ANTITRUST MADE (TOO) SIMPLE

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Robert Bork fundamentally changed the field of antitrust law with the publication of his book *The Antitrust Paradox* in 1978. The book’s primary themes were that antitrust doctrine should be concerned only with economic efficiency (which Bork termed “consumer welfare”) and that antitrust law had come untethered from efficiency. Bork championed per se legality for a variety of conduct, including resale price maintenance, non-price vertical restraints, and tying arrangements. He advocated greater latitude for horizontal mergers and complete immunity for all vertical and conglomerate mergers.

Now several decades old, Robert Bork’s *The Antitrust Paradox* continues to be among the most influential scholarship in antitrust law. Opinions differ as to the basis for Bork’s influence. Those who agree with Bork’s description of antitrust law and his prescriptions on antitrust policy would no doubt argue that it has been influential because Bork is correct on the merits. Some critics have suggested that the book’s influence stems from its circular reasoning, “which is its strength because circular logic is not rebuttable.” This essay posits an alternative explanation for Bork’s influence: even though Bork was

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3 Another reason that *The Antitrust Paradox* has been so influential is that Bork had the ability to implement the ideas espoused in his book as a federal judge for the D.C. Circuit.

4 PERITZ, supra note 2, at 244 (stating that Bork “begins with the assumption that consumers maximize their welfare and ends with the conclusion that what is chosen [by consumers] maximizes ‘consumer welfare.’”).

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largely wrong in his description and analysis of antitrust doctrine, he is influential because his explanations of complex economic phenomena were so simple.

This essay examines four issues related to the simplicity of Bork’s approach to antitrust law. First, it shows how Bork oversimplified the legal landscape of antitrust law, which he then used as a foil. Second, it discusses how Bork made sweeping claims based on weak evidence, oversimplified assumptions, and logical fallacies. Third, it hypothesizes why Bork’s views have been so persuasive to judges. And, fourth, it condemns Bork’s ultimate legacy—his attempt to thwart the evolution of antitrust economics beyond his basic model where all markets are efficient and antitrust law is unnecessary. The essay concludes that the greatest strength of Bork’s scholarship—its simplicity—is also, ultimately, its greatest weakness.

I. OVERSIMPLIFICATION OF THE LEGAL LANDSCAPE

Bork began his critique of antitrust law with the premise that antitrust doctrine was out of control, condemning all manner of business decisions indiscriminately. To make this claim, Bork exaggerated the landscape of antitrust law, trying to make it appear more overreaching than it actually was in 1978. For example, Bork asserted that “vertical mergers are today all but completely illegal, on the theory that the manufacturer who acquires a retailer also acquires the ability to shut rival manufacturers out of that segment of the market.”

Bork cites no statistics for his claims because he could not. Far from being “all but completely illegal,” vertical mergers were common in the years before the publication of *The Antitrust Paradox*.

In another example of misrepresenting the state of the law, Bork suggested that requirements contracts were treated as “inherently exclusionary” and were consequently “dealt with severely.” Through this language, Bork implied that requirements contracts fall perilously close to per se illegality. Yet requirements contracts were not considered presumptively illegal despite

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5 Bork, *supra* note 1, at 137; see also id. at 225 (“With the passage of the 1950 amendment to Section 7 of the Clayton Act and the subsequent draconian judicial interpretations, vertical mergers became, if not illegal per se, almost impossible to defend against government challenge.”).


7 Bork, *supra* note 1, at 137.

8 See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333 (1961) (“It may well be that in the context of antitrust legislation protracted requirements contracts are suspect, but they have not been declared illegal per se.”).
Bork’s attempt to so insinuate. Again, Bork tried to make antitrust law seem more draconian. The reason? These misrepresentations would provide support for Bork’s call to radically gut antitrust law.

Part of the explanation for Bork’s mischaracterization of the state of antitrust law may lie in the delay between the book’s conception and its realization. Bork drafted his book in the late 1960s, but did not actually publish it for almost a decade. At the time that Bork began writing his book, the per se rule was ubiquitous and merger law was extremely pro-government. But much had changed in the ensuing decade. Because these changes undermined the premise of his book, Bork downplayed them. For example, Bork invoked *Schwinn* to prove that antitrust has run amok. But the Supreme Court in *Sylvania* had explicitly reversed *Schwinn* before Bork published *The Antitrust Paradox*. Bork’s persistent attacks on *Schwinn* smack of scalping tickets to a concert that happened years ago.

*Sylvania* was not an isolated case. By the time that Bork actually published *The Antitrust Paradox*, antitrust law and the relationship between the antitrust agencies and business interests had already begun to change. As Bill Kovacic has noted:

In important respects, the antitrust environment Bork described in *The Antitrust Paradox* fit 1969 more closely than it did 1978. The stark portrayals of a deconcentration-minded Congress, an economically backward Supreme Court, unconstrained government enforcement agencies, and a lethargic, overmatched business community would have been more convincing had the book appeared five years earlier. Measured against Bork’s ideal vision of antitrust policy, the world was less dismal, and its outlook less discouraging, than *The Antitrust Paradox* indicated.

This illustrates the problem of publishing a book ten years after conception. Bork’s thesis was that antitrust is out of control and must be reined in, but it had been reined in before he published the book in 1978.

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9 See, e.g., United States v. Von’s Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“The sole consistency that I can find is that in litigation under § 7, the Government always wins.”).


13 Even though *Sylvania* reversed *Schwinn*, Bork nonetheless criticized the *Sylvania* opinion for not creating absolute judicial immunity for vertical restraints, characterizing Justice Powell’s adoption of the rule of reason “either as unfortunate wafflings or as judicious concessions necessary either to put together a majority or to guard against unforeseen situations.” Bork, supra note 1, at 287. Ultimately, Bork praised *Sylvania* as “surely one of the best in the modern career of antitrust.” Id.

14 Kovacic, supra note 2, at 1431.

15 Id. at 1436.
These mischaracterizations were not merely a function of Bork’s delay in completing the first edition of his book. Bork reissued *The Antitrust Paradox* in 1993 with a new introduction and epilogue. The new edition maintained the same misrepresentations of the state of antitrust law—for example, continuing to maintain that vertical mergers were practically impossible notwithstanding that the government had essentially stopped challenging them more than a decade earlier. But the reissued book also mischaracterized additional aspects of antitrust law. In the 1993 epilogue, for example, Bork misrepresented the state of monopolization doctrine by asserting—without any evidence, examples, or citation—that it was unclear whether “sheer size or market share [was] enough to confer illegality.” No confusion existed on this issue: In its 1966 *Grinnell* opinion, the Supreme Court explicitly held that illegal monopolization requires exclusionary conduct, not simply monopoly power.

