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Movements, Moments, and the Eroding Antitrust Consensus

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Cover Page Footnote

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Movements, Moments, and the Eroding Antitrust Consensus

Michael Wolfe*†

Timothy Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018). \$14.99.

Timothy Wu's book, The Curse of Bigness, offers a brief history on and critical perspective of antitrust law's development over the last century, calling for a return to a Brandeisian approach to the law. In this review-essay, I use Wu's text as a starting point to explore antitrust law's current political moment. Tracing the dynamics at play in this debate and Wu's role in it, I note areas underexplored in Wu's text regarding the interplay of antitrust law with other forms of industrial regulation, highlighting in particular current difficulties in copyright law as one of the underlying tensions driving popular discontent with the major technology firms or "tech trusts." I consider the continuing influence of Robert Bork's The Antitrust Paradox, now more than forty years old, and how the current reform movement might execute a shift as lasting and substantial as the one Bork spearheaded with his book.

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INTRODUCTION

Portlandia—the IFC comedy series that, in a series of interconnected vignettes, lampoons the city of Portland, Oregon, and its reputation for what we might call “hipsterism”—has a few key gags.¹ In its opening episode, one Angeleno pitches another about Portland’s virtues, proclaiming in song that “the dream of the ‘90s is alive in Portland.”² This sentiment refers largely to the counter-cultural trends and Gen X-ish aesthetics that are, in all fairness, characteristic of the place.³ Later in the series, however, the song is modified: “the dream of the ‘90s is alive in Portland—it’s the dream of the 1890s.”⁴ In *Portlandia*, the dream of the 1890s is pickling, bread baking, sewing—the “hipster” resurrection of a particular DIY ethos and aesthetic in a society that has largely replaced the daily practice of these kinds of activities with the conveniences of consumer capitalism.⁵

We may only have hints about what *Portlandia*’s beard-sporting, meat-curing, graphophone-listening retrophiles think about competition policy.⁶ Yet it is, in part, their image and preferred decade that are being conjured up when portions of the anti-trust academy and bar use “hipster antitrust” to describe both a resurgence of Brandeisian enthusiasm for trust busting and a rejec-

¹ See generally *Portlandia* (IFC television broadcast).

² *Portlandia: Farm* (IFC television broadcast Jan. 21, 2011); see IFC, *Dream of the ‘90s | Portlandia | IFC*, YOUTUBE (Dec. 1, 2017), <https://www.youtube.com/watch?v=U4hShMEk1Ew> [<https://perma.cc/386W-V5PE>].

³ *Id.*

⁴ *Portlandia: Cops Redesign* (IFC television broadcast Feb. 3, 2012); see Constantin Constantin, *Portlandia—Dream of the 1890s*, YOUTUBE (Dec. 12, 2012), https://www.youtube.com/watch?v=0_HGqPGp9iY [<https://perma.cc/V54Q-4F5M>].

⁵ *Id.*

⁶ Although we do get glimpses in one exchange:

Jason (Fred Armisen): Remember in the 1890s when the economy was in a tailspin; unwashed young men roamed the streets looking for work, and people turned their backs on huge corporate monopolies and supported local businesses?

Melanie (Carrie Brownstein): I thought we had to support corporations—I thought they were too big to fail.

Jason: Well, in Portland, people raise their own chickens, and cure their own meats.

Id.

tion of the consumer welfare standard as antitrust law’s lodestar.⁷ “Antitrust hipsterism,” goes the apparent first invocation of the phrase.⁸ “Everything old is cool again.”⁹

Unsurprisingly, the label has proven sticky. “Hipster antitrust” is an impressively well-coined moniker: it is tight, memorable, and sounds as if it conveys *something* immediately understandable about its target, even if the specifics of what that something might be are stubbornly opaque.¹⁰ “Hipster” on its own is a peculiar word, combining in its modern usage an extreme malleability with an uncanny specificity.¹¹ Hipsterdom is helplessly paradoxical: hipsters are either johnny-come-latelys, or else they are trendsetters; the term refers to the artisanal, but also the manufactured appearance of artisanality; bohemianness and bourgeoisness; the sleekly modern and the anachronistically old-timey; the consumerist and the DIY; the edgy and the tired. It makes sense, then, that the word can be used both to insult and to praise—a duality that is complicated, of course, by the fact that a hipster loathes above all else to be called a hipster.¹² Finally, and perhaps most significantly, hipsterdom also signifies youth, and the word is often used in the dismissal of youth and particularly of

⁷ See Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 293–95 (2019); see also Konstantin Medvedovsky, *Hipster Antitrust—A Brief Fling or Something More*, COMPETITION POL’Y INT’L (Apr. 17, 2018), <https://www.competitionpolicyinternational.com/hipster-antitrust-a-brief-fling-or-something-more/#> [https://perma.cc/W8AN-MVVH] (subscription pay wall).

⁸ Kostya Medvedovsky (@kmedved), TWITTER (June 28, 2017, 2:28 PM), <https://twitter.com/kmedved/status/876869328934711296?s=20> [https://perma.cc/3BPH-AHSH] (“Antitrust hipsterism. Everything old is cool again.”).

⁹ *Id.*

¹⁰ See Ico Maly & Piia Varis, *The 21st-Century Hipster: On Micro-Populations in Times of Superdiversity*, EUR. J. CULTURAL STUD., Aug. 2015, at 1, 3, 10 (“[T]he notion ‘hipster’ itself is rarely clearly defined—it seems to be used as if its meaning was universally fixed and transparent, while in reality its meaning is opaque and fluid.”).

¹¹ *Id.*

¹² See Robert Horning, *The Death of the Hipster*, in N+1 FOUNDATION ET AL., WHAT WAS THE HIPSTER?: A SOCIOLOGICAL INVESTIGATION 80–81 (2010) (“If you are concerned enough about the phenomenon to analyse it and discuss it, you are already somewhere on the continuum of hipsterism and are in the process of trying to rid yourself of its ‘taint.’”).

the not-necessarily-still-so-young millennial generation.¹³ Nevertheless, these people—hipsters—read as young and underemployed, and they probably have an unprecedented and financially irresponsible enthusiasm for avocados.

