

2014


# The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy

Daniel A. Crane

*University of Michigan Law School, danocrane@umich.edu*

Available at: <https://repository.law.umich.edu/articles/1550>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Antitrust and Trade Regulation Commons](#), [Consumer Protection Law Commons](#), [Legal History Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

---

## Recommended Citation

Crane, Daniel A. "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy." *Antitrust L. J.* 79, no. 3 (2014): 835-53.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## THE TEMPTING OF ANTITRUST: ROBERT BORK AND THE GOALS OF ANTITRUST POLICY

DANIEL A. CRANE\*

Of all Robert Bork's many important contributions to antitrust law, none was more significant than his identification of economic efficiency, disguised as consumer welfare, as the sole normative objective of U.S. antitrust law.<sup>1</sup> The Supreme Court relied primarily on Bork's argument that Congress intended the Sherman Act to advance consumer welfare in making its landmark statement in *Reiter v. Sonotone* that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"<sup>2</sup> This singular normative vision proved foundational to the reorientation of antitrust law away from an interventionist, populist, Brandeisian, and vaguely Jeffersonian conception of antitrust law as a constraint on large-scale business power and toward a conception of antitrust law as a mild constraint on a relatively small set of practices that pose a threat to allocative efficiency.

Bork's existential claim was powerful for many reasons. It arrived in the midst of the deregulatory impulses of the late 1970s and on the cusp of the Reagan Revolution. It pitted the interests of consumers against those of inefficient producers during a period of dramatic inflation and pro-consumer sentiment. It was grounded in assertions about the will of Congress and the responsibility of the courts. Perhaps most potently, it reduced antitrust law to an elegant and precise formula that ostensibly could be applied with consistency, accountability, and scientific rigor.

Despite, or because of his resounding victory in changing the terms of engagement in the courts and antitrust agencies, Bork has faced fierce criticisms

---

\* Associate Dean, Faculty and Research, and Frederick Paul Furth, Sr. Professor of Law, University of Michigan.

<sup>1</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). Although Bork lifted much of *The Antitrust Paradox* from his earlier work published in law reviews and *Fortune* magazine (see *id.*, *Acknowledgments*), *The Antitrust Paradox* became the canonical repository for Bork's vision of antitrust law. Hence, throughout this article, I shall cite primarily to *The Antitrust Paradox*.

<sup>2</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing BORK, *supra* note 1, at 66).

over the years. Among the leading criticisms are: (1) Bork mischaracterized the Sherman Act's legislative history to produce a result he favored ideologically;<sup>3</sup> (2) with a disingenuous sleight of hand, Bork shifted from consumer welfare to total welfare without changing labels, hence equating antitrust policy with efficiency while continuing to package it in a consumer welfare pill that courts would easily swallow;<sup>4</sup> and (3) Bork's economic efficiency account of the antitrust laws is impoverished and crowds out other legitimate objectives for the antitrust laws.

My goal in this essay is to offer a modest defense of Bork against his sharpest critics on the question of antitrust's goals. Modest, because Bork set himself up for some of the criticisms and some of them are quite fair. But the criticisms have tended to inflate small points and crowd out larger ones that deserve much more careful attention.

The focus on Bork's claims about the Sherman Act's legislative history creates the misapprehension that Bork's arguments about antitrust's goals were principally founded in arguments about subjective congressional intention, as revealed in the congressional record. To the contrary, the thrust of Bork's argument was predicated on a suite of interpretive tools, including efforts to discern meaning from the statutory texts, a "whole code" insistence on harmonizing the corpus of antitrust statutes to render them internally consistent and logically sound, a species of critical common law drawing on the most persuasive statements of the most illustrious judicial expositors, and arguments grounded in judicial restraint. In this approach, Bork's work on antitrust law mirrored his broader role as a controversial jurist and constitutional law scholar.

---

<sup>3</sup> The leading critic of Bork's interpretation of the Sherman Act's legislative history is Robert Lande. See Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349, 2354 (2013) [hereinafter Lande, *A Traditional Textualist Analysis*]; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65, 69–70 (1982) [hereinafter Lande, *Wealth Transfers*]; see also Daniel R. Ernst, *The New Antitrust History*, 35 *N.Y.L. SCH. L. REV.* 879, 882 (1990); John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 *ANTITRUST BULL.* 259, 265–90 (1988); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 *N.Y.U. L. REV.* 1125, 1136 (1987); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *CORNELL L. REV.* 1140, 1142 (1981); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 *MICH. L. REV.* 1, 22 (1989); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 *B.C. L. REV.* 551, 563–64 (2012); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 *U.C. DAVIS L. REV.* 1375, 1435 n.259 (2009).

<sup>4</sup> Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 *CORNELL J.L. & PUB. POL'Y* 239, 249 (1999).

Claims about Bork's alleged bait-and-switch on the meaning of "consumer welfare" are also in part valid but largely overstated. There was no trickery in Bork's approach. He quite plainly laid out the progression of his argument and the assumptions he was making. Bork did not, as is often argued, begin by defining the purposes of antitrust law as consumer welfare and then magically turn consumer welfare into allocative efficiency. From the beginning of his argument, he asserted that consumer welfare and efficiency went hand in hand—that the consumer interest was in efficiency. Indeed, much of his argument that Congress intended to benefit consumers began with proof that the antitrust statutes were intended to promote efficiency, from which Bork derived that Congress meant to benefit consumers. Hence, far from starting with consumers and ending with efficiency, Bork started with both efficiency and consumers.

For purposes of this essay, I do not address directly the criticism that Bork's economic efficiency account is impoverished, as I do not propose to defend economic efficiency and/or consumer welfare as the sole objectives of antitrust law.<sup>5</sup> Rather, I will challenge the conventional wisdom that characterizes Bork's juridical approach as devious and willfully disregarding of the true purposes of Congress. To be sure, Bork's arguments were ideologically driven, but they were driven by a wider ideology concerning statutory interpretation and judicial restraint, not merely by a drive to reach a particular antitrust result. Bork's arguments on antitrust's goals need to be reevaluated in light of the wider contestation over judicial power and methodologies—an enterprise that connects Bork's influence in antitrust to his influence on constitutional law and jurisprudence more generally.

