

Was the Crisis in Antitrust a Trojan Horse?

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The Trojan Horse Hypothesis, an unwritten antitrust myth, states that, through the purposeful use of confusing terminology, Robert Bork was able to disguise his conservative agenda as a “pro-consumer policy,” enlist people who disagreed with or did not endorse this agenda to promote it, and turn it into the law of the land. The Hypothesis attempts to explain Robert Bork’s remarkable success in influencing the course of modern antitrust despite the fact that his antitrust philosophy rested on two flawed propositions: (1) that Congress enacted the Sherman Act as “a consumer welfare prescription,” and (2) that “competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency.” In essence, the Hypothesis attempts to explain certain missteps in antitrust history and flaws in present antitrust logic. This Essay examines the Trojan Horse Hypothesis and its relevance to present antitrust policy. The Hypothesis stands for the role mistakes and errors play in modern antitrust. The Essay shows that, while intended to be persuasive, Robert Bork made a few mistakes but did not design an elaborate deception scheme. Bork’s mistakes served his personal biases and were not substantially different from those that are common in other academic works and judicial opinions. The endurance of Bork’s mistakes and their rationalization in modern antitrust, the Essay argues, reflects a disturbing intellectual decay of the kind Robert Bork criticized. Antitrust law and analysis will improve once courts and scholars stop pretending that flawed premises and meaningless terms have merit or can be rationalized.

Introduction

Fifty years ago, in 1963, Professor Robert Bork embarked on a 15-year journey in antitrust.¹ The journey began with a provocative essay in Fortune Magazine, *The Crisis in*

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¹ The phrase “Bork’s journey in antitrust” refers to Robert Bork’s published antitrust works between 1963 and 1978. During this period, Robert Bork engaged in many professional activities other than writing those works, including serving as the U.S. Solicitor General. Bork was active in antitrust before embarking on his journey in 1963 and after its conclusion in 1978. See, e.g., Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of An Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 ABA ANTITRUST SEC. 211 (1959); Robert H. Bork, *Anticompetitive Enforcement Doctrines Under Section 7 of the Clayton Act*, 39 TEX. L. REV. 832 (1961); Robert Bork, *Control of Sales*, 7 ANTITRUST BULL. 225 (1962). In the landmark *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), Robert Bork successfully argued for Brown & Williamson. Philip Areeda argued for Brooke Group. See also Robert H. Bork, *What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google*, 8 J. COMP. L. & ECON. 663 (2012); Harry First, *Bork and Microsoft: Why Bork Was Right and What We Learned About Judging Exclusionary Behavior*, ANTITRUST L.J. (forthcoming, 2014).

Antitrust (“*The Crisis*”),² which Bork co-wrote with Ward Bowman. It concluded in 1978 with the publication of *The Antitrust Paradox: A Policy at War With Itself* (“*The Paradox*”).³ *The Paradox* is undeniably the most influential work in modern antitrust and also the most controversial. Robert Bork’s journey in antitrust was remarkably successful in changing antitrust’s landscape. It provoked lawyers and economists, leaving no mind indifferent to the positions he expressed, and ultimately influencing the course of antitrust law.⁴

Bork’s remarkable success, however, is not obvious. Other antitrust giants of the era, such as Philip Areeda, Richard Posner, and Donald Turner, also influenced antitrust analysis and policy. Like Bork, they argued that economics should direct antitrust analysis, were critical of non-economic considerations in antitrust, and perceived most vertical arrangements as legitimate business practices. Considering the intellectual developments in his era, however, Bork was probably responsible for the greater change in the course of antitrust with his consumer welfare standard and the empowerment of the market efficiency sentiment. We will never know what antitrust would have looked like without Robert Bork.

In the antitrust mythology, the success of Robert Bork in seizing antitrust policy is often attributed to a shrewd use of confusing terminology that functioned as a Trojan horse. Antitrust warriors—scholars and advocates—have argued that Robert Bork concealed economic methodologies and efficiency standards in a framework of a “consumer oriented law,”⁵ deceiving the guards of the old regime by stating that “[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription.”⁶ The Supreme Court endorsed this prescription without examining its nature.⁷

Trojan horses typically represent the victory of both deceit and genius. The Trojan Horse Hypothesis in antitrust is no exception. This Essay examines its sources, validity, and significance to modern antitrust policy.

² Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138. *The Antitrust Bulletin* and *Columbia Law Review* reprinted the essay in 1964 and 1965, respectively. 9 ANTITRUST BULL 587 (1964), 65 Colum. L. Rev. 363 (1965). The essay is an expanded version of comments Bork made in August 1963 at a symposium of the Antitrust Section of the American Bar Association. See Symposium, *Re-evaluation of the Impact of Present-Day Antitrust Policy on the Economy*, 23 ABA ANTITRUST SEC. 288, 319-323 (1963).

³ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). Bork finished the first draft of *The Paradox* in 1969. He opened the book stating: “[I]n the ordinary course the book would have been rewritten in 1970 and published, probably in 1971. The turbulence of the campus during these years and certain personal concerns . . . precluded serious work.” *Id.* at ix.

⁴ See, e.g., Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, FORTUNE, Aug. 1964, at 127, reprinted in 65 COLUM. L. REV. 377 (1965).

⁵ See, e.g., BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at 7; Robert Bork, *Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950, 951 (1968); Robert H. Bork, *Antitrust in Dubious Battle*, FORTUNE, Sept. 1969, at 103.

⁶ BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at 66.

⁷ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107 (1984). See generally Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013).

Robert Bork's antitrust philosophy rested on two flawed propositions: (1) Congress enacted the Sherman Act as "a consumer welfare prescription," and (2) the economic concepts of "competition" and "allocative efficiency" are shorthand expressions of the concept "consumer welfare." The first proposition has no factual support and the second proposition is clearly flawed. In hindsight, it appears that a scholar like Robert Bork could not possibly make such profound mistakes. The Trojan Horse Hypothesis, therefore, accounts for these mistakes and specifically the central role of consumer welfare in Bork's work.