It is disorienting to have a term that can intelligibly capture an observed phenomenon—we will both somehow understand at least some of what you mean when you tell me you know a good “hipster coffee shop”¹⁴—while still so ably evading coherent definition. So, what can we make of the meaning of “hipster” in “hipster antitrust”? Ultimately, the word really tells us next to nothing about the substance of the movement. Nevertheless, the word still manages to convey substantial information about the politics implicated in the “hipster antitrust” paradigm—the sharp impression is that those who employ the phrase believe that trend-setting, young johnny-come-latelies are peddling an edgy approach to antitrust that is also tired. Without a doubt, this phrase is an insult.¹⁵ Indeed, George Mason University’s Joshua Wright, who has been the most enthusiastic popularizer of “hipster antitrust,” acknowledges this phrase’s effectiveness as an insult, even as he insists that it remains the most appropriate name for the movement:

[In response to the name] some were even offended, insisting that the movement be called the New Brandeis School or New Progressive Antitrust Movement. With all due respect to those associated with this movement . . . we adopt the term Hipster Antitrust here rather than the less well-known alternatives.¹⁶

This is schoolyard-level insult reasoning—“look, snotnose, if you didn’t want to be called snotnose, why are so many people calling you snotnose?” Yet, whatever the logic behind it, the attraction for the name is holding. In fact, it is entirely possible that without

¹³ Maly & Varis, *supra* note 10, at 3 (“Hipsters are a subculture of men and women typically in their 20’s and 30’s that value independent thinking, counter-culture, progressive politics, an appreciation of art and indie-rock, creativity, intelligence, and witty banter.”).

¹⁴ *Id.* at 13.

¹⁵ Wright et al., *supra* note 7, at 295.

¹⁶ *Id.*

“hipster antitrust” (the naming phenomenon), “hipster antitrust” (the movement it describes) would have less momentum, appeal, and public recognition. Again, the paradox of hipsterism: the categorization is an insult, and it is loathed, and yet you still recommended that coffee shop, and it is still always packed.

I. WHITHER THE TECHNO-GIANTS?

Tim Wu’s *The Curse of Bigness: Antitrust in the New Gilded Age*, the latest in Wu’s series of history-minded books accessibly expounding on the dynamics of competition, does not once use the word “hipster.”¹⁷ All the same, its aim is to both defend and define the movement Wu would have called Neo-Brandeisianism; what its critics and the popular press call “hipster antitrust”¹⁸; and what might more descriptively just be called progressive antitrust reform. This movement, now largely headquartered in the Open Markets Institute and catalyzed by Lina Khan’s skewering of Amazon’s corporate dominance in the *Yale Law Journal*,¹⁹ is essentially built around the idea that antitrust law took a wrong turn when it focused the law’s inquiry into anticompetitive behavior on whether a given action benefits or hurts consumer welfare—that is, whether the behavior typically raises or lowers consumer prices.²⁰ For instance, under the current state of the law, antitrust harms are theorized out of existence when a firm engages in “predatory pricing” (setting the price below cost in order to drive competitors out of the market)²¹ because, in Wu’s words, “that which did not exist in theory probably did not exist in practice,”²² and in the meantime consumers benefit from lowered prices.²³ Instead, per Khan, the reformists argue that “gauging real competition in

¹⁷ See generally TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

¹⁸ See *id.*; see also *supra* Introduction.

¹⁹ See Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710, 710 (2017).

²⁰ See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 107–15 (1978).

²¹ See FED. TRADE COMM’N, *Predatory or Below-Cost Pricing*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost> [<https://perma.cc/4ACB-LD6Q>].

²² WU, *supra* note 17, at 107.

²³ See *id.*

the twenty-first century marketplace—especially in the case of online platforms—requires analyzing the underlying structure and dynamics of markets.”²⁴ To compensate, antitrust analysis should “examine the competitive process itself,” rather than “pegging competition to a narrow set of outcomes.”²⁵

The Curse of Bigness, like Wu’s earlier books *The Master Switch*²⁶ and *The Attention Merchants*,²⁷ proceeds with detailed portraits of key players—microbiographies personalizing the dynamics he is trying to capture. The epistemology here appears to be a variant on the aphorism about needing to look back to move forward: there are direct lessons for the present in the relatively recent past, regardless of how new and shiny our current circumstances feel. Nevertheless, while this newest installment does complement Wu’s earlier works, even where it retreads some of the same ground, *The Curse of Bigness* is doing something quite different. Situated first and foremost in the current political and intellectual moment, this book’s defense of what Wu refuses to call hipster antitrust feels urgent.

The history-first approach belies the thematic urgency, but Wu compensates for it with uncharacteristic brevity. The cast for *Curse of Bigness* is a focused one: Brandeis, the principled progressive;²⁸ Roosevelt, the mercurial trustbuster; John D. Rockefeller and John Pierpont Morgan, the vintage fatcats;²⁹ Aaron Director and Robert Bork, monopoly’s apologists.³⁰ These actors assemble neatly into the dialectic Wu is exploring as a partisan: those who expressly view antitrust as an inherently political arena, a necessary check on concentrations of power toxic to democracy; and those who view antitrust as a narrow tool best confined to very rarely remedying a very particular kind of economic wrong. Brandeis theorizes on the side of a political antitrust, and Roosevelt acts; Rockefeller and

²⁴ Khan, *supra* note 19, at 717.

²⁵ *Id.*

²⁶ See TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 17–32 (2010).

²⁷ See TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 11–23 (2017).

²⁸ See WU, *supra* note 17, at 34–44.

²⁹ See *id.* at 45–77.

³⁰ See *id.* at 78–92.

Morgan monopolize their way into a gilded age; Bork and Director build the theoretical groundwork for their return.

The mini-biographical model works well here in part because the larger story Wu tells is about the life cycle of ideas: the circumstances that cause them to take root, the people who champion them, how they compete, win, and lose. Antitrust law's original and central text, the Sherman Act,³¹ "is so broadly worded and unclear in its application that it does not take real meaning or shape without an enforcement tradition,"³² leaving its meaning and practice largely contingent on the rise and fall of the ideas of the day. And this is really a story about how the Chicago school, primarily through the scholarship of Robert Bork,³³ won the day and left us with an antitrust law affirmatively comfortable with monopoly power and willing to support its exercise in all but a very few ways.

One way of understanding *Bigness* is as Wu picking up from where *The Master Switch* punted. In concluding that book, Wu wrote:

To leave the economy of information, and power over this commodity, subject solely to the traditional ad hoc ways of dealing with concentrations of industrial power—in other words, to antitrust law—is dangerous. Without venturing into the long, rancorous debate over what, if any, kind of antitrust policy is proper in our system, I would argue that by their nature, those particular laws alone are inadequate for the regulation of information industries.³⁴

The time has come, apparently, to weigh into the rancorous debate, and to come down firmly on the need for "big case" interventions. Why now?

There need not be just one answer. When the hipsters come to gentrify your neighborhood, there are generally a number of factors at play—generational, cultural, financial. Similarly, no single

³¹ 15 U.S.C. §§ 1–38 (2018).

³² Wu, *supra* note 17, at 50–51.

³³ See generally BORK, *supra* note 21, at 405–07.

