economic (and therefore political) power, the subject of the excellent Tim Wu's awesome new book, *The Curse of Bigness*. What Wu is hawking is "Neo-Brandeisianism," and I am buying what he is selling.

Wu, a Columbia Law professor and sometime (unsuccessful) reformist Democratic candidate for Lieutenant Governor of New York, writes mostly on the intersection of technology and social organization. His most recent earlier book, *The Attention Merchants*, focused on the downsides of advertising in the modern world, especially as mediated by the Lords of Tech. That book offered measured, practical ways to address the problems identified, which seems to be a Wu specialty. This book focuses on economic concentration through its legal treatment, under antitrust law, for the past one hundred and thirty years.

The Curse of Bigness is a short and punchy work; Wu is an outstanding writer. Woven throughout a history of antitrust are Wu's own insights and opinions, which he caps with specific and well-thought out solutions. The core argument of this book is that for the past several decades, antitrust law has become effectively neutered, administered not at all in the manner its original nineteenth-century drafters intended. Instead antitrust law has, lately, refused entirely to recognize the extremely pernicious societal effects of economic concentration, even though it was designed by Congress to address precisely those effects. For my money, Wu is right on target, and, just as importantly, he provides building blocks for the political realignment in which social conservatives are aligning with economic liberals against the neoliberal/corporatist elite.

Wu begins with the pre-antitrust era, when men such as J. P. Morgan and John D. Rockefeller created massive enterprises as the United States industrialized, using grit along with bribes and coercion to build their concerns. These men, who created various giant trusts (a legal device for holding companies), thought that monopoly is awesome and competition is ruinous, for both business and society. Instead, they could and should be relied upon to innovate, lower prices, and generally benefit everyone, along with themselves. (As the author notes, today Peter Thiel pushes this same line, which has worked very well for him.) Wu analyzes this as a form of Social Darwinism, closely tied to eugenics (Rockefeller gave millions to sterilize the “unfit”). “The weak, the small, and the old-fashioned [businesses] were all being swept away. . . . For some, this purge displaced not just old ways and inefficient businesses, but Christianity as well, with its regard for the disadvantaged and insistence on humility before God.” Modern conservatives have too often failed to appreciate the long-term effects of worship of monopoly and consequent economic concentration, and that the logical end of this, Ayn Rand’s Objectivism, is a very, very bad prescription for a flourishing humanity, whatever its theoretical appeal.

One hundred and thirty years ago, though, Congress was not the do-nothing group of shambling cretins it is now; it was filled with, or at least led by, serious men who took their responsibility of governing seriously. Thus, in 1890, due to concerns about these and many other trusts, which collectively dominated all relevant industry, we got the Sherman Act, which to this day on its face absolutely outlaws all actions “in restraint of trade,” as well as any monopoly or attempts to monopolize. You ask, then, why are restraints of trade and monopolies all around us? Don’t worry—Tim Wu has arrived to tell you why, clearly and succinctly.

Before we get there, though, Wu takes a detour to lay the groundwork for his preferred philosophical position. While this is a book about what the law is, it is just as much about what the law should be. Wu’s avatar is Louis Brandeis, who served on the Supreme Court from 1916 to 1939. Brandeis grew up in Louisville, when flyover country mattered. He became a business lawyer for some decades, and observed first-hand the growth of the trusts at the end of the nineteenth century and the beginning of the twentieth, unhampered by the Sherman Act, which

was treated as merely hortatory. Brandeis saw the trusts destroy small businesses, corrupt politics, and not in fact offer the efficiencies and benefits they claimed.