The Trojan Horse Hypothesis emerged from an atmosphere of crisis. Bork portrayed a "war" between free-market and anti-market forces, was perceived as a person of controversy and contention, and his work was expected to spark controversy.⁸ He forcefully promoted the idea that internal contradictions in antitrust plagued the law with "schizophrenia" and established a "paradox."⁹ "[A]ntitrust's basic premises," he observed "[were] mutually incompatible, and . . . some of them [were] incorrect."¹⁰ These inconsistencies, he charged, produced "bizarre results": "Certain [antitrust] doctrines preserve[d] competition, while others suppress[ed] it, resulting in a policy at war with itself."¹¹ This fog of war—the crisis in antitrust—has greatly contributed to beliefs that Bork resorted to a Trojan horse strategy.

The examination of the Trojan Horse Hypothesis is important to antitrust policy. The Hypothesis stands for the role known mistakes and errors play in antitrust. Valid or invalid, the Hypothesis illustrates the tendency of scholars and courts to discount the evolution of norms and premises, applying contemporary insights to evaluate past texts and unwilling to assess the robustness of the insights they apply.¹² This tendency, in turn, accounts for the stability of errors in antitrust law and policy. The most peculiar error in modern antitrust is the use of the term "consumer welfare" that has no meaning in

⁸ See, e.g., For Donald Dewey, *Antitrust and Economic Theory: An Uneasy Friendship*, 87 YALE L.J. 1516 (1978); Ernest Gelhorn, *Book Review: The Antitrust Paradox: A Policy at War With Itself*, 92 HARV. L. REV. 1376 (1979); Oliver E. Williamson, *Review: The Antitrust Paradox: A Policy at War With Itself*, 46 U. CHI. L. REV. 526 (1979).

⁹ See Bork & Bowman, *supra* note 2, at 138 ("The nature of the present crisis in the law [refers to] schizophrenia afflicting basic antitrust policy."); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L. J. 775, 777 (1965) ("Antitrust's failure to be clear . . . has caused the law to follow an apparently zigzag course of development."); Robert Bork, *Supreme Court versus Corporate Efficiency*, FORTUNE, Aug. 1967, at 92, 158 ("[A] majority of today's Supreme Court . . . prefer[s] protection of the inefficient to competitive vigor. Yet it is possible to demonstrate that this approach has resulted in irreconcilable contradictions among antitrust policies and rulings."); Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 242 (1967) ("The life of antitrust law—meaning by that its areas of policy growth—is . . . neither logic nor experience but bad economics and worse jurisprudence."); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* ix (rev. ed. 1993) [hereinafter: BORK, *THE 1993 ANTITRUST PARADOX*] ("The Crisis in Antitrust' . . . was the paradox suggested by the books title and one that did create a policy at war with itself.")

¹⁰ BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at 7.

¹¹ BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at 7.

¹² For antitrust mechanisms used to adjust the scope of antitrust to evolving premises and norms see Barak Orbach, *Choosing Among Evils: The Implied Antitrust Immunities*, ANTITRUST L.J. (forthcoming, 2014).

antitrust.¹³ Two additional conspicuous errors in antitrust law and policy are the premises premise that “competition=consumer welfare=efficiency=anti-trust” and that “judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.”¹⁴ Paradoxically, although Bork greatly contributed to the entrenchment of these errors, their endurance and rationalization proves Bork’s critique of antitrust: modern antitrust is somewhat stagnant and intellectually can do better.¹⁵

The Essay, therefore, explores an antitrust myth to explain why antitrust courts and scholars stick to flawed concepts and premises, and even rationalize ambiguity and errors. Robert Bork’s antitrust framework indeed suffers from a few serious mistakes that courts and many scholars endorsed. The Essay describes the evolution of these mistakes and argues that even if Bork introduced some confusion by design, any such subterfuge was not nearly as significant as the Hypothesis suggests. The Essay concludes that the Trojan Horse Hypothesis is a byproduct of Bork’s powerful depiction of the crisis in antitrust.

I. Footprints of the Trojan Horse

The Trojan Horse Hypothesis is an informal speculation (or accusation). It posits that, through the purposeful use of confusing terminology, Robert Bork was able to enlist people who disagreed with or did not endorse his agenda to promote it and turn it into the law of the land. Two core propositions underlying Bork’s work have inspired the Trojan Horse Hypothesis: First, Bork’s claim that Congress enacted the Sherman Act as “a consumer welfare prescription,”¹⁶ and second, Bork’s conclusion that “competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency.”¹⁷ Both propositions are so flawed that they have been construed by some as delusive by design. The Hypothesis, therefore, is that Bork’s confusing use of common economic terms—chiefly his insistence that consumer welfare and efficiency are one and the same—was intentional and designed to promote Bork’s antitrust agenda.

To illustrate beliefs regarding footprints of the Trojan horse, consider the two following propositions:

¹³ See see Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

¹⁴ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984). For flawed premises related to error see Jonathan Baker, *Taking Out “Error Cost” Analysis: What’s Wrong With Antitrust Right*, ANTITRUST L. J. (forthcoming, 2014). See also *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 279-83 (2007) (Breyer, J.) (“[A]ntitrust courts are likely to make unusually serious mistakes”).

¹⁵ BORK, THE ANTITRUST PARADOX, *supra* note 3, at 418 (“modern antitrust has so decayed that the policy is no longer intellectually respectable.”) In the 1993 edition of *The Paradox*, Bork withdrew this critique, because of the changes in the law that followed the publication of *The Paradox*. BORK, THE 1993 ANTITRUST PARADOX, *supra* note 9, at ix-x.

¹⁶ *Id.* at 66.

¹⁷ BORK, THE 1993 ANTITRUST PARADOX, *supra* note 9, at 427.

(a) Antitrust ought to address only efficiency rather than other problems, such as income inequality, externalities, and trade in undesirable goods.

(b) Antitrust ought to address only consumer welfare rather than other problems, such as income inequality, externalities, and trade in undesirable goods.

Are these propositions equivalent? Yes, if “consumer welfare” means “efficiency.” Notwithstanding, the framing of proposition (b) is rather odd. Indeed, Bork used the framing of proposition (a), when he argued that problems, such “income distribution, externalities, and the purchase of goods that society does not want consumers to have”¹⁸ should be excluded from the scope of antitrust. For antitrust readers, Bork choices of frames may appear strategic.