### I. A BRIEF REVIEW OF BORK'S ARGUMENT

It is appropriate to begin with a brief review of the progression of Bork's argument on antitrust's purposes, roughly coinciding with the first five chapters of *The Antitrust Paradox*.

Chapter 1 of *The Antitrust Paradox* concerns the historical foundations of antitrust policy and includes some discussion of legislative history. But it is a

---

<sup>5</sup> A recent symposium in the *Fordham Law Review* on the goals of antitrust provides an ample exploration of this topic. See Jonathan B. Baker & D. Daniel Sokol, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175 (2013); Roger D. Blair, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013); Harry First & Spencer W. Walker, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425 (2013); Lande, *A Traditional Textualist Analysis*, *supra* note 3; Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647 (2013); Maurice E. Stucke, *Should Competition Law Promote Happiness?*, 81 FORDHAM L. REV. 2575 (2013).

reach for a much broader historical understanding of antitrust than the narrow question of what particular congressmen were thinking in 1890. Bork's goal was to situate the various traditions that developed during antitrust's formative period. In the "great man" style of intellectual history, Bork focused on the antitrust ideology of a number of key actors—John Sherman, Edward White, Louis Brandeis, Rufus Peckham, Charles Evans Hughes, Oliver Wendell Holmes, and William Taft. Bork was mostly concerned with the judicial figures in this lot—meaning all of the names mentioned other than Sherman. He treated most of them harshly, not based on any assertion of inconsistency with congressional intent but based on analytical flaws in their arguments. Peckham took knocks for the incoherence of his *Trans-Missouri* opinion; White for the suggestion in his *Trans-Missouri* dissent that courts should weigh the reasonableness of naked restrictions on competition and his application of the rule of reason in *Standard Oil*.<sup>6</sup> Brandeis suffered for his suggestion in *Chicago Board of Trade* that courts balance the interests of small producers against those of consumers;<sup>7</sup> Holmes for his "curiously inconsistent" *Northern Securities* dissent;<sup>8</sup> and Hughes for misunderstanding the economics of vertical restraints in *Dr. Miles*.<sup>9</sup> Only Taft garnered accolades for his *Addyston Pipe* opinion.<sup>10</sup> The Sherman Act's legislative history received a page and a half of discussion, mostly focused on the relationship between the Sherman Act and the preexisting common law.<sup>11</sup>

Chapter 2 was entitled "The Goals of Antitrust: The Intentions of Congress," so critics may be forgiven for believing that Bork's consumer welfare assertion arises from an assertion about Congress's subjective motivations. But, in fact, only two pages out of 20 concerned the Sherman Act's legislative history. The first six pages continued the intellectual history themes of Chapter 1, critiquing the analytical soundness of various arguments for a normative theory of antitrust advanced by such figures as Rufus Peckham, Learned Hand, Carl Kaysen, and Donald Turner.<sup>12</sup> When Bork turned to "the intentions underlying the antitrust statutes," he devoted the first five pages to the text of

---

<sup>6</sup> BORK, *supra* note 1, at 22–26, 37 (discussing Justice Peckham's and Justice White's approaches to *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)); *id.* at 37 (discussing Justice White's opinion in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)).

<sup>7</sup> *Id.* at 41–47 (discussing the Brandeis opinion in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)).

<sup>8</sup> *Id.* at 30–32 (critiquing Justice Holmes's dissent in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904)).

<sup>9</sup> *Id.* at 32–33 (explaining Justice Hughes's "decisive misstep" in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

<sup>10</sup> *Id.* at 26–30 (agreeing with Sixth Circuit Court Judge Taft's writing in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898)).

<sup>11</sup> BORK, *supra* note 1, at 19–21.

<sup>12</sup> *Id.* at 50–56.

the statutes<sup>13</sup> (more on this momentarily). When he finally turned to legislative history, Bork spent very little time on the Sherman Act, perhaps because he had covered the Sherman Act's legislative history at length in an earlier article,<sup>14</sup> but perhaps more importantly because legislative history was not particularly important to his argument. Bork did assert that the legislative history showed that Congress was concerned with consumer welfare, but it was not his exclusive focus. Continuing the "great man" theme, the discussion largely focused on statements by Senator Sherman.<sup>15</sup> Three out of five pages in the legislative history discussion concerned not the Sherman Act but the subsequent antitrust statutes.

The next section of the chapter attempted to divine the congressional purpose for the antitrust laws from their "major structural features."<sup>16</sup> Bork found that structural features, such as the distinction between per se illegality for cartels and the more solicitous treatment of mergers, pointed toward a preference for efficiency and hence a desire to benefit consumers. One may quibble that Bork's argument does not show the will of Congress as opposed to the will of the courts, given that the distinction between per se treatment for cartels and rule of reason treatment for mergers is hardly apparent from the face of the Sherman and Clayton Acts. But Bork also relied on the statutory fabric more directly, arguing for example that the Robinson-Patman Act's meeting competition defense evidenced a preference for efficiency and hence a desire to promote consumer welfare.<sup>17</sup>

The final piece of the chapter on the intentions of Congress concerned the scope, nature, consistency, and ease of administration of the law.<sup>18</sup> In short, Bork argued that the antitrust laws would only be sensible and workable as a body if courts pursued solely a consumer welfare objective.

Bork's summation to the chapter deserves attention: "The conventional indicia of legislative intent overwhelmingly support the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare."<sup>19</sup> This capstone crystalized the implication of the chapter's title that all of the foregoing pieces of evidence—analytic critique of prominent views, statutory texts, legislative history, structural features of the law, and inferences from the scope, nature, consistency, and ease of adminis-

---

<sup>13</sup> *Id.* at 56–61.