In sum, Bork consistently described the law as harsher than it was so that he could denigrate it and argue for rolling it back even more.

II. OVERSIMPLIFICATION OF ECONOMICS, BUSINESS BEHAVIOR, AND LEGISLATIVE HISTORY

The core of Bork’s oversimplification comes in his approach to economics. Bork took a simple view of economics that was no more sophisticated than “basic economic theory” involving economic models that “are simple and require no previous acquaintance with economics to be comprehended.” Unfortunately, as any economics graduate student knows, “basic economic theory” rarely accurately describes how real markets operate. Real markets are far more complex than the basic models presented in an introductory economics course.

Bork presented an unnuanced view of economics without any shades of gray, where economic issues are black-and-white and probabilities were replaced by “always” and “never.” A search on Google Books shows that over 50 pages of *The Antitrust Paradox* contain the word “always” and another 50-plus pages include the word “never.” These unqualified descriptions of market forces lead to equally unqualified antitrust prescriptions. For example,

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16 See Calkins, supra note 10.
17 Bork, supra note 1, at 431.
19 Bork, supra note 1, at 90.
20 These numbers are anecdotal because a Google Books search excludes many pages of the book. The 50-plus figure for “always” does not include Bork’s use of the phrase “not always.” In contrast, a Google Books search of Richard Posner’s *Antitrust Law* (2d ed. 2001) reveals 15 uses of “always” (excluding references to “not always”). Again, this comparison cannot present the full picture because the whole text is not available on Google Books. But it still gives a sense of relative usage of these absolute terms.
Bork asserted that “any size achieved by internal growth without predation is the most efficient size for that firm. This, in turn, leads to the conclusion that the dissolution of any such firm will always create an efficiency loss.”

Drawing a policy prescription from his sweeping assertions, Bork asserted that “[t]his means that efficiency-based monopolies are always better for consumers than any alternative antitrust can produce.” This statement is particularly important when read in conjunction with Bork’s strong bias towards finding monopolies to be efficiency-based, which means that almost all monopolies “are always better for consumers” than antitrust enforcement.

The flipside of Bork’s “always” assertions are his “never” assertions. For example, he concluded that “vertical price fixing can never restrict output and should never be illegal.” Similarly, with respect to mergers, he declared that “antitrust should never interfere with any conglomerate merger.” Bork eschewed the need to actually look at any evidence to support his absolute policy claim: “There is no need here to review the evidence of the relation between conglomerate mergers and efficiency.” More broadly, and under unproven assumptions he makes about how markets operate, Bork asserted that “there is never a case for restructuring the market.”

Along the way in making his sweeping generalizations and policy prescriptions, Bork committed several fundamental errors.

### A. Weak Evidence

For many of his pronouncements, Bork provided no evidence whatsoever. For example, Bork asserted that horizontal mergers that leave only three firms in a market should be perfectly legal. But he provided no data or empirical evidence to support this claim. Instead, he created the illusion of precision by

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21 Bork, supra note 1, at 194. From this assertion, Bork argued that it is “wrong” to “think[ ] that dissolution can restructure oligopolistic industries without significant losses in efficiency.” Id. Bork made the leap from asserting that inefficiency will “always” be created to asserting that this inefficiency will be “significant.” Furthermore, Bork, here, does not meaningfully address the trade-offs between the two types of efficiency—productive efficiency and allocative efficiency. Even if some monopolies can enhance productive efficiency, monopolies reduce allocative efficiency when they reduce output to maximize profit.

22 See infra notes 87–88 and accompanying text.

24 See also Bork, supra note 1, at 196 (“In fact, it looks very much as though there is a high probability, amounting in fact to a virtual certainty, that dissolving any oligopolistic firm that grew to its present size would inflict a serious welfare loss.”).

25 Id. at 272.

26 Id. at 248; see also id. at 245 (“[I]n the absence of a most unlikely proved predatory power and purpose, antitrust should never object to the verticality of any merger.”).

27 Id. at 249.

28 Id. at 195.

29 Id. at 221.
providing specific numbers, as if they were the product of actual economic modeling or case studies. For example, in espousing his proposed test for condemning concerted boycotts, Bork asserted that “the boycotting group would have to control 80 or 90 percent of the market to have any chance of success . . . .”\footnote{id. at 335 (He also noted that “the losses the group accepts as well as inflicts through disruption of the distribution pattern must not only be substantial but must be proportionally larger for the victim than for the group if the victim’s reserves are to be exhausted before the group begins to suffer defections. These preconditions for successful predation by naked boycott seem very unlikely to exist.”).}
The source of these market shares? Bork himself: no data, no field work. Ironically, Bork disparaged others for not appreciating “the complexities of antitrust.”\footnote{id. at 5.}
He criticized other theories as speculative and not supported by evidence, but he often failed to satisfy his own criteria.\footnote{See id. at 179–80 (“Oligopoly theory, however, is much more speculative. It really says very little more than that if a few sellers who occupy most of a market were able to act in concert, without collusion, they would be able to achieve results in rate of output and prices very much like those a monopolist could achieve under the same cost and demand conditions. That statement is less a theory than a tautology. It says only that if sellers can behave that way, they can behave that way. But the theory itself does not tell us \textit{whether} they can or do, and those are the things we need to know.”). He minimized the data that supports alternative viewpoints. \textit{Id.} at 181. For example, he asserted that oligopolies do not reduce output significantly compared to competitive markets. \textit{Id.}}

Instead of evidence, Bork often relied on hyperbole. He condemned enforcement of then-current antitrust doctrine as “a national disaster”\footnote{id. at 200.} and accused the Supreme Court of “adopt[ing] a series of demonstrably erroneous ideas which, if uniformly and logically applied, are capable of making all mergers illegal . . . .”\footnote{Bork, \textit{supra} note 1, at 135.} He attacked antitrust scholars who use second-best analysis to adopt efficiency-based rules that are more situation specific as ad-

\footnote{Id. at 52, but neglected to mention many of the predatory moves that Alcoa had committed to achieve its monopoly position. Economist William H. Collins noted that Bork’s “reader would be given a more balanced picture concerning predation if Bork had brought out other practices of Alcoa, like its preemptive acquisition of hydroelectric generator sites and bauxite deposits, power purchase contracts which excluded power sales to other aluminum producers, and purchase of property which competitors were planning to develop.” William H. Collins, \textit{The Antitrust Paradox}, 45 S. Econ. J. 1309, 1310 (1979) (book review). By presenting only part of the picture, Bork converted a monopolist into a victim. Whether or not the government should have prevailed—and I have my doubts—Alcoa’s conduct was more complex than Bork suggested.}
vocating an approach that “is little short of preposterous.” 35 This label is relatively low on Bork’s hyperbolic scale; he referred to the FTC’s theory of reciprocal foreclosure as “a new high in preposterousness.” 36 But Bork was at his hyperbolic peak when he asserted that “[a] determined attempt to remake the American economy into a replica of the textbook model of competition would have roughly the same effect on national wealth as several dozen strategically placed nuclear explosions.” 37 This, despite his unqualified embrace of this same “textbook model of competition” as the basis for all antitrust analysis.