I've never really had much use for Brandeis; his association with the destructive Progressive movement and his use of so-called social science to decide strictly legal questions, thereby involving judges as ideological advocates in a legislative role and paving the road to the modern disastrous "living Constitution," always left a bad taste in my mouth. But Wu makes a good case that Brandeis's philosophy as it relates to economic concentration, totally aside from constitutional law, is both unanswerable and necessary for today. Like Theodore Roosevelt, Brandeis is someone whom today's conservatives should at least partially embrace, rejecting country club Republicans who prostitute themselves, cheaply, to the neoliberal elite. "If [Brandeis] had a unifying principle, politically and economically, it is . . . that concentrated power is dangerous, that institutions should be built to human scale, and society should pursue human ends. Every institution, public and private, runs the risks of taking on a life of its own, putting its own interests above those of the humans it was supposedly created to serve." It should most definitely not be the role of judges to impose their own values against the expressed will of the legislature, but as Wu notes, Brandeis's philosophy here was, more or less, the original legislative theory behind the Sherman Act and subsequent laws.

Using Brandeis as his foundation, Wu is explicit about what he wants to build. "This book aspires to resurrect and try to renovate the lost tenets of the Brandeisian economic vision. It envisions a vigorous, healthy economy, a skepticism of the self-serving rhetoric projecting the romance of big business or the inevitability of monopoly, and, above all, a sensitivity to human ends." As presented by Wu, Brandeis was profoundly conservative, or would be today, if placed next to today's Left: "For him, the very purpose of life was the building of good character and the development of self. The 'ideal' of democracy, he once said, should be 'the development of the individual for his own and the common good.'" Not for Brandeis the modern progressive goal of ever-more emancipation from unchosen bonds, of autonomic individualism enforced and empowered by the government. His goal was not gaining everyone more atomized freedom, as the Left pushes today; it was

offering freedom in the Aristotelian sense, what was until recently the universal sense in the West, the freedom to choose rightly. To make that choice possible, everyone had to have, Wu summarizes, “sufficient liberties and adequate support to live meaningful, fulfilling lives.” Neither the government nor private enterprise should “stifle opportunities for thriving and life.” Economic concentration, monopoly, was the origin of much such stifling, because it allowed big, impersonal, impervious businesses to dictate to both workers and consumers.

I quibble with Wu in that, without discussion, several times he casually equates this set of goals with democracy. Democracy may be a goal, in that one could argue (though neither Wu nor, in his telling, Brandeis, does so argue) that democracy enhances the first-order goals of “sufficient liberties and adequate support to live meaningful, fulfilling lives.” At most, though, that makes democracy a second-order goal, and there is little evidence that modern democracy is necessary to achieve the first-order goal. Still, Wu makes a good case that economic concentration, in any society, threatens the first-order goal, which is the point of the book.

Brandeis wasn't the one who resuscitated the moribund Sherman Act, though. He just acts as Wu's philosophical lodestar. It was Theodore Roosevelt who did that, seeing trusts as corrupting America and failing to curb them as leading to social unrest and even Communism. The problem Roosevelt identified was that the private power trusts represented (even though, as he pointed out, they were “creatures of the State”) was easily transmuted into massive political power. Roosevelt's intuitive observation was later given heft by Mancur Olson's mid-century work in public choice theory, which compellingly demonstrated that motivated small groups with money could achieve disproportionately favorable governmental results through the magic of collective inaction. This effect is exacerbated by concentration; an industry with only a few players, even if they are bona fide competitors, can easily coordinate actions for the benefit of all of them to extract rents from the rest of society, where a less-concentrated industry would be unable to herd enough cats to achieve the same goal. The losers are the great majority of people, who have neither the money nor the individual incentive to organize in opposition—so, in Roosevelt's and Wu's thinking, that's where the government comes in.

In 1902, Roosevelt attacked J. P. Morgan's railroad trust, an action upheld in the Supreme Court's *Northern Securities* decision. Then, starting in 1906, he broke up Rockefeller's Standard Oil, again supported by the Supreme Court, which began putting together the outlines of a legal standard, not found in the ultra-broad language of the Sherman Act, that held that only "unreasonable" restraints of trade or monopoly were illegal. What is unreasonable, therefore, became the interpretive key to antitrust law in the following hundred years. Roosevelt himself later, when out of power, turned to corporatism, where it is held that giant companies are good, and competition bad, if the companies work hand-in-glove with the government (hello, Mussolini!), but in his earlier years worked tirelessly to ensure competition and smallness at the expense of bigness, and he is thus the prototype of what Wu thinks should be the proper executive approach to antitrust law.