<sup>14</sup> Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 26 (1966) [hereinafter Bork, *Legislative Intent*].

<sup>15</sup> BORK, *supra* note 1, at 61–62.

<sup>16</sup> *Id.* at 66–69.

<sup>17</sup> *Id.* at 68.

<sup>18</sup> *Id.* at 69–71.

<sup>19</sup> *Id.* at 71.

tration of the law—were means of divining legislative intent. The legislative history of the Sherman Act was a small piece of this puzzle.

Chapter 3, “The Goals of Antitrust: The Responsibility of the Courts,” advanced Bork’s claims that courts should pursue a consumer welfare objective in antitrust cases. Of particular interest is Bork’s argument that judicial adherence to a consumer welfare standard is necessary to avoid involving judges in making basic policy choices that are rightly made by legislatures.<sup>20</sup> Here, Bork again admitted some uncertainty about what Congress subjectively intended in the various iterations of the antitrust statutes, but argued that the judicial role was best served by “ascribing to Congress a consumer welfare goal in each of the antitrust statutes.”<sup>21</sup> Bork justified this move not based on the legislative history of the statutes, but based on “their textual demands for competition.”<sup>22</sup>

In Chapters 5 and 6, Bork transitioned from legal theory to economic theory. In Chapter 5, Bork first defined allocative efficiency and showed how it could be harmed by monopoly and oligopoly.<sup>23</sup> He concluded by defining productive efficiency and relating it to consumer welfare.<sup>24</sup> It was in Chapter 6, in a three-page section on income distribution, that Bork purportedly made the subtle shift that has provoked so much criticism over the years. Having already shown how deadweight losses from monopoly pricing harm consumer interests, Bork then considered whether wealth transfers from consumers to producers harm consumer welfare and concluded that they do not.<sup>25</sup> The core of Bork’s argument occurs in three sentences:

Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers collectively, does not take this income effect into account.<sup>26</sup>

## II. INTERNAL INTEGRITY: LEGISLATIVE HISTORY

The first major criticism of Bork has been that his ascription of a consumer welfare standard to Congress was invented for ideological reasons and inconsistent with the actual legislative history of the Sherman Act. Thus, for example, Judge Vaughn Walker has argued that Bork first arrived at consumer

---

<sup>20</sup> *Id.* at 82–83.

<sup>21</sup> *Id.* at 84.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 90–104.

<sup>24</sup> *Id.* at 104–06.

<sup>25</sup> *Id.* at 110–12.

<sup>26</sup> *Id.* at 110.

welfare as a policy prescription for antitrust and then “[o]ne year later . . . penned an article claiming that in the meantime he had discovered that this too was the purpose of the drafters of the Sherman Act.”<sup>27</sup> Herbert Hovenkamp has asserted that “Bork’s analysis of the legislative history was strained, heavily governed by his own ideological agenda. . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew.”<sup>28</sup>

Criticisms of this kind are not without some merit, but they are overstated, at least insofar as they target *The Antitrust Paradox* and not just *Legislative Intent and the Policy of the Sherman Act*,<sup>29</sup> published 12 years earlier. The earlier article was devoted to proving the legislative intent of the Sherman Act from legislative history. It is thus fair to criticize Bork for selectivity and anachronism when it comes to a legislative-history-based assessment of the purposes of the Sherman Act (although Bork did spell out his argument in considerable detail, concealing none of his analysis). But, as already noted, Bork’s argument about congressional purpose in *The Antitrust Paradox* was considerably richer. For one, it made as much or more use of the legislative history of subsequent statutes as it did of the Sherman Act’s legislative history.<sup>30</sup> Second, and more importantly, legislative history was only a small piece of Bork’s claim about congressional purpose. Statutory texts, structural features of the law, inferences from the scope, nature, consistency, and ease of administration of the law, and judicial precedent were given considerably greater emphasis.

Here, it is worth remarking on the curious positioning of this criticism of Bork against the wider backdrop of ideological controversy over the use of legislative history that began to unfold in academic and judicial circles right about the time that Bork’s antitrust work was growing in influence. Within four years of the publication of *The Antitrust Paradox*, Bork would be seated on the D.C. Circuit with Antonin Scalia, who was beginning sharply to question the use of legislative history to interpret statutes.<sup>31</sup> Within a few years after that, Bork’s ideological cousins Scalia and Frank Easterbrook would launch an all-out war on judicial invocation of legislative history.<sup>32</sup> Bork’s

---

<sup>27</sup> Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1217 (2012).

<sup>28</sup> Hovenkamp, *Protected Classes*, *supra* note 3, at 22.

<sup>29</sup> Bork, *Legislative Intent*, *supra* note 14.

<sup>30</sup> This is not to say that Bork’s interpretation of subsequent statutes’ legislative history was without controversy either. Bob Lande’s classic article analyzes the legislative history of all of the major antitrust statutes. *See* Lande, *Wealth Transfers*, *supra* note 3.

<sup>31</sup> *E.g.*, *Hirschey v. FERC*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring).

<sup>32</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 388 (2012); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND*



former law clerk John Manning, a Harvard Law professor, would become the leading academic critic of reliance on legislative history.<sup>33</sup>

Bork himself did not belittle the use of legislative history to resolve statutory enigmas as much as Scalia and Easterbrook and, as a judge, sometimes relied on legislative history to interpret statutes.<sup>34</sup> But Bork did argue against a “subjectivist” approach to statutory or constitutional construction, in which the judge’s goal is to locate the subjective meaning of the legislators who voted in favor of a bill.<sup>35</sup> Thus, even if it could be shown that Congress’s true subjective purpose in passing the Sherman Act was something other than consumer welfare or efficiency—such as rent-creation for a Republican-controlled Congress as Thomas Hazlett has argued<sup>36</sup>—Bork would not have found that fatal to his argument. His quest was for an “objective” congressional purpose derived from a variety of interpretive sources.