³⁴ Wu, *supra* note 26, at 303–04.

reason explains why the current moment feels ripe for a turn to a more robust and populist understanding of antitrust. Dramatically, the darkness of the political scene sparks reminders of how industrial consolidation abetted the rise of fascism in Europe.³⁵ The success of the Chicago school in the academy and on the bench, the paucity of muscular antitrust action from government, the increase in consolidation generally—all are motivating, and all are central themes of Wu’s book. However, the single greatest propellant has to be the highly visible, grokkable, everyday dominance of Big Tech: Google, for (at least) search; Amazon, for (at least) e-commerce; Facebook, for social media. These enterprises and their clout are so great that there is even a word for the phenomenon of growing popular discontent for the giants: “techlash.”³⁶

For a book with a palpable and timely political agenda, and one so deeply tied to popular concern over the “tech trusts,” written by the coiner of net neutrality and a theorist of the web, Wu manages to spend surprisingly little ink addressing tech’s role in the current moment—just a scant seven pages capping his broader tracing of antitrust history and concluding, unceremoniously, that “[i]f there is a sector more ripe for the reinvigoration of the big case tradition, I do not know it.”³⁷

If the existence of the popular techlash proves anything, it is that one does not need to expressly identify as a New Brandeisian to worry about the clout of today’s technology monopolists. The last handful of years has featured a steady drumbeat of books decrying the power, influence, and malfeasance (both documented and suspected) of big tech.³⁸ Most of these do not focus on bigness

³⁵ At least, this is the history as Wu relates it. See WU, *supra* note 17, at 79–80. The adoption of a causal claim attributing Hitler’s rise to power, at least in part, to German industrial concentration has not gone undisputed. See, e.g., Alec Stapp, *Tim Wu’s Bad History: Big Business and the Rise of Fascism*, NISKANEN CTR. (Mar. 11, 2019), <https://niskanencenter.org/blog/big-business-rise-fascism-bad-history-tim-wu> [<https://perma.cc/X7ZV-6C62>]. For my part, I think it is fair to think that mere correlation is sufficient cause for wariness when it comes to the incubation of fascism.

³⁶ See *Word of the Year 2018: Shortlist*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/word-of-the-year/shortlist-2018> [<https://perma.cc/KR5M-6VAH>].

³⁷ WU, *supra* note 17, at 126.

³⁸ WU, *supra* note 17, at 126; see also THREAT OF BIG TECH 11–12 (2017); see also generally JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017); ANDREW

first, but rather tend to target particular manifestations of corporate power. Indeed, bigness amplifies the potentially harmful impacts of activity that might otherwise appear somewhat remote from antitrust law.

In copyright, for instance, it is not an exaggeration to say that the bigness of big technology is presently the driver of most of our major public policy debates. That is, the leading proposals presently on the table for reforming our copyright law—proposals that are proving to have legs, particularly in Europe where a new, tech-oriented copyright directive just recently passed³⁹—emerge primarily from concerns about how both individual copyright owners and the culture industry are manhandled by the biggest technology players.⁴⁰ These proposals represent a significant shift in regulatory approach. The early internet threat⁴¹ to copyright was, like the model of the early internet, largely a distributed one; the potential difficulty for copyright owners was straightforward and now very familiar—with everyone possessing networked copying devices (our computers and phones and other gizmos), everyone becomes a potential pirate of copyrighted work, limited only by individuals' respect for, or fear of, the legal prohibition on sharing copyright-protected content.

That dynamic of decentralization led to a decade characterized by industry lawsuits targeting individual infringers and countless millions of letters telling individuals to knock it off, and millions

KEEN, *THE INTERNET IS NOT THE ANSWER* (2015); ASTRA TAYLOR, *THE PEOPLE'S PLATFORM: AND OTHER DIGITAL DELUSIONS* (2014); JARON LANIER, *WHO OWNS THE FUTURE?* (2013).

³⁹ See *Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 29, COM (2016) 593 final (Sept. 14, 2016) [hereinafter *Commission Proposal*].

⁴⁰ See Richard Smirke, *European Union Passes Sweeping Copyright Reforms, Ending Safe Harbor for YouTube*, *BILLBOARD* (Mar. 26, 2019), <https://www.billboard.com/articles/business/8504177/european-union-article-13-copyright-reforms-safe-harbor-youtube-passage> (framing the most controversial European reform as targeting YouTube specifically) (subscription paywall).

⁴¹ I borrow the term from James Boyle though I use it here more loosely. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 54–82 (2008).

more directing intermediaries to remove suspect content.⁴² In the decentralized net, the leading copyright battles concerned how to best make an unruly public a rule-abiding one; or, from another perspective, how to maintain an effective copyright regime without threatening the generative potential of the network.⁴³ Copyright industry groups have since mostly moved on⁴⁴: business model realignments have been directed toward finding new equilibriums focused on lower-cost, library-scale, internet-mediated access to content, while industry has sharpened the focus of its ire toward the tech giants who hastened the change and appear to be wringing more benefit from this arrangement than the content industry browbeaten into it.

To no small degree, this shift from a decentralized threat to a centralized one is an antitrust story—or a lack of antitrust story. In the heady early internet days, firms came and went, and the idea of lasting online dominance appeared illusory. But, by the mid aughts the ground had shifted. Per Wu, “[s]uddenly, there weren’t a dozen search engines, each with a different idea, but one search engine. There were no longer hundreds of stores that everyone went to, but one ‘everything store.’ And to avoid Facebook was to make yourself a digital hermit.”⁴⁵ While some of this growth might be best understood as the result of “superior skill, foresight, and industry”⁴⁶—the cunning and dynamism that has long convinced the courts to tolerate the resulting monopolies⁴⁷—much of it was also simply the result of mergers and acquisitions that would have raised alarm bells in an earlier age. Facebook acquired WhatsApp

⁴² See generally LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008) (in part reflecting on the legacy of these enforcement campaigns).

⁴³ Of course, opinions vary wildly as to what makes for an effective copyright regime.

⁴⁴ The “mostly” caveat here is important. Some segments of the copyright economy still target individual infringers as a matter of course, but this approach appears to survive more as a lucrative sideline for the pornography industry than as a concerted effort to shape behavior. See, e.g., Gabe Friedman, *The Biggest Filer of Copyright Lawsuits? This Erotica Web Site*, *NEW YORKER* (May 14, 2014), <https://www.newyorker.com/business/currency/the-biggest-filer-of-copyright-lawsuits-this-erotica-web-site> [<https://perma.cc/9VR8-QEM3>].

⁴⁵ Wu, *supra* note 17, at 121.

⁴⁶ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

⁴⁷ See, e.g., *id.*

and Instagram, the two leading upstart competitors in core areas of Facebook business.⁴⁸ Google, struggling to capture market share with its Google Video service, simply acquired YouTube.⁴⁹

Let us consider YouTube. One way of understanding YouTube is as a host of user-submitted video. Users, of course, are the very same people previously at the pointy end of copyright infringement lawsuits, and their habits and knowledge of the liability landscape are not much changed. That is, users reliably post infringing material on any platform to which they have access, perhaps with an accompanying “no infringement intended” caption. Making the business work despite rampant user misbehavior is the fact that YouTube benefits from the availability of a “safe harbor” under the Digital Millennium Copyright Act—essentially, YouTube and its parent company are shielded from liability for the copyright infringements of its users as part of the grand bargain Congress reached to ensure that service providers are able to exist at all to host user content.⁵⁰ The tradeoff is that, to ensure safe harbor eligibility, YouTube has to remove user-posted videos promptly after receiving notice from rightsholders.⁵¹ YouTube has been receiving and acting on⁵² these notices at considerable scale for much of its existence.