Wu uses the Standard Oil case to frame what he thinks is the core question in antitrust law: is monopoly, or more broadly economic concentration, merely evidence of efficiency, spreading benefits for all? Or is it a form of anti-majoritarian and anti-human flourishing power, where monopolistic producers use their economic, and other, power, to keep out new entrants and reduce innovation and consumer choice, while deforming the political process in myriad ways, even if sometimes they also reduce consumer prices? Here Wu offers a range of often-forgotten basic economics, including that diseconomies of scale are just as real as economies of scale, so bigger is not necessarily better, and that the agency problem (the separation of ownership and control) frequently means decisions are made to build empires for management rather than in the best interest of stockholders, much less consumers. Size is closely correlated with crony capitalism and rent seeking at the expense of workers and the broader community—just look at Jeffrey Immelt and General Electric under the Obama administration, for example (not an example Wu gives). But Standard Oil, in fact, in the form of its constituent parts, boomed after its breakup, suggesting that monopoly did not even offer the company economic benefits. Wu also name-checks my favorite economist, Luigi Zingales, for these same points. Zingales is another person I think an essential player in the realignment of some conservatives and some liberals against their neoliberal/Chamber of Commerce enemies (and who also, together with

his “Capitalism’t” podcast partner Kate Waldock, recently discussed the Brandeisian antitrust revival).

Moving back to history, in the 1930s, as fascist-style central planning reached its peak under Franklin Roosevelt, antitrust action suffered a “near-death experience,” but rebounded soon enough, in part as a fresh reaction against economic concentration, which became seen as a key element of the Nazi and Soviet systems (including the rise to power of the Nazis—though the idea that the prime mover of Nazism or fascism was economic concentration is obviously silly now, it was compelling then). Concentrated economic power was now seen as un-American, and, more importantly, as risking an American turn away from democracy. Smaller businesses were seen as the iron bulwark of the American way of life, and so aggressive antitrust enforcement, including breakups of monopolies, continued through the 1950s and 1960s. During this time, though, law professors from the University of Chicago, originally led by Aaron Director and then brought to full flower by Robert Bork, created, by Wu’s account out of whole cloth, a new idea—that the real purpose of Congress in passing the Sherman Act and subsequent antitrust laws was not addressing the societal harms of economic concentration, but rather only demonstrable consumer harm. And that only in the form of increased prices, not any other, less direct, harm.

Bork, at one point the high priest of originalism, the school of Constitutional interpretation holding that the original understanding of the Constitution by its ratifiers was the only acceptable lens through which to decide Constitutional questions (which antitrust is not), based his argument on a very strained reading of legislative history (or so Wu tells us). He combined this with the powerful sales pitch that focusing on lower prices for consumers provided an objective, standard measuring stick that courts could use to decide antitrust questions, instead of vague and varied feelings about the social impact of economic concentration, which judges could use to simply impose their own politically desirable result. It was the desire for judicial restraint (not the same thing as originalism, though sometimes they go together) that really sold what Bork was offering. The net result, after Bork’s reinterpretation swept through first the academy, then the courts, was to return antitrust to its pre-Theodore Roosevelt days.

As Wu points out, Bork ignored possible costs imposed on consumers other than mere higher price, such as stifling of innovation. The classic example there was AT&T, after the breakup of which telecommunications innovation flourished, but the point is obvious—why innovate, if you are collecting monopoly profits? Bork also ignored “virtues of competition stressed by Hayek, like the virtues of decentralization and the avoidance of central planning.” AT&T was the prototypical aggressive and open monopolist, gladly engaging in collusion, “the jealous God of telecommunications, brooking no rivals, accepting no sharing, and swallowing any children with even the remotest chance of unseating Kronos.” The success of its breakup disproved Bork—but, ironically, it was around the time of its breakup that Bork’s view became dominant.