Further, Bork made clear that his discussions of legislative history were animated not primarily by a personal view that such discussions were appropriate for determining the meaning of a statute but by a need to address one of the leading approaches to statutory interpretation. In the introductory paragraphs of his discussion of the Sherman Act’s legislative history, Bork noted that “[t]he problems and artificialities of attributing an ‘intent’ to a sizable body of men are well known. We need not dwell on them.”<sup>37</sup> Bork justified his discussion of legislative history primarily on the grounds that “courts and lawyers . . . regularly ‘find,’ describe, and rely on” congressional intent as adduced from legislative history.<sup>38</sup> In other words, to the extent that Bork relied at all on legislative history, he did so to accommodate one popular theory of statutory interpretation, not because he asserted its importance independently.

It is unfortunate that the headline regarding Bork’s arguments about the congressional purpose behind the antitrust laws has been reduced, over time, to an assertion that Bork misread the legislative history. Arguments from legislative history were a small piece of *The Antitrust Paradox* and unnecessary to Bork’s wider textualist, structuralist, and institutionalist arguments.

---

THE LAW 29–37 (1997); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHL-KENT L. REV. 441, 443 (1990).

<sup>33</sup> See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

<sup>34</sup> *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Bork, J., dissenting), *aff’d*, 484 U.S. 1 (1987).

<sup>35</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144–45 (1990).

<sup>36</sup> Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 2, 263 (1992).

<sup>37</sup> BORK, *supra* note 1, at 56.

<sup>38</sup> *Id.*

Whether or not those other arguments were persuasive, they have barely been scrutinized in the rush to criticize Bork's legislative history arguments.

The assumption that Bork's argument rested on faulty legislative history has resulted in a tendency for even those sympathetic to Bork's policy prescriptions to distance themselves from his views on the statutory meanings. For example, in *Reeder-Simco*,<sup>39</sup> Justice Stevens's dissent, joined by Justice Thomas, observed that the Robinson-Patman Act's "statutory mission . . . may well merit Judge Bork's characterization as 'wholly mistaken economic theory.'" However, Stevens observed that "even if Judge Bork's evaluation (with which I happen to agree) is completely accurate," he would still feel bound by the statutory text to rule in favor of an anticompetitive result.<sup>40</sup>

Bork's argument about the Robinson-Patman Act met precisely the arguments that Stevens was advancing. It was consistent with the assertion in Justice Ginsburg's majority opinion that the Robinson-Patman Act should be read consistently with the other antitrust statutes to advance competition and not just the welfare of individual competitors.<sup>41</sup> Based on the legislative history from 1936, Bork argued that some of the framers of the Robinson-Patman Act were motivated by a "wholly mistaken economic theory,"<sup>42</sup> but the statutory text itself, when harmonized with the rest of the antitrust laws, permitted or even compelled judges to interpret the act to advance a procompetitive and consumer welfare goal.<sup>43</sup> Bork made no representation that Congress was single-mindedly in favor of a consumer welfare objective when it enacted the Robinson-Patman Act. He devoted an entire chapter to excoriating the hostility to price discrimination that underlay the act.<sup>44</sup> He acknowledged the indeterminacy of all of the relevant ingredients of judicial interpretation—

---

<sup>39</sup> *Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 187 (2006) (Stevens, J., dissenting).

<sup>40</sup> *Id.* at 188. Although Stevens was speaking of the statute's text rather than its legislative history, it is unlikely that he would have felt constrained by his interpretation of the text if he believed that the legislative history pointed in a different direction. *See Zuni Public School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("Analysis of legislative history is, of course, a traditional tool of statutory construction. There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.").

<sup>41</sup> *Id.* at 181–82 (observing that the Robinson-Patman Act should be read consistently with broader policies of the antitrust laws" and that "[e]ven if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*").

<sup>42</sup> BORK, *supra* note 1, at 382; *see also id.* at 63 (asserting that "many of the backers of the Robinson-Patman Act were moved by an NRA-style philosophy and intended to protect independent merchants against chains and new methods of distribution").

<sup>43</sup> *Id.* at 68–69 (arguing that the statutory cost justification defense demonstrates that Congress intended the statute to advance economic efficiency and consumer welfare).

<sup>44</sup> *Id.* ch. 20.

text, structure, legislative history, and precedent. Ultimately, Bork argued that the antitrust statutes reflected a smorgasbord of incongruous goals and purposes and that the courts' proper function was to sort through them and render as rational, consistent, and coherent a reading as possible. He asserted that given that efficiency and consumer welfare emerged as a dominant congressional purpose, Congress did not specify how any other values should be weighed against efficiency and consumer welfare. In the absence of congressional direction it would be improper for courts to insert their own value judgments. Courts were bound to follow an efficiency/consumer welfare approach.<sup>45</sup>

Bork's argument in favor of efficiency and consumer welfare was thus predicated in substantial part on the same themes of judicial restraint that animated his work in constitutional law. Bork based his central point about the role of courts in interpreting the antitrust laws on a quotation from Bork's former Yale colleague Alexander Bickel on the void for vagueness doctrine.<sup>46</sup> Consistent with his wider argument for "passive" judicial virtues, Bickel argued that, when confronted with a vague statute, courts should simply withhold adjudication of the substantive issues until the legislature clarified the statute.<sup>47</sup> Bork argued that any congressional objectives other than efficiency and consumer welfare were so vague that courts should refuse to enforce those objectives—which left efficiency and consumer welfare as the sole remaining purposes that courts could enforce.<sup>48</sup>

Subjective congressional intent, as manifested in legislative history, mattered far less than leading criticisms of Bork suggest. Bork's arguments about the purposes of the antitrust laws were primarily grounded in a conventional suite of interpretive methodologies, including textual analysis, a "whole code" reading of the antitrust laws, critical analysis of leading judicial expositors, and arguments about judicial restraint. With the emergence of textualism and "objective" approaches to statutory interpretation and the continued discussion about the value and meaning of judicial restraint, Bork's arguments should be understood as significantly broader than the legislative history claims that have figured almost exclusively in the criticisms of his arguments in favor reading the antitrust laws to advance a consumer welfare objective.