When confronted with evidence that disproved or undermined his assertions, Bork generally ignored or dismissed the contradictory evidence. This is illustrated by Bork’s view of the legislative history behind the Sherman Act. Bork asserted “antitrust policy, as expressed in our present statutes, cannot properly be guided by any goal other than consumer welfare,” 38 which he defined as efficiency. 39 Bork asserted that there was “not a scintilla of support” in the Sherman Act’s legislative history for “broad social, political, and ethical mandates.” 40 Consequently, “in Bork’s view, all other suggested goals, such as achieving a politically attractive distribution of economic power, ensuring the survival of small businesses, or preventing the transfer of consumer surplus from consumers to producers, must be ignored.” 41 Bork persuaded his Chicago School compatriots, such as Richard Posner, who cited Bork for the proposition that “[t]he framers of the Sherman Act appear to have been concerned mainly with the price and output consequences of monopolies and cartels . . . .” 42

Bork’s thesis prompted scholars to revisit the legislative history of the Sherman Act, and they found his work deficient. Professor Robert Lande famously dismantled Bork’s proffered legislative history of the Sherman Act. 43 Lande researched the entire legislative record and discovered a significantly more complicated story of the legislative intent behind the first federal antitrust law. Lande concluded that “[g]iven the state of economic theory at that time, the assertion that the legislators supporting the Sherman Act were influenced by considerations involving allocative efficiency is without credibil-

35 Id. at 114.
36 Id. at 231.
37 Id. at 92.
38 Id. at 9.
39 Id. at 91.
41 Kovacic, supra note 2, at 1438.
Arbitrating the dispute between Bork and Lande, Professor Herbert Hovenkamp reviewed the opposing evidence and found Bork’s position wanting. Hovenkamp explained:

Bork’s analysis of the legislative history was strained, heavily governed by his own ideological agenda. He concluded all too quickly that because some members of Congress knew that demand curves slope downward (i.e., that output is reduced as prices rise), that they also had a modern conception of allocative efficiency and the social cost of monopoly. Not a single statement in the legislative history comes close to stating the conclusions that Bork drew.

A clear consensus exists among economic historians and legal scholars that Bork misconstrued the legislative history of the Sherman Act. These critiques have rested upon a reexamination of the legislative history of the antitrust statutes and extensive analysis of the economic, political, and jurisprudential environment that shaped the thinking of Congress in the formative era of the federal antitrust system. Collectively, these works demonstrate that Congress conceived the antitrust system to embrace objectives reaching well beyond attainment of productive and allocative efficiency.

Indeed, Senator Sherman himself condemned efficient combinations that reduced costs but pocketed all the gains for themselves.

After Bork’s misrepresentation of the legislative history of the Sherman Act was exposed, he reprised it in his new epilogue to The Antitrust Paradox. First, Bork denied that he said that Congress articulated consumer welfare as

\[\text{Id. at 89.}\]

\[\text{Herbert Hovenkamp, Antitrust’s Protected Classes, 88 Mich. L. Rev. 1, 24 (1989) (observing, in “the dispute between Bork and Lande—Lande clearly appears to have the better supported argument”).}\]

\[\text{Id. at 22.}\]


\[\text{Kovacic, supra note 2, at 1462.}\]

\[\text{Hovenkamp, supra note 45, at 24 (quoting 21 Cong. Rec. 2460 (1890)); see also MCI Commc’ns Corp. v. AT&T Co., 708 F.2d 1081, 1178 (7th Cir. 1983) (Wood, J., concurring in part and dissenting in part) (quoting Senator Sherman to show concern for non-efficiency goals).}\]
the exclusive or dominant concern of antitrust law.\textsuperscript{50} This, despite the fact that in his seminal law review on the subject, Bork wrote: “My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value that we would today call consumer welfare.”\textsuperscript{51} Second, Bork then defended the position that he simultaneously denied making.\textsuperscript{52}

In addition to ignoring the relevant historical record—while making sweeping claims—Bork also ignored the relevant scholarly literature while claiming its nonexistence. For example, Bork argued that tying arrangements should be per se legal because “the entire theory of tying arrangements as menaces to competition is completely irrational in any case.”\textsuperscript{53} Without referencing any literature review, Bork asserted “there is no viable theory of a means by which tying arrangements injure competition.”\textsuperscript{54} The absence of such theory, according to Bork, required per se legality for tying arrangements.\textsuperscript{55} Bork’s work on tying has proved influential,\textsuperscript{56} albeit without yet succeeding in making tie-ins immune from antitrust liability.\textsuperscript{57}

Despite Bork’s claim that tying cannot injure competition, tying arrangements can leverage a monopoly in the market for the tying product into the market for the tied product in a manner that increases the tying monopolist’s profit if there are purchasers of the tied product who do not use the tying product. If the tying seller can use a tying arrangement to force enough buyers of the tied product (those who use the tied product in conjunction with the tying product), then the tying strategy could force other sellers of the tied product below their minimum efficient scale such that they cannot effectively

\textsuperscript{50} Bork, supra note 1, at 427 (“Thus, it is frequently argued that my reading of the congressional debates is incorrect because Congress did not articulate an exclusive or even dominant concern with the welfare of consumers. But that response rebuts an argument I did not make.”).

\textsuperscript{51} Bork, supra note 40, at 7.

\textsuperscript{52} Bork, supra note 1, at 428 (1993 epilogue).

\textsuperscript{53} Id. at 368.

\textsuperscript{54} Id. at 372.

\textsuperscript{55} Id. at 380–81 (“In our present state of knowledge, this means the law would accept the legality of all tying arrangements and all reciprocal dealing. The reason is that we have no acceptable theory of harm done by these phenomena, but a number of plausible theories of the good they may do.”).

\textsuperscript{56} See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 (1984) (O’Connor, J., concurring) (“The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the tying product. . . . Counterintuitive though that assertion may seem, it is easily demonstrated and widely accepted.”) (citing Robert Bork, The Antitrust Paradox 372–74 (1978); Phillip Areeda, Antitrust Analysis 735 (3d ed. 1981)); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1345 n.2 (9th Cir. 1987) (“Thoughtful antitrust scholars have expressed serious doubts about the alleged anticompetitive effects of tie-ins.”); Kovacic, supra note 2, at 1459 (concluding that “Bork’s greatest impact in the vertical restraints field has been in the area of tying arrangements”).

compete against the tying seller in the market for the tied product. This would enable the tying seller to monopolize the market for the tied product and extract monopoly profits from those purchasers of the tied product who do not purchase the tying product.