Finally, Wu turns to what he calls the Tech Trusts, and I call the Lords of Tech. He does not like them. Like other authors, such as Franklin Foer and Niall Ferguson, he distrusts, and more importantly sees evil in, all of Amazon, Facebook, Google, and so on. After a brief efflorescence of freedom in cyberspace, a false dawn in which fools (not including me) thought the rules of economics had changed forever, what always happens happened again: a handful of giant companies concentrated in their hands all economic power in the relevant portions of the new internet economy, using all the usual tools of coercion, economies of scale, and crony capitalism, along with a few new ones. So, for example, Facebook bought all its competitors that might threaten it, such as Instagram, and the antitrust regulators swallowed the laughable claim that they were not competitors at all. Listing this parade of horrors, as well as intimating that possible future combinations of such economic power with government could lead to even worse things (a point he has expanded on in interviews talking about this book), Wu concludes, “If there is a sector more ripe for the reinvigoration of the big case [breakup] tradition, I do not know it.”

What Wu wants most of all is a return to aggressive breakups of any concentration of economic power, with a near-conclusive presumption that any long-term monopoly, say existing for longer than ten years, be broken up by government action. (He only touches lightly on the definition of monopoly, which revolves around how one defines the relevant market, but that is a relatively easily overcome hurdle.) Wu points out that since the decline of antitrust to near-total irrelevancy in

the past twenty years, numerous critical industries have become very substantially more concentrated: airlines, cable, pharmaceuticals, beer, and even telecommunications, with AT&T reborn without government objection (though in a substantially changed technological environment, where the old AT&T monopolies are gone forever).

So, wrapping it up, he offers a “Neo-Brandeisian Agenda.” First, aggressive prior review of mergers, which now is perfunctory (and as I know from my own experience as an M&A lawyer, mostly an excuse for the government to charge juicy transactions taxes masquerading as fees). Second, transparency in mergers, which as an administrative process is mostly kept from public view by law. Third, and fourth, and most important, resurrecting “big cases,” followed by a presumption in favor of breaking up companies. This would involve bringing suit against them under existing laws (Wu does not call for any major new laws), with the claims being not consumer harm through higher prices, but the mere existence of restraint of trade and monopoly, or of any behavior that does not protect competition, for which the punishment should be corporate death, or at least corporate amputation. Wu notes that the idea that breakups can’t be done is laughable—again, something I know from personal experience, having helped put together many companies in my time, it’s very clear that the external appearance of an efficient, welded monolith is a fantasy for any big company, or any big organization, and breaking them up would cause almost no real trauma. He also points out that court-ordered breakups are self-executing, rather than, as with consent decrees, requiring constant ongoing supervision for compliance. Fifth, Wu recommends what he calls “market investigations,” already done in Europe, which scrutinize any existing market concentration and recommend whether it should be attacked, either for bad behavior or because it has ensorcelled itself from competitive attack.

This is all compelling. I think Wu’s program should be implemented immediately, with no changes, though doubtless some adjustments will need to be made along the way. I admit this demand may sit uneasily with my oft-expressed general contempt for government workers. However, I think that the people needed to administer this program are few enough that selections could be made exclusively on merit, like federal judicial clerks, and there is no reason that beefed up antitrust

should be captured by the Left, as most of the government has been. We can make it (presumably the Antitrust Division of the Department of Justice) into that rare government body that is not a left-wing preserve. It will not be some AFSCME hell of laziness and grifting.

But I want to add some thoughts on two items: the Lords of Tech and Net Neutrality (a term Wu coined and a topic on which he is the leading expert). Let's focus on the first, and of the Lords, on Facebook and Amazon. The latter has been much in the news this week, having culminated its year-long process of finding an additional headquarters (isn't that an oxymoron?) by revealing that it was lying the whole time. Instead, it split its new location, and 50,000 high-paying jobs, into two places that already represent the centers of political (Washington) and cultural (New York) power, at the same time accepting billions in dollars of handouts and stealing under false pretenses incredibly valuable information from every sizeable municipality in the country. For this, Amazon is celebrated by the neoliberal elites, and not criticized by their allies, the conservative elites. George Soros and Bill Kristol, in bed together, toast with Cristal, and then get down to the sordid business of mutual pleasure. Good times are had by the elites, who look forward to a massive increase in concentrated economic power. Bad times are had by everyone else—not just the deplorables, but everyone outside the top ten percent, the professional-managerial elite.