---

<sup>45</sup> This argument is crystallized on pages 82–83 of *The Antitrust Paradox*.

<sup>46</sup> BORK, *supra* note 1, at 82 (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 152 (1962)).

<sup>47</sup> *Id.*

<sup>48</sup> BORK, *supra* note 1, at 82–83; *see also id.* at 7–8 (arguing that "antitrust's basic premises are mutually incompatible" and that courts are therefore required to decide which premises and goals "the law may legitimately and profitably implement").

### III. THE SLIP FROM CONSUMER WELFARE TO ALLOCATIVE EFFICIENCY

The second principal assault on Bork's arguments about antitrust's purposes is that Bork deceptively switched from consumer welfare to allocative efficiency without changing terms—a claim that Barak Orbach, writing in this Symposium, aptly names the Trojan Horse hypothesis.<sup>49</sup> This alleged bait-and-switch ostensibly compounds Bork's shoddy work on the Sherman Act's legislative history, confirming that Bork's overall project was a Trojan Horse aimed at advancing an ideological agenda unsupported by the legislative history or texts. Bork's critics have been harsh. Robert Lande has complained of “Bork's brilliant but deceptive choice of the term ‘consumer welfare’ as his talisman, instead of a more honest term like ‘total welfare,’ ‘total utility,’ or just plain ‘total economic efficiency.’”<sup>50</sup> Herbert Hovenkamp has complained of “more than a little chicanery in such terminology.”<sup>51</sup> John Kirkwood and Bob Lande have referred to Bork's use of “consumer welfare” as “an Orwellian term of art that has little or nothing to do with the welfare of true consumers.”<sup>52</sup>

As with the legislative history discussion, I will not press for a complete exoneration. Bork's choice of terminology can be misleading, both to lay people and to antitrust insiders. The average lay person might find it surprising that a system designed to protect “consumer welfare” would remain unperturbed if producers extracted surplus from consumers through increased prices so long as the producers did not reduce output. Antitrust insiders, who bandy about the terms “consumer welfare,” “allocative efficiency,” and “total welfare” as differentiated concepts with differing policy implications, could also easily be confused. But admitting that Bork's terminology can be confusing is a far cry from admitting that Bork engaged in rhetorical deception or intellectual dishonesty. To the contrary, Bork laid out his cards clearly and offered a consistent, principled argument from start to finish.

First, contrary to popular assertion, Bork did not begin with consumer welfare *simpliciter* and then morph into efficiency. From the beginning, Bork's arguments for a consumer welfare goal were tied to his argument that the

---

<sup>49</sup> Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, *infra* this issue, 79 ANTITRUST L.J. XX (2014).

<sup>50</sup> Robert H. Lande *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 638 (1989).

<sup>51</sup> HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 49 (1985).

<sup>52</sup> John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 198–99 (2008); *see also* Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987) (complaining that “consumer welfare is the most abused term in modern welfare analysis”).

antitrust laws were intended to promote efficiency. In *The Antitrust Paradox's* introduction, Bork began to build his case that “[b]usiness efficiency necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or service offered.”<sup>53</sup> In his earliest discussion of the Sherman Act’s legislative history, Bork expressly equated the concerns with consumer welfare with “restriction of output.”<sup>54</sup> Similarly, Bork derived a congressional intent to promote efficiency from the Robinson-Patman Act’s meeting competition defense,<sup>55</sup> and then extrapolated from the efficiency rationale a desire to protect the welfare of consumers. His arguments from textual structure similarly began by deducing an efficiency goal, from which Bork then backed into a consumer welfare rationale.<sup>56</sup> For example, Bork argued that Congress distinguished between “size achieved by normal means, thought to reflect superior efficiency, and size gained by unfair practices that prevented competition.”<sup>57</sup> Bork opined that “[t]he latter were unfair precisely because they were means of winning without attaining superior efficiency.”<sup>58</sup> The summation of this paragraph encapsulates the overall structure of Bork’s argument: “Again, the distinction in favor of efficiency imports a consumer welfare policy.”<sup>59</sup>

Critics who have assumed that Bork began with consumer welfare and then slipped into efficiency without changing labels have the story backwards. In many ways, Bork began with efficiency and then slipped into consumer welfare. His return to efficiency for purposes of excluding wealth transfers from the antitrust calculus was a return to first principles, not a diversion to an ideologically preferred result.

Second, Bork clearly explained why he was excluding wealth transfers from his definition of consumer welfare. He argued that wealth transfers from producers to consumers had no discernible net impact on consumer welfare since producers could spend the incremental dollars to maximize their own preferences as consumers.<sup>60</sup> One can of course challenge Bork’s premise. Wealthy managers or shareholders may be more likely to save or invest than to spend, and hence may not experience their income gains from wealth transfers in a consumer capacity. Or the incremental income gains to producers

---

<sup>53</sup> BORK, *supra* note 1, at 7.

<sup>54</sup> *Id.* at 21 (citing Senator Sherman’s statement that increases in price would “diminish the amount of commerce”); *see also id.* at 62 (discussing congressional view that higher prices were problematic because of decline of output).

<sup>55</sup> *Id.* at 68–69.

<sup>56</sup> *Id.* at 66–71.

<sup>57</sup> *Id.* at 68.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See* text accompanying notes 25–26.

may be less socially valuable than the comparable income losses to consumers because of the diminishing marginal utility of money.<sup>61</sup> But these kinds of substantive disputations of Bork's claim only go to show that Bork was clear enough in his analysis that there is no doubt about the conceptual moves he was making. Whether persuasive or not, Bork's argument was honest.