Although the Trojan Horse Hypothesis is largely an unwritten myth, its spirit can be detected in antitrust literature. Over the years, numerous antitrust scholars have pointed out that the term “consumer welfare” has a few meanings, but none is “economic efficiency.”¹⁹ For many, the phrase “consumer welfare” represents non-economic values, and for most (if not all) it does not include the producer welfare.²⁰ As Joseph Brodley observed: “The term consumer welfare is the most abused term in modern antitrust analysis.”²¹ The Trojan Horse Hypothesis submits that this terminological abuse is the consequence of intentionally confusing scholarship.²²

Several scholars have referred to the Hypothesis in writing. For example, Robert Lande criticized “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.’”²³ Steven Salop noted that “Judge Bork’s . . . motivation for creating such confusion . . . is unclear.”²⁴ He pointed out that “[s]ome have suggested that he was intending to deceive uninformed readers,” but also suggested that “perhaps even Judge Bork did not understand the actual broad implications of his proposal.”²⁵ Herbert Hovenkamp posited that “[t]here is more than a little chicanery in such terminology.”²⁶

¹⁸ BORK, THE ANTITRUST PARADOX, *supra* note 3, at 106.

¹⁹ See generally Orbach, *The Antitrust Consumer Welfare Paradox*, *supra* note 13 (reviewing the literature).

²⁰ See generally Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982).

²¹ Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987).

²² See, e.g., 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, 2360 n. 54 (“[Robert Bork’s] deceptive use of the term ‘consumer welfare,’ instead of the more honest term ‘total welfare,’ was a brilliant way to market the efficiency objective.”)

²³ Robert H. Lande, *Chicago’s False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 638 (1989).

²⁴ Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 348 (2010).

²⁵ *Id.*

²⁶ HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 48 (1985).

Judge Vaughn Walker argued that “[a]ntitrust affords a remarkable example of ‘strict construction’ serving as a Trojan Horse for the policy preferences of its advocates.”²⁷ Judge Walker pointed out that, first, Bork published an article advocating consumer welfare as the sole legitimate goal of antitrust law and, then, published his famous article about the legislative intent of the Sherman Act.²⁸ He therefore posited that “Judge Bork’s policy insight . . . drove his reading of the statute’s history, not the other way around.”²⁹

Judge Douglas Ginsburg presented a different perspective of Bork’s work.³⁰ Believing that Bork’s work “brought order to antitrust law,” he praised the superiority and robustness of the consumer welfare standard, dismissed the persistent academic criticism as irrelevant, and stressed the success of the originalists who have applied Bork’s method in other areas of law.³¹ Judge Ginsburg acknowledged that Bork’s historical claims might not have been sound, but stressed that “Bork was candid . . . and cautioned against viewing his work as an attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act.”³² Bork’s work, he insisted, was necessary to “counter” undesirable trends in antitrust. Judge Ginsburg praised the consumer welfare standard as a practical legal norm that has increased certainty and “no doubt lead to a more efficient allocation of scarce resources, thereby increasing the wealth of the nation.”³³

The Trojan Horse Hypothesis, therefore, is not a faded myth in antitrust. Rather it is an enduring belief that Robert Bork strategically devised a confusing terminology that the Supreme Court endorsed without understanding its vagueness and, for more than 30 years, has been reluctant to recognize that such vagueness exists.

II. The Trojan-Horse Hypothesis

A Trojan horse is an innocent-looking delivery vehicle disguising a powerful destructive force. In the case of antitrust, the vehicle was “consumer welfare” and the destructive force was a version of Aaron Director’s antitrust agenda. The effective delivery of this agenda into antitrust indeed resulted in the demolition of non-economic theories in antitrust and contributed to the downsizing of antitrust.

²⁷ Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1215 (2012).

²⁸ *Id.* at 1217.

²⁹ *Id.*

³⁰ See Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL’Y INT’L 225 (2006); 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).

³¹ Ginsburg, *An Introduction to Bork (1966)*, *id.*; Ginsburg, *Originalism and Economic Analysis*, *id.*

³² Ginsburg, *An Introduction to Bork (1966)*, at 225.

³³ *Id.*, at 231.

A. *The Delivered Agenda*

Robert Bork's work in antitrust followed the vision of Aaron Director.³⁴ In Bork's words, Director's antitrust course in Chicago changed his "view of the entire world" and he underwent a "secular conversion."³⁵ Upon graduation, Bork served as a research associate at Director's Antitrust Project, where he wrote his first antitrust paper.³⁶ The paper, published in 1954, argued that vertical integration should not be an antitrust concern.³⁷ During his journey in antitrust, Bork developed several lines of papers: (1) three essays published in *Fortune* magazine that introduced the "crisis" in antitrust,³⁸ (2) scholarly articles about antitrust analysis of vertical restraints and the rule of reason,³⁹ and (3) two papers about the goals of antitrust laws.⁴⁰ These works were the cornerstones of Bork's antitrust edifice that he later fully presented in *The Paradox*.

Director's political philosophy rested on the proposition that "every extension of state activity should be examined under the presumption of error."⁴¹ Consistent with this philosophy, Director apparently believed that antitrust laws were generally unwarranted. His antitrust critique consisted of several arguments summarized in the celebrated 1956 essay he wrote with Edward Levi:⁴² (1) Economics should direct antitrust analysis and indeed "antitrust laws have been greatly influenced by economic doctrine;"⁴³ (2) as the

³⁴ See, e.g., Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, 65 Colum. L. Rev. 363, 366 n5 ("The authors are indebted to Professor Director by whom they were introduced to the general economic approach to antitrust problems represented in this of article."); BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at ix ("My intellectual indebtedness is particularly heavy. Much of what is said here derives from the work of Aaron Director, who [is] the seminal thinker in antitrust economics and industrial organization.") See also Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J. L. & ECON. 163 (1983).

³⁵ Kitch, *id.*, at 183.

³⁶ BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at ix; Bork, *Vertical Integration and the Sherman Act*, *supra* note 2. Bork's account of the writing of this paper see Kitch, *id.*, at 201.

³⁷ *Id.* at 201.

³⁸ Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2; Bork, *Supreme Court versus Corporate Efficiency*, *supra* note 9; Bork, *Antitrust in Dubious Battle*, *supra* note 5.