Now, Wu doesn't talk about this disgusting charade specifically, since his book was published last week, not this week. But Wu does object to Amazon's ability to manipulate the political process, and the law, in its favor, something that is on the fullest display ever this week. It is essential that Amazon be destroyed. I have other objections to Amazon, such as its political activities and its selective suppression of the sale of politically disfavored items, but those objections are really secondary to the more pernicious social effects that Wu so clearly lays out, and his solutions would solve those problems as well.

Facebook has also been in the news, attacked from all sides. By the Left, for supposedly allowing bad actors to manipulate elections. By the Right, for suppressing conservative speech. And by everyone, for gross manipulations of the political process to protect its desperate search for ever-greater profits, covered with the smoke screen of cheesy bromides about "connecting the world." Unlike Amazon, Facebook isn't looking

for handouts. It's looking for a free hand. The issues tied to Facebook are related more to Net Neutrality than to the power derived from economic concentration, so let's turn to that. In essence, as I understand it, this is the idea that carriers of internet traffic should be required to treat all traffic as a common carrier, making no price or other distinction among different customers. To this issue, I have long not paid much attention. That's probably because I'm infected with the debilitating conservative virus which holds that on principle private businesses shouldn't be hampered by the government, yet at the same time I fully recognize, and have for a long time, that big corporations are not the friends of conservatives, or of anybody except a small slice of America. Wu is aggressively in favor of Net Neutrality; while this book is not about that topic, Wu does touch on it, primarily by in passing analogizing lack of Net Neutrality to not breaking up Standard Oil.

As I have written repeatedly elsewhere, I believe strongly that tech companies that act as monopolistic platforms for communication should be rigidly forbidden, under pain of enormous penalties, from any viewpoint discrimination. Wu notes, in the context of Net Neutrality, "In 2008, Google published a statement speaking out against letting broadband providers abuse their market power to affect access to competing applications or content. They further equated the situation to that of the telephony market, where telephone companies are not allowed to control who their customers call or what those customers are allowed to say." This, like so much of Wu's analysis, seems difficult to answer. I can't claim to have fully studied Net Neutrality, and there are arguments against it, the most compelling of which is that compliance costs of yet another governmental regulatory regime would be crippling for smaller businesses (one reason big businesses, like the ones Wu targets, generally love more regulation). Perhaps Wu understates, or ignores, the impact of regulation on smaller businesses. But the underlying principle, that communications should not be throttled by concentrations of economic power, any more than the government itself could, seems both indisputable and critical. So, my first cut is that Wu is right, and Net Neutrality should be (re-) implemented, whatever corporatist Republicans like Ajit Pai say.

However, Net Neutrality has to extend to more than wholesale broadband traffic. It must extend to all aspects of all the tech monopolies Wu

identifies, for the reasons Wu identifies. Wu nods a little in this direction, “we have not even touched upon the non-economic concerns, such as the concentration of so much power over speech into a single platform [i.e., Facebook].” There is absolutely no reason not to require Facebook, Google, Instagram, Twitter, and every other communications platform that functions with monopoly power to never engage in any kind of viewpoint discrimination—they should only be allowed to ban, or deprioritize, speech that the government itself could ban, such as obscenity. Otherwise they should be punished severely for any viewpoint discrimination (this will be enforced primarily by a private right of action, similar to today’s other anti-discrimination laws). Yes, they could offer filters to let users choose to limit to what they are exposed, and they should be allowed mechanical, non-viewpoint based presentations of filtered data. But given the evils that Wu identifies that result from concentrations of economic power, the immediate remedies, along the way to forcible breakup of all these companies, should include ending the political censorship they now exercise. The result will be a freer, better America, and maybe even a more virtuous, flourishing one.