Economists and antitrust scholars have shown how a tying arrangement can expand a monopolist’s power and increase monopoly profits. Years before Bork reissued *The Antitrust Paradox* with its new epilogue, economist Michael D. Whinston formally demonstrated how tying can be anticompetitive through its exclusionary foreclosure effects. This was not an abstract or hard-to-find piece of scholarship. Whinston’s work on tying received a great deal of attention in both the economic and antitrust law communities. Yet, in 1993, Bork continued to assert that no viable theory existed to explain the anticompetitive effects of tying arrangements. Such a theory did exist. Bork simply ignored it.

B. SIMPLE ASSUMPTIONS

Bork based many of his assertions about market efficiency on unsupported assumptions. For example, Bork assumed that market entry is easy and that markets are not complex. In some instances, Bork assumed that some forms of predation do not happen. At base, however, Bork’s fundamental assumption was that markets always behave efficiently. This section challenges all of these assumptions.

Bork assumed that market entry is always unproblematic. Bork proclaimed that there is no such thing as an artificial barrier to entry, only efficiency, asserting that “it [is] clear that no such class of artificial barriers exists.” This false premise led Bork to conclude that monopolies must be efficient because “that size will not last if it does not rest on superior efficiency. Moreover, any attempt to restrict output and raise prices by such a firm will merely hasten its decline.” Bork overlooked the fact that predatory and exclusionary conduct may allow a monopolist to raise price while shielding itself from new rivals that could price discipline the monopolist.

Bork’s assumption of easy entry extends to dual-market entry as well. Tying arrangements, vertical integration, and monopoly leveraging can be anticompetitive if they compel a would-be challenger to enter two markets

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59 *Bork*, supra note 1, at 372.
60 Id. at 195.
61 Id. at 432.
simultaneously instead of just one market. While most scholars would see this forced dual-entry as a barrier to entry, Bork casually avowed (in the context of vertical markets) that “the prospective entrant in manufacturing should have no difficulty in finding someone else to enter distribution.” It is naïve to assert that a manufacturer should have “no difficulty” in finding a distributor that is willing to devote its resources to an entrant taking on an entrenched monopolist. As with his other sweeping assertions, Bork provided no data or even examples to support his claims of easy dual-entry.

Despite his lack of evidence, courts have followed Bork’s teaching on easy entry. For example, in permitting a merger resulting in a 48.8 percent combined market share, the Second Circuit relied on Bork for the proposition that “entry into the relevant product and geographic market by new firms or by existing firms . . . is so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation.” The court’s claim that entry is faster than an antitrust solution is peculiar because the court could have immediately prevented “any anti-competitive impact of the merger” by enjoining the merger or requiring divestitures. Instead, the court followed Bork’s siren song of easy entry.

Bork also assumed easy access to capital for upstarts. Bork advocated a simple model of economics whereby antitrust should not care about capital requirements because “[c]apital suppliers take risks when the stakes are high.” But when the risks are high, the terms of access to capital are more burdensome. Basic microeconomic theory tells us this. So the upstart would not have equal access to capital as the monopolist and, by definition, the playing field will not be level. Nonetheless, Bork asserted—without evidence or any citation—that monopolists cannot increase the capital costs of entrants.

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63 Bork, supra note 1, at 322.
64 Furthermore, finding and negotiating with a distributor costs money and time. That is a barrier to entry; how significant a barrier depends on the actual costs involved.
66 Bork, supra note 1, at 320.
67 Id. at 322.
68 Id. at 323.
69 Bork wrote: “It has been urged that there may be a rising cost in acquiring capital, since the borrower must deal with progressively less informed lenders. But this does not mean that capital requirements are artificial barriers. It means only that there are costs involved in raising capital, as there are costs involved in every activity, and that the potential entrant must overcome this cost as well as others.” Id. at 323. Significant capital costs can be a barrier to entry.
70 Id. at 324 (“In sum, capital does not constitute an artificial barrier to entry, capital requirements cannot be arbitrarily imposed upon potential entrants, and the possession of capital is merely a socially valuable efficiency.”); id. at 323 (“There being nothing to the notion that an
Furthermore, Bork failed to appreciate how predatory conduct can increase the cost of capital because threats of predation can deter venture capitalists from funding entrants.\(^70\)

In advocating per se legality for various restraints, Bork assumed away the complexity of markets. For example, he famously asserted that “vertical price fixing can never restrict output and should never be illegal.”\(^71\) Yet Bork acknowledged that a vertical price-fixing scheme can be foisted upon a manufacturer by a retailer cartel, which would restrict output and increase inefficiency.\(^72\) Bork dismissed the relevance of these reseller cartels, asserting that this risk constitutes a serious objection to the proposed legality of all vertical restraints only if (1) reseller coercion or inducement is more common than manufacturer origination of vertical restraints, and (2) there is little likelihood that the antitrust enforcement agencies can tell the two apart. It seems highly doubtful that the first condition obtains, and the second certainly would not.\(^73\)

Both aspects of Bork’s formulation are flawed. First, Bork wrongly asserted that if coercion is not “more common” than manufacturer origination, then per se legality is justified. But the prospect of dealer-initiated resale price maintenance supports, at least, a rule of reason approach in which courts determine whether or not the manufacturer or a coalition of resellers is responsible for the imposition of the vertical restraint.\(^74\) This is what the Supreme Court did in


\(^71\) *Bork*, supra note 1, at 272.

\(^72\) *Id.* at 289 (“Retailers who agree to a horizontal restraint that the manufacturer does not desire are almost certainly attempting to restrict output for the sake of monopoly gains. If such a restraint would increase efficiency, the manufacturer would not only favor it but would impose it himself. When a manufacturer wishes to impose resale price maintenance or vertical division of reseller markets, or any other restraint upon the rivalry of resellers, his motive cannot be the restriction of output and, therefore, can only be the creation of distributive efficiency. That motive should be respected by the law.”).

\(^73\) *Id.* at 292 (emphasis added).

\(^74\) Bork made this same mistake in his call to make exclusive dealing per se legal. He asserted that “there is no reason to believe that the terms set, such as exclusive dealing, do not create efficiency far more often than they indicate predation.” *Id.* at 157. Even if he is correct that efficiency happens “far more often” than predation, this justifies rule of reason analysis to determine whether a particular exclusive dealing arrangement is predatory. Moreover, cases such as *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), demonstrate why it is important to keep exclusive dealing within the ambit of antitrust law.