³⁹ Bork, *Contrasts in Antitrust Theory*, *supra* note 9; Bork, *The Rule of Reason and the Per Se Concept I*, *supra* note 9; Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) [hereinafter: "*The Rule of Reason and the Per Se Concept II*"]; Robert H. Bork, *Reply to Professors Gould and Yamey*, 78 YALE L.J. 731 (1967); Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968); Robert H. Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP CT. REV. 171 (1977). See also D. Daniel Sokol, *The Transformation of Vertical Restraints: Per se Illegality, the Rule of Reason and Per se Legality*, ANTITRUST L.J. (forthcoming).

⁴⁰ Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966); Bork, *The Goals of Antitrust Policy*, *supra* note 9.

⁴¹ Aaron Director, *The Parity of the Economic Market Place*, 7 J. L. & ECON. 1, 2 (1964). Of course, this proposition defines Frank Easterbrook's *The Limits of Antitrust*. See Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 63 1 (1984). See also Baker, *Error Costs*, *supra* note 14.

⁴² Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. L. REV. 281 (1956).

⁴³ *Id.* at 282.

law of antitrust evolved, courts occasionally resorted to noneconomic considerations, leading to uncertainty regarding the future direction of antitrust; (3) economic principles could not support the application of antitrust laws in several areas in which courts had applied them; (4) antitrust law became obsessed with size regardless of efficiency considerations; (5) theories of exclusion and leverage were unsubstantiated; and (6) vertical restraints and vertical integration serve legitimate business purposes and the arguments regarding their anticompetitive effects were not persuasive. Director and Levi predicted that “a recognition of the instability of the assumed foundation for some major antitrust doctrines”⁴⁴ and argued that this recognition would “lead to a re-evaluation of the scope and function of antitrust laws.”⁴⁵

Director’s intellectual heirs, Chicago scholars, have developed this framework.⁴⁶ These scholars, however, were not clones and disagreed on a few antitrust issues.⁴⁷ Among those scholars, Bork stood out. His framing was particularly effective because of the contrasts and contradictions he emphasized. The contrasts and contradictions—tensions between economic and noneconomic considerations, market and anti-market forces, procompetitive and anticompetitive doctrines—established, Bork argued, an apocalyptic crisis in antitrust.

B. *Saying Consumer, Meaning Efficiency*

The vehicle Robert Bork used to deliver Aaron Director’s antitrust agenda was the consumer welfare standard. Bork downplayed the significance of core concepts in antitrust, such as “competition,” “efficiency,” and “anti-trust,” arguing that they are “shorthand expressions” of his welfare standard. He presented antitrust as “consumer oriented law” but sought to promote efficiency. Did he see the flaws in his analysis or was it a strategic framing? Or, if you wish, did he design a Trojan horse?

1. The Introduction of the Confusing Terminology

During his antitrust journey, Bork made one significant revision to the conceptual framework he introduced in 1963. He switched the goal of antitrust from “the preservation of competition” to “consumer welfare.”⁴⁸ Prior to the introduction of the consumer welfare standard, the preservation of competition was understood to be the goal of antitrust.⁴⁹ Indeed, in 1954, early in his professional career, Bork wrote that “it is accepted that the purpose of the antitrust law is the preservation of a competitive

⁴⁴ *Id.* at 296.

⁴⁵ *Id.*

⁴⁶ See generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-26 (1979) (“Director formulated the key ideas of the [Chicago school of antitrust], which were then elaborated by students and colleagues such as Bowman, Bork, McGee, and Telser. These ideas did not, I believe, emerge from a full-blown philosophy of antitrust.”)

⁴⁷ For example, in 1979, Richard Posner described the views presented in his 1976 antitrust book as “closely resemble but not identical to the more orthodox Chicago position espoused by Bork.” Posner, *id.*, at 926.

⁴⁸ See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 7.

⁴⁹ See *id.*

economy.”⁵⁰ *The Crisis* was similarly unequivocal in stating that one goal—the preservation of competition—should direct antitrust laws. Bork and Bowman explained that “we want to preserve competition . . . [because] it gives society the maximum output that can be achieved at any given time with the resources at its command.”⁵¹ The choice to switch to “consumer welfare” to promote efficiency has greatly contributed to the Trojan Horse Hypothesis.

Bork introduced the consumer welfare standard in his work on the rule of reason, which he published in two parts. *The Yale Law Journal* published Part I in April 1965 and Part II in January 1966. The work provides a comprehensive analysis of the distinction between horizontal and vertical restraints, arguing that efficiency considerations justify outlawing horizontal restraints under a per se rule and examining vertical restraints under the rule of reason (if at all).

In this work, Bork also tried to establish the argument that efficiency directed what he called the “main tradition” of the rule of reason, which he distinguished from the “Brandeis tradition.” The main tradition “was shaped in the law’s formative period primarily by three men: Justice Peckham, . . . Justice Taft, . . . and Chief Justice White.”⁵² Bork resented the evolution of antitrust from the “main tradition” to the “Brandeis tradition” and considered it regression for using in antitrust noneconomic considerations. In his mind, the main tradition was unequivocally superior to the Brandeis tradition.⁵³

Bork acknowledged that “policy may never have been explicitly formulated in any judge’s mind,” but argued that “we can extrapolate from the early cases the policy of the maximization of wealth or consumer want satisfaction.”⁵⁴ Nonetheless, this caution quickly evaporated. When he discussed the “superiority” of main tradition, the inference by extrapolation turned into a fact. “The main tradition,” he wrote, “serves the single, unchanging value of wealth maximization [and] does not require the courts to choose or weigh ultimate values.”⁵⁵ This statement was an exaggeration. The judges in the formative era, including Justices Peckham, Taft, and White, did not perceive maximization of wealth as a meaningful goal of antitrust. They mostly feared the trusts. For example, Justice Peckham famously emphasized the interests of “the small dealers and worthy men.”⁵⁶ Justice Taft felt that the relaxation of antitrust laws through the rule of reason was “to set sail on a sea of doubt.”⁵⁷ And Chief Justice White supposedly

⁵⁰ Bork, *Vertical Integration and the Sherman Act*, *supra* note 2, at 194.

⁵¹ *Id.* at 138-39.