If this were all YouTube was, it would—at this point anyway⁵³—be largely noncontroversial for copyright stakeholders. The notice-and-takedown balance does not exactly leave everyone

⁴⁸ See Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html> [https://perma.cc/B2Y5-4EMS].

⁴⁹ See Victor Luckerson, *A Decade Ago, Google Bought YouTube—and It Was the Best Tech Deal Ever*, RINGER (Oct. 10, 2016, 8:30 AM EDT), <https://www.theringer.com/2016/10/10/16042354/google-youtube-acquisition-10-years-tech-deals-69fdbe1c8a06> [https://perma.cc/S4XW-HP6K].

⁵⁰ Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2018).

⁵¹ See *id.* § 512(c).

⁵² See *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010) (describing YouTube’s compliance with large number of notices for clips in suit).

⁵³ It should go without saying that direct pushback against user-uploaded video hosts has very much been a thing, featuring flagship suits against YouTube and its competitors. See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners*, 667 F.3d 1022, 1022–23 (9th Cir. 2011); *Viacom Int’l Inc. v. YouTube, Inc.*, 676 F.3d 19, 19 (2d Cir. 2012).

happy (rightsholders do not consider the resulting whack-a-mole game to be a solution; user advocates balk at abuse of the takedown process), but it does not seem to *break* anything either.

But YouTube is not merely a host of user-submitted video. For one thing, it is effectively *the* host for user-generated video—its particular combination of price point (i.e., free), visibility, and comprehensiveness has no peer. YouTube hoovers up hundreds of hours of video every minute, serves a monthly audience of roughly two billion *logged-in* users, and streams more than a billion hours of video *per day*.⁵⁴ Alexa, the web metrics company and Amazon subsidiary, ranks YouTube as the world’s second most popular website.⁵⁵ YouTube provides its simple-sounding service—video hosting—in a way that nobody else does and, given the operation’s scale, expense, lead-time, and comprehensiveness, nobody else likely can.

Moreover, YouTube is a great deal more than just a host of “user-generated” video: it is also a leading provider of professionally and semi-professionally made video, the world’s most popular music streaming service,⁵⁶ and a cable company of sorts, providing access to a bundle of live television.⁵⁷ It is impossible to forget that YouTube is also an Alphabet (that is, Google) subsidiary—a key part of the larger Google ecosystem and a close relative of that conglomerate’s other media efforts like its video store (Google Play Movies), music store (Google Play Music), and separate subscription music streaming service (Google Music).⁵⁸

That YouTube is all of these things—enormous, vertically and horizontally integrated, dominant—is, of course, bound to have

⁵⁴ *Press*, YOUTUBE, <https://www.youtube.com/yt/about/press> [<https://perma.cc/4UE3-SR8S>].

⁵⁵ *The Top 500 Sites on the Web*, ALEXA, <https://www.alexa.com/topsites> [<https://perma.cc/L92Z-F9BV>].

⁵⁶ INT’L FED’N OF THE PHONOGRAPHIC INDUS., MUSIC CONSUMER INSIGHT REPORT 13 (2018), <https://www.ifpi.org/downloads/music-consumer-insight-report-2018.pdf> [<https://perma.cc/LN8N-3SHB>].

⁵⁷ *YouTube TV*, YOUTUBE, <https://tv.youtube.com> [<https://perma.cc/QE3A-2DC9>].

⁵⁸ See Alejandro Alba, *A List—from A to Z—of All the Companies, Brands Google’s Alphabet Currently Owns*, N.Y. DAILY NEWS (Aug. 11, 2015), <https://www.nydailynews.com/news/world/z-list-brands-companies-google-alphabet-owns-article-1.2321981> [<https://perma.cc/5P8K-LLLW>].

visible effects in its relationship with the media industry that owns the rights to many high-value infringed materials. This is not simply a people-will-post-what-they-will situation where YouTube and rightsholder groups follow the statutorily provided path forward. Instead, YouTube, at considerable expense, has developed Content ID—a system it uses to, well, identify content uploaded to its service.⁵⁹ So, for example, if YouTube has a fingerprint of a given song or video, it can do a decent job of spotting uploads that incorporate the fingerprinted media.⁶⁰ With that information, YouTube can prevent uploads from ever appearing, mute apparently infringing audio, or monetize resulting advertising revenue to the rightsholder's benefits.⁶¹

Content ID is no silver bullet for the infringement problem. Representations about copyright ownership are inherently difficult to verify,⁶² meaning any effective implementation will probably limit access to sophisticated, larger, and more credible rightsholders. Indeed, YouTube's implementation does exactly that.⁶³ Yet, so long as the system is underinclusive of rightsholders, infringing content will continue to be uploaded and shared the way

⁵⁹ *How Content ID Works—YouTube Help*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/S4GT-3PXA>] [hereinafter *YouTube Content ID*].

⁶⁰ This determination is necessarily subjective. Speaking for itself, YouTube calls Content ID “industry leading.” *Manage Your Copyright on YouTube*, YOUTUBE, <https://web.archive.org/web/20191118170127/https://creatoracademy.youtube.com/page/lesson/copyright-management?cid=copyright&hl=en> (archived link dated Nov. 18, 2019).

⁶¹ See *YouTube Content ID*, *supra* note 59.

⁶² This is a systemic characteristic flaw of the copyright system in general. Long-lasting rights attach to protectable subject matter automatically by operation of law, and protectable subject matter is an expansive domain. See 17 U.S.C. §§ 102, 302 (2018). While the Copyright Office maintains a registration system and a recordation system for transfers, both are voluntary. See *id.* § 408(a). But see *id.* § 411(a) (stating that registration, or attempted registration, is necessary to commence a civil infringement action). Among the results of this state of affairs is that most everyone controls myriad copyright interests, but the credibility of any individual claim is often dubious. The most well-known upshot of this state of affairs is the phenomenon of “orphan works”—that is, protected works without an identifiable owner due to the lack of apparent rightsholder information or a murky chain of title. See generally U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [<https://perma.cc/XQ8J-8KTD>].

⁶³ See *YouTube Content ID*, *supra* note 60.

it always has. Just as importantly, the metes and bounds of copyright's exclusive rights are poorly suited to algorithmic interpretation.⁶⁴ Infringing works can be so dissimilar from the originals as to escape detection, and noninfringing works can borrow enough from others as to throw flags, or otherwise their status as noninfringing can be dependent on context not available to the machine.⁶⁵ YouTube works to correct the system's tendency toward underenforcement by providing less-powerful tools to those outside the Content ID system,⁶⁶ and to correct the tendency toward overenforcement by providing in-house dispute procedures for resolving complaints over wrongful Content ID-facilitated actions. Even though the system Google has developed would appear to realign the baseline in rightsholders' favor, it is not a system that, on balance, is going to make anyone very happy.