Finally, to the extent that the conduct in *Lorain Journal* can be considered a form of exclusive dealing—and Bork argued that *Lorain Journal* correctly found antitrust liability—Bork himself would have condemned exclusive dealing in some instances, which suggests that per se legality is inappropriate. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Bork*, supra note 1, at 344–45.
Leegin.  Second, it was facile for Bork to assume that “the enforcement authorities should have no difficulty in detecting those restraints that are really horizontal.” How is it that antitrust enforcers are suddenly omniscient when Bork claimed throughout his scholarship that enforcement authorities are not particularly competent? Part of the answer lies in Bork’s claim that “coerced manufacturers will often complain to the enforcement agencies.” But this is a bald assertion. Bork also contended that “reseller cartels are very easy to detect because the large numbers and disparate interests involved make such cartels notoriously difficult to organize, administer, and police.” Here, again, he assumes without evidence that reseller cartels must have a large number of participants. More importantly, Bork ignored the fact that reseller cartels may not be “difficult to organize, administer, and police” precisely because the resale price maintenance serves all of these functions as the manufacturer sets the price and monitors for compliance.

Finally, Bork assumed away the complexity associated with resale price maintenance by treating all consumers as homogeneous. For example, Bork concluded that “all vertical restraints are beneficial to consumers and should for that reason be completely lawful.” This sweeping claim fails to appreciate that different categories of consumers exist. For the consumer who does not need the product to be explained or for the store to be fancy, resale price maintenance—which raises the price of the product—is absolutely not beneficial. Depending on the composition of the consumer class affected by a particular resale price maintenance scheme, vertical price fixing can cause net harm to consumers. But Bork avoided these hard issues with a convenient assumption.

With respect to specific antitrust causes of action, Bork assumed away the plausibility of various violations without engaging in the necessary empirical research, research that would have disproved his assertions. For example, Bork asserted that predatory pricing does not happen because it makes no economic sense. To make his case, Bork assumed disproportionate losses by the predator. He asserted that predatory pricing “requires the predator to bear losses that are much larger, both absolutely and proportionally, than those inflicted on the intended victim.” Some courts have embraced Bork’s assen-

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76 Bork, supra note 1, at 292.
77 Id.
78 Id.
79 Id. at 297.
80 Id. at 148.
Bork, however, is wrong because firms engaged in predatory pricing can target below-cost pricing to specific customers of specific rivals, which is precisely what Standard Oil did when it engaged in predatory pricing.\footnote{See, e.g., Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 n.3 (9th Cir. 1995) (quoting Bork for proposition that predator’s losses must be proportionately higher than the target’s losses).} Despite the plausibility of price predation, Bork suggested that theory should trump facts with respect to predatory pricing.\footnote{Christopher R. Leslie, \textit{Revisiting the Revisionist History of Standard Oil}, 85 S. Cal. L. Rev. 573 (2012).} Bork has convinced at least some antitrust decision-makers that firms will not attempt predatory pricing.\footnote{See BORK, supra note 1, at 39.} Thus, even though some monopolists have, in fact, successfully employed predatory pricing,\footnote{Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1300, 1304 (D.C. Cir. 1989) (Wald, J., dissenting) (citing Bork, among others, for proposition that “Classic economic principles and basic antitrust law run counter to any prediction that sophisticated firms will pursue below-cost pricing strategies over the long haul.”); Int’l Tel. & Tel. Corp., 104 F.T.C. 280, 1984 WL 565367 at *97 n.30 (July 25, 1984) (citing Bork and Easterbrook for the proposition that “At least two commentators have argued that predation is so rare that it should be completely ignored, in order to avoid deterring legitimate competitive pricing.”).} Bork assumed the cause of action away.

The most critical—and common—assumption that Bork made was the almost irrebuttable presumption of market efficiency. Bork assumed that any status quo absent antitrust enforcement is optimal.\footnote{See Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, \textit{Predatory Pricing: Strategic Theory and Legal Policy}, 88 Geo. L.J. 2239 (2000); Christopher R. Leslie, \textit{Predatory Pricing and Recoupment}, 113 Colum. L. Rev. 1695 (2013); Leslie, supra note 82.} He suggested that monopolies, by definition, are efficient.\footnote{See BORK, supra note 1, at 156 (“In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns.”); see also id. at 236 (“The structure of an industry supplying the automotive industry will be whatever is most efficient for the automotive industry.”).} For example, Bork claimed that monopolization through requirements contracts is not an antitrust concern because if the defendant can monopolize in this manner, then “the market is destined for monopoly anyway, because of [the defendant’s] superior efficiency.”\footnote{Id. at 196 (“Yet where the firm has grown to its monopoly size, its efficiency must outweigh its output restriction, or entry would erode its position.”).} Bork generally downplayed or ignored the complexities of how markets actually operate.\footnote{Id. at 304; see also id. at 304–05 (“The advantage of the contract must be the creation of efficiency, and Areeda cites a variety of efficiencies that such contracts may create. In this situation, efficiencies are the reality, and the fear of foreclosure is chimerical.”).} Bork assumed away market imperfections when, in 1993, he essentially said market imperfections do not exist, describing them as “both inge-
nious and imaginary.” He further suggested that juries should not be allowed to hear about market imperfections.

Bork’s approach was a one-two punch designed to knock out most antitrust rules: declare that efficiency is all that matters and assume that almost everything is perfectly efficient. After asserting that antitrust law is concerned only with efficiency, Bork asserted that virtually all unilateral conduct by monopolists and almost all agreements—save naked price fixing—are efficient and, consequently, of no antitrust significance. Professor Rudolph Peritz has explained that “Bork’s logic is circular and thus closed to the empirical investigation that makes social sciences scientific.”

C. LOGICAL FALLACIES

To make his case for rolling back antitrust law, Bork committed a number of logical fallacies. This section examines two: false equivalence and false dichotomies. In an effort to further simplify his analysis, Bork had a tendency to equate disparate actions. For example, he argued that “[t]ying arrangements and reciprocal dealing are the same economic phenomenon,” as were vertical market division and vertical price fixing. These might be similar, but they are not the same. More troubling, in assuming that mergers expand output, Bork asserted that there is “no valid distinction between outlawing a merger because of its efficiencies and permitting a cartel.”