Finally, Bork quite correctly noted that whether wealth transfers should count in antitrust analysis "is not crucial, perhaps, since most antitrust cases do not involve a trade-off."<sup>62</sup> Actions that diminish market competitiveness and generate wealth transfers but not deadweight losses are relatively few compared to the much larger set of cases to which antitrust law is applied. The major thesis that Bork sought to advance was that courts should interpret the antitrust laws to protect economic efficiency and to benefit consumers and not to advance other objectives, such as protecting small business, limiting corporate size, or maintaining even inefficient competitors in order to increase rivalry. The persuasive power of that thesis does not turn on whether or not one subscribes to Bork's smaller point about wealth transfers.

Bork's critics often seem to miss the forest for all of the trees. Bork's big move—his rejection of alternatives to efficiency or consumer welfare-oriented theories of antitrust enforcement—was the headline of *The Antitrust Paradox*. His assertions from legislative history and concerning wealth transfers were relatively small and expendable elements of his wider argument.

#### IV. ENDURING LEGACY

Bork's argument for a single-minded consumer welfare objective had a swift and powerful effect. The maxim that "Congress designed the Sherman Act as a 'consumer welfare prescription,'" attributed to Bork in *Reiter* a year after the publication of *The Antitrust Paradox*,<sup>63</sup> has subsequently been quoted 29 times in federal antitrust decisions.<sup>64</sup> The more general idea that the anti-

---

<sup>61</sup> *But see* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 216 (1st ed. 1972) (arguing that there is no "theoretical basis for the conclusion that . . . a transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's utilities").

<sup>62</sup> BORK, *supra* note 1, at 110.

<sup>63</sup> *Supra* text accompanying note 2.

<sup>64</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 486 U.S. 85, 107 (1984); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 367 (1982) (Powell, J., dissenting); *Jacobs v. Tempur-Pedic Int'l*, 626 F.3d 1327, 1339 (11th Cir. 2010); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1136–37 (9th Cir. 2004); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1054 (D.C. Cir. 1995); *Town of Concord v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990); *USA Petroleum Co. v. Atl. Richfield Co.*, 859 F.2d 687, 703 (9th Cir. 1988) (Alarcon, J., dissenting); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *Westman Comm'n Co. v. Hobart Int'l*, 796 F.2d 1216, 1220 (10th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 230 (D.C. Cir. 1986) (Wald, J., concurring); *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 521 (9th Cir. 1984); *Marrase v. Interqual, Inc.*, 748 F.2d 373, 387 (7th Cir. 1984); *Indiana Fed'n of Dentists v. FTC*,

trust laws exist to advance consumer welfare has been acknowledged scores of times.<sup>65</sup> But for all of the disputation in the academic literature about consumer welfare versus allocative efficiency or total welfare, that aspect of Bork's work has proven unimportant to the continuing development of antitrust law thus far.

#### A. THE NARROW QUESTION: CONSUMERS OR EFFICIENCY?

For all of the debate in the academic literature over whether antitrust law should advance a consumer welfare or allocative efficiency objective, that issue has received little play in judicial decisions, confirming Bork's argument that the distinction is unimportant in most antitrust cases. Indeed, the distinction is rarely acknowledged. A few courts, most notably the Ninth Circuit, have explicitly tied consumer welfare to allocative efficiency. Beginning in *Rebel Oil*, and repeated several more times, the Ninth Circuit held that "allocative efficiency is synonymous with consumer welfare" and that "[c]onsumer welfare is maximized when economic resources are allocated to their best use, and when consumers are assured competitive price and quality."<sup>66</sup> Similarly, the Eleventh Circuit has relied on Bork in holding that "consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act."<sup>67</sup> But in none of the cases in which courts conflated consumer welfare and allocative efficiency has the possible distinction between the two mattered. Courts have not rejected antitrust claims that showed that diminished competition created wealth transfers but not output reductions.

The distinction between wealth transfers and deadweight losses comes closest to being an issue when courts have expressed a concern about condemning certain tying arrangements that might increase output through price discrimination. A notable example is Justice O'Connor's concurring opinion in *Jefferson Parish*, which relies on Bork for the proposition that price discrimination

---

745 F.2d 1124, 1140 (7th Cir. 1984); *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 520 (7th Cir. 1982); *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 482 n.92 (S.D.N.Y. 2012); *United States v. VandeBrake*, 771 F. Supp. 2d 961, 1001 (N.D. Iowa 2011); *United States v. UPM-Kymmene Oyj*, 2003 WL 21781902, \*12 (N.D. Ill. 2003); *In re Terazosin Hydrochloride Antitrust Litig.*, 164 F. Supp. 2d 1340, 1348 (S.D. Fla. 2000); *J. Allen Ramey, M.D., Inc. v. Pac. Found. for Med. Care*, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); *Coast Cities Truck Sales v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 761 (D.N.J. 1995); *Chicago Prof'l Sports P'ship v. Nat'l Basketball Ass'n*, 874 F. Supp. 844, 861 (N.D. Ill. 1995); *Irvin Indus. v. Goodyear Aerospace Corp.*, 803 F. Supp. 951, 956 (S.D.N.Y. 1992); *Kerasotes Mich. Theaters v. Nat'l Amusements, Inc.*, 658 F. Supp. 1514, 1520 n.17 (E.D. Mich. 1987); *Machovec v. Council for Nat'l Register of Health Serv. Providers in Psychol.*, 616 F. Supp. 258, 270 (D.C. Va. 1985).

<sup>65</sup> See, e.g., *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (noting the antitrust laws' "traditional concern for consumer welfare and price competition").

<sup>66</sup> *Rebel Oil*, 51 F.3d at 1433; accord *MetroNet*, 383 F.3d at 1136.