As a result, Content ID is a powerful bargaining chip for YouTube in its dealings with rightsholders. YouTube is now infamous among musicians and the larger recording industry for its low royalty rates relative even to its notoriously tightfisted competition⁶⁷—and its edge makes good sense. YouTube, with its scale, can comfortably know that most anything that has been taken down will come back up. YouTube has, and will continue to have, an unparalleled library to draw from thanks to user uploads. Rightsholders, given the choice either to struggle against the tide using the statutory tools provided by the DMCA or to sign up for Content ID, have a clear incentive to use Content ID: use of the system offers worlds-more expedient and reliable identification of

⁶⁴ For instance, copyright doctrine recognizes both “literal” and “non-literal” infringements. *See* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). Literal copying is, typically, easy to recognize: protected expression is taken directly. *Id.* Non-literal infringement, where the copying at issue is in some way abstracted, is much trickier. *Id.* Complicating matters further, copyright limitations—most notably fair use—have boundaries that are necessarily determined ad hoc. *See, e.g.,* *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1136–37 (9th Cir. 2015).

⁶⁵ *See* *Copyright Management Tools—YouTube Help*, YOUTUBE, <https://support.google.com/youtube/answer/9245819> [<https://perma.cc/F6CU-LEJW>].

⁶⁶ *See id.*

⁶⁷ *See* Daniel Sanchez, *What Streaming Music Services Pay (Updated for 2018)*, DIGITAL MUSIC NEWS (Jan. 16, 2018), <https://www.digitalmusicnews.com/2018/01/16/streaming-music-services-pay-2018> [<https://perma.cc/QTH9-4VM4>] (“Last year, at \$0.00006 per play, [YouTube] had the worst artist revenue payouts.”).

infringing content, and more fine-grained control over how to respond to individual cases. The catch, of course, is that YouTube can leverage access to the tool—or possible uses of the tool—in its negotiations with rightsholders for licensed access to their content.

The resulting arrangements are tightly controlled by nondisclosure agreements, but it is clear that access to the full suite of Content ID's features is both a carrot and a stick. When YouTube wants to expand into new areas, as when it set about building its music subscription service, for instance, the exchange appears to have been participation in the program—with complete catalogs—or else the loss of monetization.⁶⁸ Make some money YouTube's way and at YouTube's rates, or else make no money on YouTube at all. Either way, rightsholders' content will still be there, or be coming back there soon. The same copyright carveout that makes YouTube possible as a host for user-generated content also arms the platform powerfully in its quest to serve a half dozen other roles as a provider of copyrighted work entirely distinct from that of a neutral intermediary.

We can see this as a bigness problem or as a copyright problem—or perhaps, as no problem at all. If YouTube stood alone, or if it operated solely as a user-generated enterprise without ambitions across parallel industries, or it were just *smaller*, the balance struck by the DMCA safe harbor would probably continue to work acceptably well, just as it does for most websites hosting user-generated content. With bigness more or less off the table as a realistic target—and with many copyright industry players themselves potentially subject to attacks on bigness—it makes sense that YouTube's critics in the traditional content industries have framed the issue as one of copyright law rather than one of antitrust.

So now the European Union has adopted a new approach to the copyright responsibilities of online hosts of user content,⁶⁹ one that appears targeted at YouTube first and foremost.⁷⁰ In a major reversal, this new directive will obligate hosts—with no meaningful

⁶⁸ See Zoë Keating, *What Should I Do About Youtube?*, TUMBLR (2015), <https://zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube> [<https://perma.cc/46ZH-XLZ9>].

⁶⁹ See *Commission Proposal*, *supra* note 40, at 29.

⁷⁰ See Smirke, *supra* note 41.

carveouts for scale for most of them—to attempt to secure licenses for any material that might be uploaded and prevent the public availability of material identified by rightsholders.⁷¹ Put another way, the directive would make Content ID-like screening of uploads mandatory, while pressuring service providers to secure licenses from major rightsholders or rights management groups. Rightsholders will have automated screening technology work to augment their own bargaining power rather than that of online intermediaries.

Nevertheless, the move can look bewildering on its surface: rightsholders' concerns about YouTube's clout are almost single-handedly driving an effort to write into law a technical hurdle that would appear to make YouTube almost singularly competition proof. Yes, rightsholders would have more leverage *over* YouTube, but by imposing technical requirements that play directly to YouTube's strongest competitive advantage, they would help ensure that meaningful competition will be absent from this space for generations.

The YouTube story evinces an arms-race solution to monopoly: in the face of overwhelming licensee market power, the copyright industry is turning to legislative means of acquiring more of their own. You may not be able to kill your giant, but you may yet be able to hijack, emulate, or piggyback on its dominance. This is a remarkably brazen approach to antitrust harms: *your* monopoly power is too strong; the remedy is to *increase my own* or to *share in some of yours*. In the copyright-industry wars against the technology giants, this approach is now a common one: Amazon is a bully to publishers; publishers allied with Apple to fix prices, wanting to equal its bully's power while maintaining access to its essential customer base.⁷² Google bullied its way into build-

⁷¹ See *Commission Proposal*, *supra* note 40, at 29 (known popularly as Article 13 under the draft numbering).

⁷² This particular cartel, crossing antitrust's still-firm bar against price fixing, did draw the Department of Justice's (DOJ) attention, resulting in settlements from the publisher defendants and a loss in court for Apple. See *United States v. Apple, Inc.*, 791 F.3d 290, 296–97 (2d Cir. 2014). I have written about this case elsewhere. See generally Michael Wolfe, *The Apple E-Book Agreement and Ruinous Competition: Are E-Goods Different for Antitrust Purposes?*, 12 DUKE L. & TECH. REV. 129 (2014). Amazon, despite drawing

ing the world's largest library of digital books⁷³; publishers and authors used a copyright lawsuit to try and cement Google's position as the sole provider of out-of-commerce texts while taking a cut of the proceeds.⁷⁴ Google is comfortably profitable and links individuals to news reporting while the news business flounders globally⁷⁵; therefore, the news business advocates for—and secures in Europe—a new copyright-like press-publishers right that would entitle them to payment for these links.⁷⁶ It is now awkwardly apparent that many of the copyright industries' giant-killers do not appear to be exactly sincere in their ambitions, looking at every turn more eager to make or to force a power-sharing deal than to strike a blow capable of making genuine change.

Of course, the industrial titans of our new gilded age have made enemies in almost every sector of the economy, even if

antitrust allegations over its practices in the book industry, has not faced a real antitrust challenge. See Khan, *supra* note 19, at 710.