Even when arguing for antitrust liability, Bork committed the fallacy of false equivalence. For example, Bork asserted that “there is no difference between” “an agreement by automobile dealers to close on Sundays [and] an agreement by the same dealers to add $200 to the price of each car.” The Federal Trade Commission found Bork’s comparison apt and cited him in concluding that “there is no economic difference between an agreement to

\[90\] Bork, supra note 1, at 438.

\[91\] Id. (“The result of [ ] introducing [market imperfections] into the law is lengthy trials on baseless claims and with unpredictable outcomes. Many antitrust issues must be tried to a jury, but economic impossibilities ought not be.”).

\[92\] Peritz, supra note 2, at 259.

\[93\] Bork, supra note 1, at 365.

\[94\] Id. at 280 (“Vertical market division has the same economic impact as vertical price fixing, the same relation to competition and consumer welfare . . . .”).

\[95\] Id. at 86.

\[96\] Id. at 85. Cont’l Airlines, Inc. v. United Air Lines, Inc., 126 F. Supp. 2d 962, 976 n.40 (E.D. Va. 2001) (quoting Bork for the proposition that because “‘[l]eisure and money are merely different forms of income for producers and different forms of payment by consumers,’ there is no economic difference between an agreement by car dealerships to raise nominal car prices and an agreement to reduce hours of operation, for ‘[b]oth are limitations upon competition whose sole purpose is to increase the dealer’s income by restricting output.’”), vacated, 277 F.3d 499 (4th Cir. 2002).
limit shopping hours and an agreement to increase price.' While both of these agreements may be illegal, they are not the same; they do not have the same economic effects. In particular, these agreements have different effects for the consumer who was going to buy a car on Tuesday; she is indifferent to an agreement to be closed on Sunday but she cares deeply about a higher price.

Bork used such false comparisons to reach incorrect conclusions. For example, he argued that oligopolies do not significantly reduce output. He did so by comparing monopoly to oligopoly output, suggesting that the latter was more than the former. But this is the wrong comparison. He should have compared oligopoly output to competitive output. The oligopolistic market experiences higher prices than the competitive market but less than the monopoly market. That still makes an oligopoly outcome worse than a competitive outcome, even though it is better than the monopolized outcome. Oligopolies thus remain a legitimate antitrust concern. But Bork sought to avoid this observation by distracting the reader away from the relevant benchmark: the competitive market. Bork, however, is still not without influence, as at least one court has cited Bork for the proposition that oligopolists are competitive. Nevertheless, it is hard to believe that the oligopolies in gas and airlines, for example, have not increased prices beyond what would occur in a truly competitive market.

More troubling than his false comparisons is the false dichotomy that Bork employed throughout his book. According to Bork, if conduct does not reduce output, then it must increase efficiency. For example, “[s]ince vertical restraints are not means of creating restriction of output, we must assume that they are means of creating efficiencies, and it is perfectly clear that they are.” Under this formulation, conduct must either reduce output or increase efficiency. After setting up the false dichotomy, Bork then assumed efficiencies. For example, he asserted that “[e]xclusive dealing, being a form of vertical integration, creates efficiencies and does not create restriction of output. It should, therefore, generally be lawful.” Similarly, in defending exclusive dealing, Bork asserted without any evidence that “the fear of foreclosure is

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97 In re Detroit Auto Dealers Ass’n, Inc., 955 F.2d 457, 470 (6th Cir. 1992) (quoting FTC).
98 See, e.g., Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1437 (9th Cir. 1995).
99 Bork, supra note 1, at 290. He elaborated: “When a manufacturer wishes to impose resale price maintenance or vertical division of reseller markets, or any other restraint upon the rivalry of resellers, his motive cannot be the restriction of output and, therefore, can only be the creation of distributive efficiency.” Id. at 289 (emphasis added).
100 Id. at 303. Similarly, when arguing for per se legality for all vertical restraints, Bork asserts: “Basic economic theory tells us that the manufacturer who imposes such restraints cannot intend to restrict output and must (except in the rare case of price discrimination, which the law should regard as neutral) intend to create efficiency.” Id. at 297.
chimerical.” The Dentsply case, however, shows how a monopolist may use exclusive dealing to exclude rivals and to raise price, which (according to even Bork) necessarily reduces output. In Dentsply, a monopolist in the market for artificial teeth precluded dealers from distributing the products of Dentsply’s competitors. The Third Circuit held that Dentsply’s policy violated Section 2 of the Sherman Act as it artificially excluded rivals, thereby rendering them too small to price discipline Dentsply and allowing the monopolist to raise prices aggressively.

Unfortunately, some courts have bought into Bork’s false dichotomy whereby challenged conduct is presumptively efficient and, consequently, must not be anticompetitive. But Bork’s false dichotomy between output restriction and efficiency fails to sufficiently grapple with the fact that some conduct can simultaneously reduce output and increase some forms of efficiency. In this scenario, courts must decide whether and how to trade off the benefit of efficiency against the harm of reduced output. Bork avoided this problem by assuming it away through his false dichotomy.

III. THE ALLURE OF THE SIMPLE, BUT INACCURATE, APPROACH

The Antitrust Paradox has proven popular with federal judges. The discussion in the previous Part raises the question, if Bork’s conclusions are based on unproven assumptions and faulty analysis—not evidence—why do judges (and others without formal economics training) find Bork so persuasive? This Part argues that federal judges have been influenced by Bork’s approach precisely because it is easy to understand and apply. Bork explained: “The entire attempt of this book is to demonstrate that correct antitrust rules require only basic economics and that they are capable of easy and precise application by courts.” Bork instructed federal judges not to bother trying to understand anything beyond basic economic theory, which not even economists could understand, according to Bork. For example, Bork asserted that 90 percent of antitrust lawyers and a similar percentage of economists did not understand productive efficiency: “Productive efficiency is a simple, indispensable, and thoroughly misunderstood concept. Not one antitrust lawyer in ten has a remotely satisfactory idea of the subject, and the proportion of econ-

101 Id. at 305.
103 Id. at 190-91.
104 See, e.g., USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 511 (7th Cir. 1982).
105 Kovacic, supra note 2, at 1468 (“[T]he prescriptions of The Antitrust Paradox have gained considerable favor among federal judges.”).
106 Bork, supra note 1, at 277.
omists who do, though surely higher, is perhaps not dramatically so.”

This makes one wonder: who are these economists—a majority of economists, according to Bork—who find economic analysis difficult to understand? More importantly, the most recent decades of antitrust litigation show that federal judges, often aided by economic experts, can properly employ complex economic analysis.

Bork presented a judge-friendly theory of economics that allowed judges to dismiss antitrust cases quickly. Bork’s simple economics model assumed that artificial barriers to entry do not exist. This makes federal judges’ lives a lot easier because they do not have to worry about efficient rivals being illegally excluded from the market because if the rival were efficient, by definition, according to Bork, it would be able to compete. Bork assumed away the possibility of a monopolist creating artificial barriers to entry through predatory conduct.