⁵² *Id.* at 783.

⁵³ *Id.* at 833-47.

⁵⁴ *Id.* at 830.

⁵⁵ *Id.* at 838.

⁵⁶ *U.S. v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

⁵⁷ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898). *See also* WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* (1914) (presenting Taft’s antitrust views).

justified no-fault monopolization theories⁵⁸ and argued that tying was intended “only to multiply monopolies.”⁵⁹

Bork also referred to the “the general muddiness of the legislative intent” of the Sherman Act.⁶⁰ Like many others he believed that the preservation of competition was one of the major motivations behind the enactment of the Sherman Act:

One frequently hears talk of the original meaning of the Sherman Act . . . but it can hardly be stressed too much that, with respect to the Sherman Act, and particularly . . . such talk of legislative intent is more than usually foolish. Congress simply had no discoverable intention. . . . At least some of the legislators apparently thought they were enacting the common law. . . . *The preservation of competition was certainly one of the major policies motivating the passage of the Sherman Act.*⁶¹

A few months later, in October 1966, *The Journal of Law & Economics* published Bork’s influential work on the legislative intent of the Sherman Act.⁶² The paper presented a totally new approach to the legislative history of the Sherman Act, departing from Bork’s earlier reading of the history and inconsistent with the thorough study of Hans Thorelli.⁶³ Under the new reading—

Congress intended the courts to implement . . . only the value we would call today consumer welfare. To put it another way, the policy courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.⁶⁴

This reading has no support in the Congressional Record.⁶⁵ Here, suffice it to list three problems of which Bork was aware. First, Bork’s study focused on statements of Senator John Sherman whose anti-trust bill inspired the enactment of the first federal competition statute. Senator Sherman’s bill, however, was very different from the one Congress debated and voted on. Members of the Judiciary Committee drafted a new bill

⁵⁸ *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (“[T]he dread of enhancement of prices and of other wrongs which it was thought would flow from undue limitation[s] on competitive conditions” motivated the enactment of the Sherman Act.)

⁵⁹ *Henry v. A.B. Dick Co.*, 224 U.S. 1, 53 (1912) (White, C.J., dissenting).

⁶⁰ *Id.* at 784 n. 24.

⁶¹ Bork, *The Rule of Reason and the Per Se Concept I*, *supra* note 9, at 783 (emphasis added). See also Bork, *The Rule of Reason and the Per Se Concept II*, *supra* note 39, at 375 (“The main tradition of the Sherman Act’s rule of reason . . . necessarily rests, whether phrased in such terms or not, upon the premise that the law’s exclusive concern is with the maximization of wealth or consumer want satisfaction.”)

⁶² Bork, *Legislative Intent and the Policy of the Sherman Act*, *supra* note 40, at 7. For a general discussion see Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, ANTITRUST L.J. (forthcoming).

⁶³ HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1954).

⁶⁴ Bork, *Legislative Intent and the Policy of the Sherman Act*, *supra* note 40, at 7.

⁶⁵ See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 7.

that Senator Sherman did not really like.⁶⁶ Bork apparently believed, or at least argued, that “[it] can be shown . . . that the policies of the drafts were the same so that the debates were fully applicable to the Act as it stands today.”⁶⁷ Second, the 51st Congress that passed the Sherman Act was controlled by the Republican Party, which then was committed to protectionism. The backers of the Sherman Act did not understand concepts of efficiency, or at least did not act to enhance such.⁶⁸ Bork noted that the inconsistency between protectionism and efficiency “was either not apparent to [Senator] Sherman and the Republican majority—though pointed out incessantly by the Democrats—or did not perturb them.”⁶⁹ However, he insisted that “the tariff approach to domestic competition was never suggested by [Senator] Sherman or others who supported his antitrust objectives.”⁷⁰ Third, when Congress debated the Sherman Act, economists were divided over the question whether the trusts presented an economic problem that required government intervention.⁷¹ Members of Congress had no conceivable appreciation of free markets and efficiency. They were determined to take action against the trusts to stop wealth transfers from the public.⁷²

As Judge Walker pointed out,⁷³ Bork’s flawed historical claim indeed happened to serve the normative framework he introduced a few months earlier. That is, Bork introduced the consumer welfare vehicle after developing the efficiency framework.

2. The Choice of Vehicle

Bork’s choice of the term “consumer welfare” appears intuitive, although it is misguided. It is undeniable that the 51st Congress enacted the Sherman Act to protect consumer interests, though members of the Congress had no clear grasp of why anti-trust legislation would accomplish that. The Congressional Record, therefore, requires any jurist who cares about legislative intent to refer to consumer interests.

As Bork understood the virtue of competition, it enhances allocative efficiency, thereby expanding prosperity in society and benefitting all individuals. *The Crisis* presents this view:

There is much justifiable concern about relative poverty in our society and about particular groups that are thought to be disadvantaged in one way or another. It should be obvious that such groups will achieve major gains in

⁶⁶ See THORELLI, *supra* note 63, at 211 (“That Sherman was not the author of the [Sherman Act] is clear to any intelligent reader of the Congressional Record.”); ⁶⁶ See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 7, at 2258-61.

⁶⁷ Bork, *Legislative Intent and the Policy of the Sherman Act*, *supra* note 40, at 13.

⁶⁸ See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 7, at 2264-66.

⁶⁹ *Id.*

⁷⁰ Bork, *Legislative Intent and the Policy of the Sherman Act*, *supra* note 40, at 16 n. 11.

⁷¹ See, e.g., Arthur Twining Hadley, *The Good and Evil of Industrial Combination*, 79 ATLANTIC MONTHLY 377, 377 (1897) (“This is a subject on which it is easy to argue, and hard to judge.”). See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 48, at 2261-64.

⁷² Orbach, *How Antitrust Lost Its Goal*, *supra* note 7, at 2264-68.