⁷³ Google characterizes its Google Books project as the “world’s most comprehensive,” and there is no reason to disbelieve the claim. See *Google Books*, GOOGLE, <https://books.google.com> [<https://perma.cc/6UNG-LM7M>]. The collection was built, in large part, by the wholesale scanning of research library collections under a later-vindicated theory that copyright law would not prevent the use. See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 90, 98 (2d Cir. 2014). Today, the collection has more than 40 million volumes. *15 Years of Google Books*, GOOGLE (Oct. 17, 2019), <https://blog.google/products/search/15-years-google-books> [<https://perma.cc/957S-VETX>].

⁷⁴ The proposal took the form of a sweeping class action settlement that would have remade the market for older books. See generally Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479 (2011). The settlement was ultimately scuttled by the district court following sharp criticism by the public and the submission of Justice Department arguments about potential antitrust concerns. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). The copyright suit and its twin—a case against Google’s library partners—ultimately resulted in a pair of remarkable fair use rulings that upheld the digitization effort as lawful. See generally *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2013).

⁷⁵ See *Google News*, GOOGLE, <https://news.google.com> [<https://perma.cc/P4WL-N4RF>]. While the relationship between online news aggregation and the decline of news reporting is a difficult one to untangle, traditional news reporting has contracted significantly in the internet era. See *U.S. Newsroom Employment Has Dropped a Quarter Since 2008, with Greatest Decline at Newspapers*, PEW RES. CTR. (July 9, 2019), <https://www.pewresearch.org/fact-tank/2019/07/09/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008> [<https://perma.cc/8RLC-QV7A>].

⁷⁶ The new European-wide press-publishers right is also found in the 2019 copyright directive. See *Commission Proposal*, *supra* note 40, at 29 (widely known as Article 11 following the draft numbering).

the copyright industries stand out as being particularly aggrieved. In 2019, we all might have good reason to question the wisdom of YouTube's bigness, or that of any of the technology giants. YouTube's control over how videos are recommended or autoplayed shapes what we see and hear, and those choices—like, say, Facebook's choices in what the newsfeed displays—have drifted toward providing toxic misinformation and conspiracy.⁷⁷ These are the Cheetos of information goods: glaringly and facially bad for you, yet still craved and loved by millions. No terribly compelling counteraction has been found to the incentives steering online intermediaries toward the serving of bad information, and—particularly in the absence of workable answers—the idea that whatever solutions we have, whatever online media environment we receive, will most likely be the result of the secretive internal deliberations of a small handful of profit-seeking firms is one that should be frightening to any small-d democrat.

But if bigness is readily apparent as a source of identifiable complaints, a tension remains between antitrust solutions to social problems and alternative piecemeal regulatory solutions. It is not at all clear that any of these problems *should* be solved by antitrust, and certainly most *can* be tackled through other means, just as YouTube's clout with the copyright industries is addressable through changes to copyright law. Indeed, the key challenge issued by the consumer welfare standard's defenders is that antitrust reformers naively view the antitrust laws (and/or antitrust remedies) as a cure-all for a diverse set of much more specific problems that may or may not be best remedied by countering bigness per se—in the words of Wright et al., the hipsters advocate “antitrust regulation expansive enough to solve societal woes ranging from economic inequality to climate change.”⁷⁸

⁷⁷ See generally Kevin Roose, *YouTube Unleashed a Conspiracy Theory Boom. Can It Be Contained?*, N.Y. TIMES, (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/technology/youtube-conspiracy-stars.html> [<https://perma.cc/7PBQ-98ME>]; Alexis C. Madrigal, *What Facebook Did to American Democracy*, ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502> [<https://perma.cc/SC3C-CXNC>].

⁷⁸ Wright et al., *supra* note 7.

The truth is that law shapes markets from both the top-down (how we regulate market structure, with antitrust) and from the bottom-up (the ground rules we set for industries and businesses). It would be naive to think that one approach can solve all woes. Yet how do we determine *ex ante* where the more appropriate solution for a given problem lies?

II. GRAPPLING WITH BORK'S LEGACY

Robert Bork published *The Antitrust Paradox* more than forty years ago, crystallizing his ideas on antitrust into rules that have largely steered the law since. By now even Bork's most sympathetic readers, those keen to reign in the wilder antitrust enforcement of the 1960s and give limiting principles and rigor to the field, would admit that the book's approach is looking dated. Bork himself—taking aim at the earlier antitrust approaches and policies Wu would in part revive—aptly summed up the risk of reliance on mistakes, writing: “Wrong ideas, repeated often enough, lodge themselves in the culture as well as the law, and then proceed to expand according to their inner logic.”⁷⁹ The stakes for the rightness or wrongness of Bork's conception of antitrust are that, at this point in American antitrust's history, no ideas have been repeated as often, or as influentially, as Bork's.

The most wrong idea Bork spawned here, for progressive antitrust reformers, is the foundational one: “The only legitimate goal of American antitrust law,” argues *The Antitrust Paradox*, “is the maximization of consumer welfare.”⁸⁰ This standard contains a specific prescription for how antitrust law should consider cases (in practice, looking at the price effects of the activity in question), a limiting principle making this prescription *exclusive*, and is built on the theory that a famously vague law that had been otherwise interpreted for nearly three quarters of a century has nevertheless always *required* both adoption of this particular standard and the exclusion of others.

⁷⁹ BORK, *supra* note 20, at 420.

⁸⁰ *Id.* at 51.

It is possible to find wrongness here at several levels. Most fundamentally, one can question the value of consumer welfare as a yardstick, but there is a baby in that bathwater.⁸¹ Instead, the more profitable tack is to target the test's exclusivity and its necessity—to demand an antitrust law that may see the consumer welfare standard supplemented, or perhaps in certain cases even supplanted, with other considerations as circumstances demand.

Scholars and practitioners working within the post-Bork mainstream may find this pushback puzzling, not because it is the law or its standards are beyond reproach, but rather because there may be room for reform within the confines of the prevailing tradition. Yes, Bork's worldview is so narrow as to dismiss outside harms—even if precipitated by activities squarely in antitrust's wheelhouse—as “not *antitrust* issues,” and to conclude that these harms “must be taken care of by other laws.”⁸² Nevertheless, assuming either that Bork was right, or else that we have to pretend he was, does it really lead to the conclusions and limitations the Neo-Brandeisians are chafing under? After all, we have an antitrust literature that purports to apply the standard with more depth than Bork was willing to allow that might provide for a more robust law within the confines of the existing approach. For antitrust, the promise of behavioral law and economics, of information economics, and of innovation economics is that given sufficient depth, we might more clearly and accurately recognize where market structure creates welfare problems that under more superficial analyses might otherwise fail to render fully.⁸³

Viewed charitably, Bork's antitrust legacy can be read as a laudable kind of intellectual modesty. Legal interventions that offer treble damages, the power to break up big companies, or the imposition of perpetual government oversight over the market decisions of private actors may be necessary, but these are all notably powerful responses. Allowing for action of this sort without fully understanding the stakes and the likely effects is *danger-*

⁸¹ See WU, *supra* note 17, at 135 (“While the tools of economics will always be essential to antitrust work, it is a disservice to the laws and their intent to retain such a laserlike focus on price effects as the measure of all that antitrust was meant to do.”).