Bork oversimplified how markets work and offered easy answers to complex questions, answers that relieved judges of the burden of wrestling with complicated facts. But markets are complicated and whether a particular monopolist—or a particular vertical restraint—has injured competition in a manner that antitrust law cares about requires examining the facts. The facts of any given case are more complex than the theory that Bork proposed to reject many antitrust claims out of hand. That is what makes Bork’s work so attractive. Bork’s approach is appealing because it’s simple: Bork’s arguments “sound unimpeachable precisely because they assume away the troublesome points in the analysis.”

Bork has also been greatly aided in his mission of simple pro-defendant economics through conservative seminars paid for by corporate donors that indoctrinate federal judges in the simple “perfect markets” economics espoused by Bork, among others.

These economics seminars created the illusion of teaching neutral economics principles while actually being “quite limited and one-sided ideologically.”

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107 Id. at 105.

108 Bork, supra note 1, at 310. He hedges a little later in his book: “The argument of this chapter in no way suggests that there are no artificial barriers to entry. It does suggest that the only artificial barriers of interest to antitrust are those capable of creation by private parties, and that such barriers are always instances of deliberate predation.” Id. at 329.


110 Kovacic, supra note 2, at 1434 n.97 (“In 1976, for example, Henry Manne’s Law and Economics Center held its first economics institute for federal judges. A substantial part of the funding for the institute came from corporate donors. By 1980, nearly 15% of the federal judiciary had participated in the annual program.”).

Judges who wish to employ Bork’s efficiency-is-all-that-matters paradigm may be concerned about four issues: (1) efficiency can be difficult to measure; (2) Congress articulated goals besides efficiency; (3) legal precedent has invoked non-efficiency concerns in antitrust cases; and (4) the facts of the case may conflict with economic theory. Bork provided yet another simple response to all four problems: Ignore them.

First, Bork instructed federal judges never to attempt to measure efficiency. He asserted “antitrust must avoid any standards that require direct measurement and quantification of either restriction of output or efficiency. Such tasks are impossible.” Instead, judges should—according to Bork—assume that business conduct is efficient without any attempt at measurement. This seems inappropriate because even if efficiency cannot be measured with precision, the proponents of a merger that significantly concentrates a market should have to show that the merger will create some measurable efficiency. How else can judges weigh efficiency gains against the anticompetitive risks posed by market concentration? Bork’s easy response is to ignore market concentration because if a market is becoming more concentrated, it must be because concentration is efficient. Furthermore, judges should not be weighing efficiency against any other concerns because, according to Bork, judges are not competent to do so. Thus, Bork argued that efficiency governs everything, but then he assumed that suspicious conduct is efficient. When pressed, he opined that efficiency is not measurable and courts should not try.

Second, even though Congress has articulated antitrust goals beyond efficiency, Bork instructed federal judges to simply ignore antitrust legislation that is inconsistent with Bork’s view of antitrust doctrine. For example, with respect to the Clayton and Robinson-Patman Acts, he encouraged judges to say something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences, and the like injure competition or lead to monopoly. . . . [W]e hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes

112 Bork, supra note 1, at 117.
114 See supra notes 77–84 and accompanying text.
115 Bork, supra note 1, at 427 (“The distribution of that wealth or the accomplishment of noneconomic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases.”).
116 See supra notes 43–49 and accompanying text.
117 Bork, supra note 1, at 409–10; Orland, supra note 47, at 121–22 (“With a bold assertion of judicial intervention, Professor Bork urges that if Congress passes antitrust legislation which does not pass the ‘efficiency’ litmus test, the Supreme Court should refuse to enforce the legislation.”).
never injure competition and hence are not illegal under the laws as written.\textsuperscript{118}

Bork’s political philosophy also included an attack on Congress as an institution.\textsuperscript{119} Bork implored judges to ignore the underlying statute while he conceded that Congress reflected the will of the people.\textsuperscript{120} Ironically, in non-antitrust “areas of law, Bork has contended that judges are ‘elitists’ who should show restraint in interpreting law because they do not reflect the will of the legislators elected by the citizens.”\textsuperscript{121} Even when limiting his discourse to antitrust matters, Bork at points provided conflicting messages. On the one hand, Bork argued that Congress must be more specific if it wants courts to actually enforce antitrust laws,\textsuperscript{122} but he then argued that “any future congressional participation is likely to make matters worse.”\textsuperscript{123} In his 1993 epilogue, Bork informed judges that they should “refuse[ ] the delegation” if Congress instructs them to weigh efficiency against other considerations such as maintaining “an economy composed of smaller business units.”\textsuperscript{124} At the same time, Bork asserted that “[e]xclusive adherence to a consumer welfare goal is superior” to a “multiple-goal approach” because it “places intensely political and legislative decisions in Congress instead of the courts . . . .”\textsuperscript{125} Bork’s position is internally inconsistent because Congress wanted courts to develop an antitrust common law that considered goals other than efficiency. In advocating that courts look only at efficiency, Bork argued that courts should ignore what Congress intended because that “places intensely political and legislative decisions in Congress instead of the courts.”\textsuperscript{126} This is internally inconsistent.

Third, Bork argued that judges should ignore legal precedent and rely instead on his simple economic theory. He asserted that the Sherman Act was “less a body of precedent, but a direction to enforce the law’s rationale. Prece-
Bork explicitly conceded that his “conclusion means that economic reasoning is more important than legal precedent,” while mocking those who would refer to him as an “activist.” This seems like odd advice—telling courts that precedent is not controlling. But Bork’s reliance on his brand of economic theory over legal precedent or actual facts serves his ultimate goal: To take antitrust cases away from juries. Bork argued that because “juries do not usually understand basic price theory,” it is important for trial judges to grant summary judgment to defendants in order to keep antitrust cases away from juries. For judges who want to clear their dockets of complicated antitrust litigation—especially drawn-out antitrust trials—Bork was preaching to the choir and providing them a creative hymnbook to justify their decisions.