<sup>67</sup> *Jacobs*, 626 F.3d at 1339.

may “*decrease* rather than increase the economic costs of a seller’s market power.”<sup>68</sup> But even that statement does not approach an endorsement of the view that antitrust law should disregard wealth transfers. Even the most ardent supporters of a pure “consumer welfare” objective agree that output reductions diminish consumer welfare and that actions that increase output generally benefit consumers. Bork’s dismissal of wealth transfers would come into play if a court insisted that *only* output reductions counted—a position that one does not see at issue in litigated cases.

From the perspective of litigated cases, criticisms of Bork’s distinction between wealth transfers and output reductions seem largely contrived. Consider, for example, Judge Wald’s concurring opinion in *Rothery Storage*, a decision written by Bork himself.<sup>69</sup> In *Rothery*, a group of moving company agents challenged Atlas Van Lines’ exclusive dealing agreements, which prohibited independent moving companies aligned with Atlas from working for other carriers.<sup>70</sup> Bork’s opinion rejected the antitrust challenge, largely because Atlas, with a 6 percent market share, had no market power.<sup>71</sup>

In her concurring opinion, Judge Wald distanced herself from the majority’s implicit assumption that “the *only* legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices.”<sup>72</sup> Attributing that view to *The Antitrust Paradox* as well as to Richard Posner’s *Antitrust Law: An Economic Perspective*, Wald noted that the Supreme Court had not so narrowed the purposes of antitrust law and that other commentators had argued for objectives other than economic efficiency.<sup>73</sup> She cited three authorities—Bob Pitofsky, Louis Schwartz, and Bob Lande—for the proposition that non-efficiency considerations should be considered as well.<sup>74</sup> The allusion to Lande’s well-known article arguing that wealth transfers should count hardly advanced Wald’s position, because wealth transfers are a product of the “rise in prices” that, per Wald, the majority opinion recognized as covered by the antitrust laws. Pitofsky’s and Schwartz’s articles argued for consideration of “political” objectives, but Wald did not suggest how any such political consideration should have been weighed against the majority’s finding that, lacking market power, Atlas’s restrictive contracts did not harm con-

---

<sup>68</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36 n.4 (1984) (O’Connor, J., concurring) (emphasis added).

<sup>69</sup> *Rothery Storage & Van Co. v. Atlas Van Lines.*, 792 F.2d 210 (D.C. Cir. 1986).

<sup>70</sup> *Id.* at 211.

<sup>71</sup> *Id.* at 217.

<sup>72</sup> *Id.* at 230 (Wald, J., concurring).

<sup>73</sup> *Id.* at 230 n.1.

<sup>74</sup> *Rothery Storage & Van Co. v. Atlas Van Lines.*, 792 F.2d 210, 230 n.2 (D.C. Cir. 1986) (citing Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979); Lande, *Wealth Transfers*, *supra* note 3, at 68).



sumers. As with many criticisms of Bork, the concurring opinion seems to fight an illusory battle.

The second major criticism of Bork—that he conflated consumer welfare and allocative efficiency—has proven immaterial to the development of antitrust law. Considerably more important is a different distinction—that between productive efficiency and allocative efficiency. Here, the story in the past three decades has by and large been a victory for allocative efficiency. The triumph of the consumerist version shows up most clearly in the Horizontal Merger Guidelines, which require that any cognizable efficiencies—those considered in offsetting the potential anticompetitive effects of a merger—be passed on to consumers.<sup>75</sup> Judicial opinions have generally supported the Guidelines' position that efficiencies only be balanced against anticompetitive effects if they are likely to be passed on to consumers.<sup>76</sup>

It is important to note, however, that the rejection of a total welfare standard does not entail a rejection of Robert Bork, since Bork did not argue that antitrust law should pursue a total welfare standard. Indeed, contrary to frequent claims,<sup>77</sup> Bork did not argue directly for a total welfare model. To be sure, Bork argued that antitrust law should be sympathetic to productive efficiency which was essential to the creation of consumer welfare.<sup>78</sup> But Bork rejected Oliver Williamson's argument that antitrust law should explicitly balance productive efficiency versus allocative efficiency in cases where the two were arguably in conflict, for example by permitting the assertion of an efficiencies defense in horizontal merger cases.<sup>79</sup> Bork found it analytically impossible to gauge efficiencies on a case-by-case basis, and hence argued that courts should not try to do it.<sup>80</sup> Instead, Bork argued that the courts and agencies could enhance productive efficiency simply by recognizing that many of the competitive bogeymen feared by antitrust authorities of earlier generations

---

<sup>75</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), available at [www.justice.gov/atr/public/guidelines/hmg-2010.html](http://www.justice.gov/atr/public/guidelines/hmg-2010.html).

<sup>76</sup> See *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088–91 (D.D.C. 1997) (rejecting efficiencies defense in part because historically Staples had passed on only 15–17% of its cost savings to consumers).

<sup>77</sup> Many commentators argue that Bork argued for a total welfare standard. See, e.g., Kirkwood, *supra* note 5, at 2436; Stucke, *supra* note 5, at 2603 n.171; Michael C. Dorf, *Spandrel or Frankenstein's Monster? The Vices and Virtues of Retrofitting American Law*, 54 WM. & MARY L. REV. 339, 355 n.82 (2012).

<sup>78</sup> BORK, *supra* note 1, at 104 (arguing that “antitrust policy cannot be rational unless productive efficiency is understood and weighed in the law’s processes” and that producer efficiency is necessary to consumer welfare).

<sup>79</sup> *Id.* at 117–29.

<sup>80</sup> *Id.*

enhanced productive efficiency without threatening allocative efficiency.<sup>81</sup> To the extent that Bork recognized any need to balance productive and allocative efficiency, it would arise in a limited set of horizontal merger cases and the solution would be to frame the prohibitory rules to capture the appropriate balance.<sup>82</sup> This solution, which has also been proposed by some of Bork's sharpest critics,<sup>83</sup> has been effectively implemented in the Merger Guidelines' presumptions.<sup>84</sup>

The narrow point on which Bork is sharply criticized—the conflation of consumer welfare and allocative efficiency—is a dud. It matters relatively little in most cases. The wider point on which Bork is criticized—the suggestion that courts should weigh the competing interests of consumer welfare and productive efficiency—is an argument that Bork actually rejected.