⁸² BORK, *supra* note 20, at 248.

⁸³ See *infra* notes 93–95 and accompanying text.

ous, the thinking goes, so putting action before theory is a cart-before-horse kind of move. Welfarism is mercifully capacious: all the misleading references to “consumers” aside, what both Bork and modern antitrust care about is maximizing *social* welfare.⁸⁴ Utilitarians, at least, can feel comfortable with the target even if there is plenty of room to quibble with the methodology, and glad to see the law evolve with our understanding of how market structure and competitive processes affect welfare. There would be something appealing about this kind of intellectual modesty, if it were not paired with the jarring audaciousness of Borkean exclusivity: by restricting all possible theories of harm to those understood by a welfare analysis, the argument pairs its humble mantle of restraint with an imperial crown. Remember, princes: to pass as paupers, you are going to have to commit to completing the look.

There ought to be a word—and perhaps there is, I don’t claim perfect knowledge here—for the use of an over-powered specialist tool to identify with care and precision the big, obvious thing that is right there in front of you.⁸⁵ *The Curse of Bigness* wants first and foremost to make antitrust capable of dealing with the harms consolidation and monopoly can have for *democracy*, noting that “the struggle for democracy now and in the progressive era must be one centered on private power—in both its influence over, and union with, government.”⁸⁶ For reformists, this is the big, obvious thing right in front of us all, and they have had enough of antitrust law puzzling over it with a microscope. Allowing that maybe we can craft a price-theory-driven antitrust law with a complexified awareness and treatment of irrational actors, imperfect knowledge, innovation, and market dynamism that is sufficiently well-tuned to see and speak to these other harms, how long can we wait for price effects to convincingly speak to principles of governance if in the meantime democracy is crumbling?

⁸⁴ See generally Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011) (exploring the confusion surrounding Bork’s “consumer welfare” nomenclature).

⁸⁵ If we adopt “economize” for the purpose, it would have the benefit of being a near autoantonym, but I am sure there are many equally good candidates.

⁸⁶ WU, *supra* note 17, at 139.

It bears noting, however, that in *The Antitrust Paradox* “predation by abuse of governmental procedures” is expressly an antitrust harm, and one to which Bork is actually sympathetic.⁸⁷ This makes sense: Bork’s ideology and economics (assuming the two are separable) both caution against the evils of too-big *government*, so flipping the script on antitrust to make it about the potential abuse of government power rather than the abuse of private power is a natural leap. The obvious solution from a Borkean perspective is a weaker government, and therefore, less opportunity for abuse. But recognizing the problem—that businesses can leverage their scale and power to use government as an anticompetitive weapon—also opens the door to the idea that private power at government-shaping scale is insidious to the project of democratic governance. Again, even though understanding these potential harms in efficiency or price terms is not necessarily impossible, why should we wait years for economists to squabble over inconclusive and contestable answers if there is a way to express them clearly in strictly political terms today?

This kind of thinking will lead many antitrust scholars to view Wu’s book with—at best—irritation. The whole turn of modern antitrust after Bork and Director was to replace the massively inconsistent, economically dubious hodgepodge of case law with some judicially administrable standards and rules applied toward consistent and coherent economic ends.⁸⁸ Yes, in the process, some of the political goals of the actual statutes themselves were to be given up—an ironic revolution to be started by Bork, a scholar who declared his undying fidelity to (constitutional) framers, but

⁸⁷ BORK, *supra* note 20, at 364.

⁸⁸ Wu does not pretend that pre-Chicago antitrust law was somehow free of these problems: his defense of earlier practice concedes the point some have viewed as going too far.

It would be crazy, however, to defend every case that was brought as part of the big case tradition. For example, in the 1970s, the Federal Trade Commission went after the cereal industry based on the observation that it was profitable and somewhat concentrated. . . . The agency believed that product differentiation (that is, products aimed at children, older people, the health-conscious, and so on) was the anti-competitive tool of choice. To even describe the theory is to reveal its absurdity.

WU, *supra* note 17, at 113–14.

made perhaps his biggest mark on the academy by encouraging scholars and the courts to ignore the intentions of (legislative) framers.⁸⁹ Nevertheless, leaving aside the irony, antitrust scholars were right about the chaos and economic incoherence of the doctrine,⁹⁰ and might rightly worry about the fate of the decades of work done since to at least try and right it. To have a critic arrive and urge us to focus once again on political economy, on bigness' costs to innovation and democracy, may seem like the worst kind of backpedaling.

Moreover, antitrust scholars—notably including many who have a less robust faith in the self-policing capacity of markets than Bork and Director—could argue that antitrust law and scholarship are already doing what Wu calls for, albeit in a more disciplined way. Antitrust law *does* look at the dangers of government cooptation and, as the Bork quotation above suggests, has done so throughout the modern era.⁹¹ There have also been thoughtful discussions of the tradeoff between short-run efficiency and long-term innovation,⁹² and the need to chasten muscular neo-classical economics with more critical approaches that draw on traditions such as behavioral economics⁹³ or institutional economics.⁹⁴

⁸⁹ See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143–60 (1997). Of course, the inconsistency is not one Bork himself would have acknowledged. Bork argues in *Legislative Intent and the Policy of the Sherman Act* that his own reading of antitrust law is, in fact, the only faithful interpretation of the legislation—a position that strains credulity and Bork's own source material. See WU, *supra* note 17, at 87–88, 89 (quoting Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989)).

⁹⁰ See *supra* note 89 and accompanying text.

⁹¹ Consider, for instance, the long—if tellingly inconclusive—back and forth on how antitrust should incorporate and respond to state capture. See generally John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075 (2005); Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1988); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

⁹² See generally, e.g., Herbert Hovenkamp, *Restraints on Innovation*, 29 CARDOZO L. REV. 247 (2007). This literature is certainly not lost on Wu, given his contributions to it. See, e.g., Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 313 (2012).

⁹³ Behavioral economics have of course served as a leading counterbalance to the assumptions made across the spectrum of fields where law and economics have been influential, and antitrust is no exception. See Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573, 576–77 n.7 (2014) (collecting scholarly literature). *But*

To put the two critiques together, antitrust scholars might say, “you are throwing away all we have achieved in this attempt to turn back to messy, intuitive political economy, when we are actually well aware of the dangers you cite, and have accounted for them in various sophisticated ways.” This is, in one sense, a fair critique. Wu does not do a deep dive into the economics and econometrics of modern antitrust law. Nor does he stress the dangers of incoherent, “I know it when I see it” antitrust enforcement. Point taken. In another sense, this critique misses Wu’s argument at a fundamental level—that antitrust, including current antitrust, is always already political in its choices. Economics provides no escape from those value choices, it merely picks one desirable value (consumer welfare) from an abundant normative basket.