⁷³ See *supra* notes 27-29 and accompanying text.

prosperity only by sharing in the general increase of wealth. Competition allows us to use our resources most effectively to this end.⁷⁴

Keeping in mind that antitrust laws address consumer interests, allocative efficiency may be presented as a criterion directing competition to serve the individual, or consumer welfare. This logic is consistent with Bork's view that efficiency-enhancing rules, such as per se bans on price fixing, serve "a pro-consumer policy." Such rules intend to prevent misallocation of resources that would result in lower output and higher prices. Another way to reach the same outcome, under Bork's intellectual framework, is that allocative efficiency necessarily benefits individuals ("consumers") and is gained through competition. It is also clear that Congress adopted anti-trust legislation; namely, a statute aiming at trusts. Hence, restating the relationships among these values: consumer welfare = allocative efficiency = competition = anti-trust.

In *The Paradox*, Bork offered a theoretical foundation for his consumer welfare standard and explained why, although antitrust serves "a pro-consumer policy," it does not concern welfare tradeoffs.⁷⁵ Bork expressly dismissed the basic economic distinction between "consumer surplus" and "producer surplus," framing it as a distinction between classes of consumers.⁷⁶ For example, in a transaction between a consumer and a monopoly, Bork saw a "shift in income between two classes of consumers"—from the monopoly's buyers to the monopoly's owners.⁷⁷ "The consumer welfare model," he explained, "views consumers as a collectivity [and] does not take . . . income effect into account."⁷⁸ This analysis was needed to support Bork's belief that antitrust courts are not permitted to consider welfare tradeoffs. It also responded to Oliver Williamson's observation that welfare tradeoffs could produce "social discontent."⁷⁹

Did Bork intend to deceive others? The record of his journey in antitrust presents an evolving error surrounding the goals of antitrust. Bork constructed an elaborate framework for antitrust, intending to resolve the "crisis in antitrust" that in his mind threatened the economy and the nation as a whole. His genius was in the effective framing that drew attention even in the form of controversy.⁸⁰ In this framework, the consumer welfare standard appears logical considering the array of propositions Bork developed and their sequence, though some of its propositions are incorrect.

The Trojan Horse Hypothesis presents the flaws in Bork's work as a shrewd political maneuver designed to benefit from the intellectual weaknesses of others. It is far from clear, however, that Bork understood the mistakes in the underlying propositions he developed to rationalize the consumer welfare standard. To design a Trojan horse, Bork

⁷⁴ Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 139.

⁷⁵ BORK, THE ANTITRUST PARADOX, *supra* note 3, at 7, 90-107.

⁷⁶ *Id.* at 110-12.

⁷⁷ *Id.* at 110.

⁷⁸ *Id.*

⁷⁹ Oliver E. Williamson, *Economies As an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 28-29 (1968).

⁸⁰ *See, e.g.,* Gelhorn, *supra* note 8; Williamson, *supra* note 8.

should have been aware of these and believed that others would not see or understand them.

III. The Meaning of the Crisis

The Trojan horse Robert Bork allegedly designed emerged from his depiction of an apocalyptic crisis in antitrust. Bork painted antitrust policy with colors of war, warning about Armageddon and sparking a heated controversy. Bork's critics have blamed him for being a cause of an actual crisis in antitrust.⁸¹ Both perceptions of crisis have fed the Trojan Horse Hypothesis. First, Bork's own account of the crisis in antitrust created a belief that, in this ideological war, all maneuvers were justifiable. Second, the polarization through the intensification of the ideological war has caused critics and admirers of Bork alike to believe—or at least suggest—that Robert Bork was a person who could design a Trojan horse. The understanding of the myth, therefore, requires understanding of the “crisis in antitrust.”

A. Mischaracterization of Evolution

The central theme motivating Bork's journey in antitrust was his perception of a crisis—contradictions and contrasts in antitrust law—that he believed posed an imminent threat to the economy and the nation. In Bork's mind, the crisis in antitrust threatened our national identity because antitrust “is also an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency.”⁸² He, therefore, concluded that the contradictions and contrasts established placed the “policy at war with itself.”

This crisis, Bork warned, was created by “dubious reasoning that [became] law,”⁸³ “dubious battles”—major campaigns against desirable economic activities,⁸⁴ protectionists and anti-free market forces who were “steadily broadening and consolidating their victory,”⁸⁵ and a Supreme Court that was “a fallible human institution” and preferred the “protection of the inefficient to competitive vigor.”⁸⁶ “Unsuspected by most Americans,”⁸⁷ the crisis was directly tied to “the business community and its lawyers [that did] not urge[] the basic ideas of the free market in the

⁸¹ See, e.g., First, *supra* note 1, at • (“Robert Bork nearly killed antitrust.”)

⁸² Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 138. See also Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401, 401 (1965) (“Antitrust has become far more than economic regulation. It displays many of the signs of a secular religion.”); Bork, *Supreme Court versus Corporate Efficiency*, *supra* note 9, at 158 (“Antitrust is a subcategory of ideology, and a majority of today's Supreme Court is in the grip of an economic and social ideology that leads it to prefer protection of the inefficient to competitive vigor.”); BORK, THE ANTITRUST PARADOX, *supra* note 3, at 3, 408 (“Antitrust is a subcategory of ideology.”)

⁸³ Bork, *Supreme Court versus Corporate Efficiency*, *supra* note 9, at 156.

⁸⁴ See, e.g., Bork, *Antitrust in Dubious Battle*, *supra* note 5.

⁸⁵ Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 138.

⁸⁶ Bork, *Supreme Court versus Corporate Efficiency*, *supra* note 9, at 158.

⁸⁷ Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 138.

courts. In failing to do that, they [did] not represent[] us well.”⁸⁸ With these concerns in mind, Bork declared that “modern antitrust has so decayed that the policy [was] no longer intellectually respectable.”⁸⁹ Time was “running out” for “rational, pro-consumer antitrust policy.”⁹⁰ With doomsday around the corner, the consumer welfare standard emerged to establish order in the chaos and save us all.⁹¹ The rhythm Bork set for his own writing invited Trojan horse myths.