Fourth, Bork suggested that when facts conflict with his economic theory, theory should prevail. When criticizing the Supreme Court’s Kodak opinion, Bork noted that the majority “held that economic theory was not adequate to overcome allegations of fact to the contrary, and the ISOs had alleged that services and parts prices had been raised to supracompetitive levels while the sales and prices of Kodak machines had not suffered.” Bork rejected the facts and proclaimed that it “is impossible to see how this could be true.” Bork implicitly suggested that the court should ignore the evidence and rely on simple microeconomic theory instead. Bork dispensed with the factual complexities of the case with facile counterfactuals. For example, Bork dismissed the significance of switching costs by arguing that “when word of the exploitation got out, Kodak would find very few new purchasers of equipment.” Bork declined to admit that this did not happen. He also failed to recognize that this would not be the case if Kodak’s rivals were engaging in similar behavior. Instead, he again assumed a perfectly competitive market filled with firms that behave as he imagined they should according to theory. Indeed, in his 1993 epilogue, Bork argued that it is more rigorous to ignore actual evidence and rely instead on economic theory. Thankfully,

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127 Id. at 36.
128 Id. at 430.
129 Id. at 433.
130 Id. at 436–37.
131 Id. at 437.
132 Id.
133 See C. Scott Hemphill & Tim Wu, Parallel Exclusion, 122 YALE L.J. 1182 (2013) (describing the anticompetitive effects when multiple competitors engage in similar exclusionary conduct); Christopher R. Leslie, Tying Conspiracies, 48 WASH. & MARY L. REV. 2247 (2007).
134 Bork also asserted that it is easy to calculate lifecycle costs of equipment, but he provided no evidence to support his assertion. Similarly, he asserted that Kodak’s competitors would “inform prospective customers of Kodak’s exorbitant lifecycle costs,” Bork, supra note 1, at 438, but failed to admit that no evidence suggested that Kodak’s rivals did that.
135 Id. at 433.
some courts have explicitly rejected Bork’s call for judges to follow him instead of the law.\textsuperscript{136} Yet other courts seem drawn in by the “efficiency” of dismissing antitrust cases based on economic theory despite the presence of a factual record that shows such theory is inapplicable to the facts at hand.\textsuperscript{137}

IV. AN ANTI-ANTITRUST LEGACY

At times, Bork acknowledged that antitrust law needs to evolve.\textsuperscript{138} But Bork’s economic understanding did not evolve, and he tried to stop antitrust evolution. Bork instructed judges not to consider more advanced economic concepts and schools of thought. For example, Bork argued that antitrust courts should not consider the theory of the second-best.\textsuperscript{139} At first, Bork did not understand game theory and thus he mocked it.\textsuperscript{140} Following the rise of game theory and its models that showed predation could be profitable when a monopolist acquires a reputation for aggression,\textsuperscript{141} Bork in 2003 asserted that “this theory of predation by reputation should be dismissed out of hand.”\textsuperscript{142} Bork certainly did not anticipate the development of behavioral economics and its potential contributions to antitrust law.\textsuperscript{143} Yet his simple anti-evolutionary approach to antitrust theory would dictate ignoring this entire evidence-based branch of economics. For example, Bork attempted to blunt the evolution of antitrust economics beyond his simple no-market-failure model

\textsuperscript{136} Alan’s of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990) (“For the time being we are satisfied merely to make it clear that when confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel, unlike those of a more activist bent, see, e.g., R. Bork, supra, at 36, that economic argument is not ultimately controlling; judicial precedent is.”) (quoting Bork, \textit{The Antitrust Paradox}).

\textsuperscript{137} Leslie, supra note 70, at 318–38 (discussing examples).

\textsuperscript{138} Bork, supra note 1, at 10 (“Antitrust is also a set of continually evolving theories about the economics of industrial organization.”); id. at 288 ("As Chief Justice White said in \textit{Standard Oil}, the Court should continue to reinterpret the Sherman Act under the rule of reason as its economic understanding evolves.").

\textsuperscript{139} Id. at 113 (“The legislative decision to promote competition rules out the adoption of the theory [of the second-best] as the general rule of antitrust, since its adoption would require judicial repeal of the laws in their entirety, and the theory provides no criteria that could be applied by a court to the decision of individual cases.”). Bork is inconsistent here because, in contrast to saying that courts should ignore advanced economic theory because it would require judicial repeal of laws, he expressly argued that courts should nullify portions of the Clayton Act and the Robinson Patman Act in its entirety because he believed Congress was wrong to conclude that the prohibited conduct would injure competition.

\textsuperscript{140} See Bork, supra note 1, at 189 (“Oligopolists who proliferate models and variations are making the ‘game’ of oligopolistic restriction of output impossible.”); Kovacic, supra note 2, at 1465.

\textsuperscript{141} Leslie, supra note 70, at 297–300.


of microeconomics by asserting that lower federal courts may not incorporate new economic understanding; only the Supreme Court can.\textsuperscript{144}

In some ways, Bork seemed oblivious to the evolution of economic thought and antitrust doctrine that had been taking place since the 1970s. The antitrust landscape changed significantly between the first publication of \textit{The Antitrust Paradox} in 1978 and the publication of its revised version in 1993. For example, economic analysis of mergers had become more sophisticated.\textsuperscript{145} Yet the 1993 reissued version of \textit{The Antitrust Paradox} ignored the 1992 Horizontal Merger Guidelines (as well as their 1982 and 1984 predecessors), as well as 12 years of Republican administrations’ fundamentally curtailing the enforcement of antitrust law. Much of the new literature showed how markets are more complicated than described by Bork,\textsuperscript{146} particularly with respect to vertical restraints.\textsuperscript{147} During the 1980s, game theory scholarship had risen to a place of prominence in economics literature, including its application to antitrust.\textsuperscript{148} In his 1993 reissued book, Bork ignored all of this literature and indeed this entire field of economics that undermined his simplistic view of how markets work. This is not entirely surprising. When asked in 1989 about revising \textit{The Antitrust Paradox}, Bork expressed reluctance about “going back reading all that literature” and suggested a lack of “interest to go back and rewrite.”\textsuperscript{149} More importantly, Bork seemed uninterested in the new literature on antitrust economics.\textsuperscript{150}

\section*{V. CONCLUSION}

Bork’s legacy is an oversimplified economics that often rests on unfounded or disproven assumptions. Yet the very simplicity that renders Bork’s descriptions and prescriptions hollow is what makes them so dangerously attractive.
to some. Bork’s model, however, is not just simple; it’s simplistic. Nevertheless, the book’s text has become so authoritative that more sophisticated understandings of economics and antitrust history have not unseated many of its teachings even after these teachings have been proven incorrect.\textsuperscript{151} In attacking the Supreme Court’s \textit{Brown Shoe} opinion, Bork asserted that “once an erroneous idea is let loose in antitrust it tends to run riot.”\textsuperscript{152} Ironically, it turns out he was describing his own influence in the field.

\footnotesize\textsuperscript{151} Despite an academic consensus that Bork’s interpretation of antitrust legislative history is wrong (see \textit{supra} notes 43–49 and accompanying text), “the academy has failed to persuade the judiciary, and Bork’s consumer welfare thesis has become one of his many enduring contributions to U.S. antitrust law.” Douglas H. Ginsburg, \textit{Judge Bork, Consumer Welfare, and Antitrust Law}, 31 Harv. J.L. & Pub. Pol’y 449, 453 (2008).

\footnotesize\textsuperscript{152} Bork, \textit{supra} note 1, at 231.