Moreover, antitrust is not just about theory; it is about *enforcement*, the inevitable need to rank and prioritize a hierarchy of values. The original Brandeisian movement was prompted by a political urgency, a call to action because both market and polity were being disfigured by the trusts.⁹⁵ The behavioralist, innovation, and institutionalist epicycles that recent scholars have added to antitrust’s orrery⁹⁶ do indeed parallel some of Wu’s concerns, though at a third, fourth or fifth remove from the efficiency calculus.⁹⁷ Wu, however, like the Brandeisians, is saying that our time

see Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1517 (2012) (finding behavioral economics traditions “irrelevant” for antitrust analysis and not providing cause for a more interventionist antitrust policy).

⁹⁴ Oliver Williamson, coiner of “new institutional economics,” OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: A STUDY IN THE INTERNAL ORGANIZATIONS I* (1983), was, notably, motivated in his antitrust work by frustration with the lack of economic rigor seen in his experience as a Special Economic Assistant to the Assistant Attorney General for Antitrust in the late 1960s. See Carl Shapiro, *A Tribute to Oliver Williamson: Antitrust Economics*, 52 CAL. MGMT. REV. 138, 138–39 (2010). While those contributions and those of following works are consistent with skepticism of pre-Chicago antitrust methodology, they also provide nuanced results that can be at odds with the Borkean neo-classical baseline. See Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 95, 97 (2002) (“[T]ransaction cost economics [TCE] . . . may lead to different conclusions from mainstream approaches that ignore TCE considerations.”).

⁹⁵ See Wu, *supra* note 17, at 38.

⁹⁶ See *supra* notes 89–91 and accompanying text.

⁹⁷ My thanks to James Boyle for assisting with this metaphor.

calls for a different vision in which those concerns are at the center, not the periphery. He is also saying that contemporary reality and contemporary enforcement practice give ample evidence that those concerns are indeed at the periphery. He may be eliding some of the subtleties of contemporary antitrust scholarship, or the virtues of its goals but, if they miss that crucial dimension, the critics of Wu's work are missing *his* point.

CONCLUSION

The history Wu recounts demonstrates that ideas, ably wielded in the right moment and aptly tailored to their institutional context, can be powerfully transformative—in the case of antitrust, helping outline the shape and structure of our economy, with all the knock-on effects that come with that kind of high-level tinkering. Today, there is no doubt that we are currently in a moment where another inflection in the history of antitrust is possible. The size, visibility, and rancor of the debate is a testament to the stakes and to the tangibility of the opportunity. The present debate is one of those rare moments, like those Wu traces, where ideas can be operationalized and *powerful*. There is a reason for the name calling: there is something to see here.

Demonstrating the possibility of change and charting the path ahead, however, are not the same thing. To move their agenda forward, the ideas challenge-antitrust reformers have are two-fold: (1) to convincingly undermine antitrust's reigning idea—the pre-eminence of the consumer welfare standard—and (2) to outline a substitute vision of the future. At every turn, the first part of the challenge has been easier. Critics can easily point out harms that are clearly about bigness but that the consumer welfare standard seems to miss. They can offer histories that provide better explanations for the law's intent. They can take potshots at the economic theory, and the application of economic theory, that undergirds the status quo. The work that *The Curse of Bigness* does is primarily of this sort.

When it comes to offering an alternative vision, the movement—and Wu—struggles. Not in absolute terms, mind you; they have plenty of ideas to offer, and Wu's proposed standard is as

good as any. Quoting Brandeis, he would have the courts ask “whether the targeted conduct is that which ‘promotes competition or whether it is such as may suppress or even destroy competition,’”⁹⁸ which has the virtues of a good pedigree and a focus on process over outcome. Recognizing that antitrust is and has always been political, for reformists, is meant to be liberating. For them, antitrust can do the abstract work of protecting democratic institutions, countering inequality, and promoting free speech values precisely because these are things that bigness and monopoly threaten, and antitrust is a body of law that can and has challenged, overseen, and dismantled bigness and monopoly.

For the establishment, however, all of these concepts are dangerously under-specified, and amount to giving the government carte blanche to go after corporate enemies with only the most minimal of limiting principles. It might be difficult to imagine a dangerously unhinged, capricious, and vindictive executive, but try to picture such a thing, and then hand it a newly empowered and political antitrust. Specificity and rigor need not entail the consumer welfare standard, but critics have a straightforward case to make about their importance.

So the most powerful rebuttal to Wu’s view—the one employed most often and the most credibly by critics of the progressive reformist movement⁹⁹—is simply that there is not anything here to provide a workable and consistent methodology. You may not like consumer welfare as a yardstick, but it at least looks like something we can measure against or at least theorize about using the tools we have at our disposal.¹⁰⁰ Wu does not, and probably cannot, counter that notion.

The disagreement between Wu and his critics reflects a conflict that runs far deeper than just antitrust: the appeal of rules that *seem* possible to consistently and clearly apply is a real one in *any*

⁹⁸ Wu, *supra* note 17, at 136.

⁹⁹ See, e.g., Wright et al., *supra* note 7, at 313.

¹⁰⁰ Cf. Oliver E. Williamson, Book Review, 46 U. CHI. L. REV. 526, 527 (1979) (reviewing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978)) (“Too often, other [non-efficiency] goals [for antitrust law] are vaguely stated and invoked uncritically, with the result that such goals are not meaningfully promoted by proposals that purport to have beneficial effects of a non-efficiency kind.”).

debate, even when their evenhandedness or clarity or ability to work justice is more fiction than fact. This is Robert Bork's superpower and most lasting legacy in- and outside of antitrust: the ability to craft rules that, between their clarity and exclusiveness, stifle competing ideas. Methodological pluralism, balancing tests, and concerns about abstract or indirect consequences are much harder to justify or explain when your competition offers the simplicity of a single, clear, and exclusive rule, along with a single, clear, and exclusive understanding of the harm at stake. To make their ideas win, reformists will need to pull judges away from a clear test built to *look* apolitical—though inaction is never apolitical—to an unclear one that embraces an antitrust that is essentially political. This will not be an easy road to walk.

The reformist movement has identified its moment and voiced its complaint. All eyes are on it. Can it deliver? To the extent the label provides insight here, it is worth noting that another element of hipsterism's paradox lies in the term's applicability to both passing fads and moments of genuine upheaval in the cultural bedrock. The antitrust story as Wu relates it is about powerful ideas, advanced by passionate advocates, taking root in "the culture as well as the law."¹⁰¹ The ingredients are all here, now; one would need to be historically blinkered to think they cannot make this moment one of real change.

¹⁰¹ BORK, *supra* note 20, at 420; *see also supra* note 80 and accompanying text.