#### B. THE BROADER QUESTION: EFFICIENCY AND ITS ALTERNATIVES

Bork's lasting influence on the purposes of antitrust law has not been felt on the comparatively narrow questions of whether only allocative efficiency or also wealth transfers and productive efficiency should count in the antitrust calculus. It has been felt on the broader question of whether antitrust law should serve primarily or exclusively to police practices involving the exercise of market power to diminish market competitiveness or should also take into account amorphous concerns with fairness, small business independence, and deconcentration for its own sake. Although he was by no means the only champion of narrowing antitrust's goals to an economic core, Bork, along with Richard Posner, led the way toward an economic-centered antitrust jurisprudence.<sup>85</sup> As Judge Douglas Ginsburg has put it, "The Court's initial embrace of the economic approach to antitrust followed directly from the scholarly work of Judge Robert Bork."<sup>86</sup>

Bork was of course not the first to suggest that antitrust law should pursue purely economic objectives. As Herbert Hovenkamp has noted, antitrust law

---

<sup>81</sup> *Id.* at 128 ("We can avoid [Williamson's tradeoff] because price theory tells us that many practices the law now views as dangerous do not contain any potential for restriction of output. In such cases there is no trade-off problem.").

<sup>82</sup> *Id.* ("The trade-off problem arises primarily in the context of horizontal mergers, and there we can take it into account by framing rules about allowable percentages that reflect the probable balance of efficiency and restriction of output.").

<sup>83</sup> Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582 (1983) (arguing for implicit incorporation of efficiencies defense in setting concentration threshold presumptions).

<sup>84</sup> Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 365–66 (2011).

<sup>85</sup> See Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217 (2010).

<sup>86</sup> *Id.* at 223.

has always pursued *some* economic theory.<sup>87</sup> Bork also was not the first to suggest that antitrust law should promote competition for the sake of society at large and not to protect individual competitors from rough play in the market. The maxim that antitrust law protects “competition, not competitors” appeared in *Brown Shoe*<sup>88</sup> in 1962 and was repeated in pre-Chicago School classics like *Philadelphia National Bank*<sup>89</sup> and Justice Stewart’s dissent in *Von’s Grocery*.<sup>90</sup> But Bork made a tremendously important contribution by crystallizing antitrust law as the application of objective economic analysis to advance a cluster of efficiency interests centered on the consumer. Bork sought to demystify the aspects of antitrust jurisprudence that opposed bigness, concentration, and economic power without linking those qualities to demonstrable economic harms to concrete interests.<sup>91</sup> For jurists writing in Bork’s tradition, antitrust law was reduced to the application of economic theory to advance efficiency and consumer welfare.

Bork’s critics tend to conflate his insistence on an objective economic approach with the content of the particular economic theory that he and his Chicago School colleagues advanced—namely, neo-classical price theory and the rational actor utility maximization framework. That is unfortunate. One can accept Bork’s claim on antitrust’s goals without fully accepting the economic theories Bork applied in later chapters of *The Antitrust Paradox*. One can believe, for example, that antitrust law should promote consumer welfare exclusively, but reject Bork’s contentions that predatory pricing, vertical integration, and tying arrangements never or almost never reduce consumer welfare. Advances in game theory, behavioral economics, or empirical learning may undermine Bork’s claims about consumer behavior and firm responses without touching his central premise on antitrust’s goals.

---

<sup>87</sup> HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW* 268 (1991) (“One of the great myths about American antitrust policy is that courts began to adopt an ‘economic approach’ to antitrust problems only in the 1970’s. At most, this ‘revolution’ in antitrust policy represented a change in economic models. Antitrust policy has been forged by economic ideology since its inception.”); see also Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 226 (1995) (“In almost every era of antitrust history, policymakers have employed economic models to explain or modify the state of the law and the rationale for its enforcement.”).

<sup>88</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

<sup>89</sup> *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 367 n.43 (1963).

<sup>90</sup> *United States v. Von’s Grocery Co.*, 384 U.S. 270, 282 n.2 (1966).

<sup>91</sup> A particular target of Bork’s was Learned Hand’s statement in *Alcoa* that “great industrial consolidations are inherently undesirable, regardless of their economic results.” *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (emphasis added). See Bork, *Legislative Intent*, *supra* note 14, at 8 (critiquing *Alcoa*). Other opinions that Bork criticized as failing to follow a consumer welfare opinion included *Board of Trade v. United States*, 246 U.S. 231 (1918); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); and *Fashion Originators’ Guild of America v. FTC*, 312 U.S. 457 (1941). See Bork, *Legislative Intent*, *supra*, at 8 n.4.

Thirty-five years after the publication of *The Antitrust Paradox*, Bork's understanding of economics is surely due for some updating. His claims about antitrust's goals, however, are not the sorts of contentions that are easily eroded by subsequent economic learning. Despite the fuzziness around the meaning of "consumer welfare," Bork's arguments about antitrust's goals have had a profound and enduring influence.

#### V. CONCLUSION

Robert Bork's argument that antitrust law should promote consumer welfare and economic efficiency exclusively has generated intense criticism. But it has also proven enormously successful, contributing to the transformation of antitrust law from an often scattered, incoherent, and contradictory set of policy objectives to a disciplined and focused enterprise. The most frequent and severe criticisms of Bork—that he abused the Sherman Act's legislative history and deceptively conflated consumer welfare and efficiency—merit less play than they usually receive. Bork's argument was founded on a wider set of statutory construction tools than legislative history, and his conflation of consumer welfare and efficiency was both more clearly explained and less consequential than asserted by his critics. The core of Bork's argument—that antitrust law should discard objectives other than the promotion of competition leading to superior market performance—has weathered the critics and stood the test of time.