But the contrasts and contradictions that Bork perceived as the elements of the crisis in antitrust characterize the normal evolution of common law. In such evolution, at any point of time there may be contrasts and inconsistencies between new and older legal norms that co-exist. New legal norms rely on newer social norms and theories, whereas the older legal norms reflect outdated intuitions and values. Antitrust law, which is almost entirely judicial, inevitably progresses inconsistently.⁹²

In the Chicago tradition, the common law tends to generate efficient rules.⁹³ Bork, therefore, tried to explain why antitrust common-law evolution did *not* lead to efficient rules. He attributed the crisis to the tendency of antitrust courts to “write afresh each case,” rather than maintaining the common law tradition that “places great value upon continuity of doctrine.”⁹⁴ In the modern common law, Bork argued, “policy movements” tend to take place only in “peripheral cases where it is not clear what rule governs.”⁹⁵ Antitrust, he charged, was erratic and in war with itself because courts made significant policy movements relying on judges’ personal values. Bork believed that courts derailed antitrust policy and created the crisis: while antitrust intends to serve an economic goal—the preservation of a competitive economy—judges used noneconomic considerations,

⁸⁸ Bork, *Supreme Court versus Corporate Efficiency*, *supra* note 9, at 93.

⁸⁹ BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at 418

⁹⁰ Bork, *Supreme Court versus Corporate Efficiency*, *supra* note 9, at 158.

⁹¹ BORK, *THE 1993 ANTITRUST PARADOX*, *supra* note 9, at ix-xiv (describing the consumer welfare standard as a resolution to the paradox).

⁹² See generally William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the ‘Common Law’ Nature of Antitrust Law, 60 *Tex. L. Rev.* 661, 663 (1982) (“To provide . . . flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.”); WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT 3* (1914) (The Sherman Act “was drafted by great lawyers . . . with the intention that [it] should be interpreted in light of the common law.”) See also Daniel A. Crane, *Rules versus Standards in Antitrust Adjudication*, 64 *WASH. & LEE. L. REV.* 49 (2007) (describing contemporary evolution).

⁹³ This is the spirit of the Coase Theorem. See R. H. Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960). See generally George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. L. STUD.* 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. L. STUD.* 51 (1977). Contrary to the theory, empirical evidence shows that the law does not necessarily converge, and when it does not necessarily to efficient rules. See generally Anthony Niblett, Richard A. Posner & Andrei Shleifer, *The Evolution of a Legal Rule*, 39 *J. L. STUD.* 325 (2010).

⁹⁴ Bork, *Contrasts in Antitrust Theory I*, *supra* note 82, at 780.

⁹⁵ Bork, *The Goals of Antitrust Policy*, *supra* note 9, at 250.

such as “the protection of viable, small, locally, owned businesses,”⁹⁶ and the perception that “economies cannot be used as a defense to illegality”⁹⁷ to decide cases.

This characterization of antitrust common law explained, in Bork’s view, why the “Brandeis tradition” was inferior to what he identified as “main tradition.” But the examples Bork provided did not always support his arguments and seem to suggest that, in the evolution of antitrust, doctrines that did not preserve competition *and* were understood as such did not survive. For example, in *The Crisis*, Bork and Bowman observed that “[t]he rule that price fixing and related cartel arrangements are illegal *per se* . . . must be ranked [as] one of the greatest accomplishments of antitrust.”⁹⁸ Referring to cases prior to *Trenton Potteries* (1927)—mostly cases from the era of the main tradition—Bork and Bowman noted that this wisdom “was not always apparent.”⁹⁹ The *per se* ban against price fixing, which was created by the Brandeis tradition, indeed replaced outdated antitrust norms used by the main tradition.

Further, Bork’s characterization of the crisis missed an important dimension of evolution in antitrust. Bork used economic insights of his time to evaluate the robustness of judicial decisions from eras when different economic insights dominated. His critique often benefitted from a hindsight bias.¹⁰⁰ To illustrate, consider Judge Learned Hand’s opinion in *Alcoa*.¹⁰¹ In a fairly complex decision, Judge Hand argued that the Sherman Act was enacted to address “the helplessness of the individual” and protect small businesses.¹⁰² Bork used these remarks as one of the prime example of the use of noneconomic considerations in antitrust.¹⁰³ But in 1945, when Judge Hand wrote the decision, even Chicago economists believed that antitrust should be used to address business size.¹⁰⁴ Further, it is far from clear that these considerations dominated Judge Hand’s decision.¹⁰⁵ By contrast, Bork was quite generous with the Justices of the “main tradition” and ignored their missteps.¹⁰⁶

⁹⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

⁹⁷ *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 580 (1967).

⁹⁸ Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 139.

⁹⁹ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). *See also* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹⁰⁰ Hindsight bias is the tendency to believe that others should have been able to make decisions better than it was actually possible. *See generally* Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J EXP. PSYCH. 288 (1975).

¹⁰¹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945) (“Alcoa”).

¹⁰² *Id.* at 427-29.

¹⁰³ *See, e.g.*, Bork & Bowman, *The Crisis in Antitrust*, *supra* note 2, at 140, 192; BORK, *THE ANTITRUST PARADOX*, *supra* note 3, at 51-52, 166-67.

¹⁰⁴ *See* George J. Stigler, *The Case Against Big Business*, FORTUNE, May 1952, at 123. *See generally* Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

¹⁰⁵ In their 1956 essay, Director and Levi used *Alcoa* as a prime example for misguided anti-size sentiments. *See* Director & Levi, *Law and the Future*, *supra* note 42.

¹⁰⁶ *See supra* notes 56-59 and accompanying text.

Undeniably, when Bork began his journey in antitrust, the field suffered from many internal contrasts and contradictions. Contrary to Bork's claims, however, the legal community was aware of them. He was not the only antitrust titan to criticize them. Most famously, perhaps, in 1966, Donald Turner, then the Assistant Attorney General in charge of the Antitrust Division, described antitrust's approach to vertical agreements as "inhospitality in the tradition of antitrust law."¹⁰⁷ Unlike other antitrust critics, however, Bork saw wars and battles in legal imperfections and effectively prescribed policy solutions to the conflicts he perceived. In retrospect, Bork acknowledged that he was overly pessimistic and underestimated "the power of ideas."¹⁰⁸ But it was Bork's effective presentation of the crisis in antitrust that established him as the single most influential individual in modern antitrust.¹⁰⁹ In effect, this presentation served as his apparatus to influence the course of antitrust's evolution.

B. *The Luck Factor*

The stars aligned to make Bork's journey in antitrust exceptionally successful. Bork finished the first draft of *The Paradox* in 1969 but could not complete the book until after his service as the U.S. Solicitor General.¹¹⁰ Quite importantly, Frank Easterbrook joined him in the U.S. Solicitor General Office and was writing briefs referring to antitrust works of Robert Bork.¹¹¹

In the years between the drafting of *The Paradox* and its completion, the Chicago School—embodying Aaron Director's agenda—and the consumer movement gained power nearly simultaneously. These developments greatly contributed to Bork's success and to the emergence of the Trojan Horse Hypothesis. The phrase "consumer welfare" that Bork introduced into antitrust in 1965 was a political currency by the time *The Paradox* was published in 1978. The circumstances turned an academic mistake into a successful frame of influence.

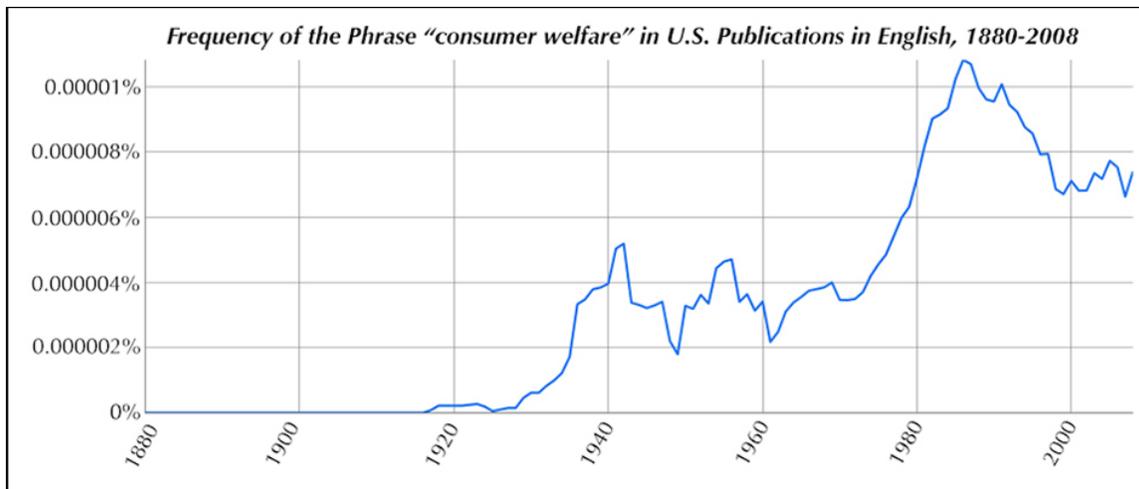
¹⁰⁷ Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 1–2 (1966).

¹⁰⁸ BORK, *THE 1993 ANTITRUST PARADOX*, *supra* note 9, at ix-xi.

¹⁰⁹ See William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990).

¹¹⁰ See *supra* note 3.

¹¹¹ See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 7, at 2272-75.



Source: Google Ngram¹¹²

Economists often use the word “welfare” to refer to the economic term “surplus.”¹¹³ Bork too gave the word “welfare” in this common (though misguided) economic meaning.¹¹⁴ For non-economists, however, the term “welfare,” resonates as a pro-regulatory sentiment. Again, for the Trojan Horse Hypothesis, the primary issue is the use of the consumer to promote an efficiency agenda, not the confusion between “surplus” and “welfare.”

Bork introduced his “consumer welfare” standard, before the consumer movement became a political force. The standard gained power, among other reasons, because activists and lawyers construed antitrust’s inherent focus on consumer interests to serve the movement,¹¹⁵ although antitrust laws protect only *certain* consumer interests. This confusion was supposedly clarified by scholars, who explained that although antitrust serves consumers it may sometimes be in tension with consumer protection. These scholars emphasized the distinction between “surplus” and “welfare” although they did not use the terms. Antitrust, they argued, focuses on maximization of output at low prices (surplus), whereas consumer protection incorporates qualitative considerations

¹¹² For the methodology and its limitations see Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 SCIENCE 176 (2011).

¹¹³ See generally See, e.g., John M. Currie et al., *The Concept of Economic Surplus and Its Use in Economic Analysis*, 81 ECON. J. 741 (1971); Martin L. Weitzman, *Consumer’s Surplus As an Exact Approximation When Prices Are Appropriately Deflated*, 103 Q.J. ECON. 543 (1988); Robert D. Willig, *Consumer’s Surplus Without Apology*, 66 AM. ECON. REV. 589 (1976).

¹¹⁴ In economics, “surplus” refers to the difference between the willingness to pay and price paid, while “welfare” refers to well being. “Consumer welfare” means the buyer’s well-being—the benefits a buyer derives from the consumption of goods and services. Unlike the term “consumer surplus,” this term also include health and other effects. Similarly, the term “social welfare” incorporates effects on decision-makers and externalities. See generally Orbach, *The Antitrust Consumer Welfare Paradox*, *supra* note 14.

¹¹⁵ See, e.g., Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973)

(welfare).¹¹⁶ Richard Posner, for example, argued that “attempts to press antitrust into the service of the new consumer movement are essentially opportunistic.”¹¹⁷

During his fifteen-year journey in antitrust, Bork might have considered the possibility that his framing of allocative efficiency as consumer welfare as was flawed. Discussions in the literature of allocative efficiency stressed the distinction between efficiency and consumer surplus (or welfare).¹¹⁸ He had a draft of *The Paradox* and might have realized that his original framing was erroneous, yet left it intact because it was a powerful vehicle to promote his agenda. The published version of *The Paradox*, however, presents an elaborate set of legal and economic propositions that try to rationalize the consumer welfare standard. It appears that, like all academics, Bork believed in his thesis.

IV. Conclusion

The study of a largely unwritten myth perhaps requires explanation. Why should we ever care about unsubstantiated allegations that are not good enough to be printed? The Trojan Horse Hypothesis refers to mistakes and errors that dominate modern antitrust. The vagueness of the myth symbolizes the vague approach to known mistakes and errors in law and policy. Robert Bork was not an economist, yet constructed an economic framework for antitrust. It was a very ambitious and successful effort, but it contained a few serious mistakes. Considering the scope of his work, mistakes were inevitable. The important question is not why Bork published academic works with flawed propositions or why courts adopted these propositions. Rather, the question is why these flawed propositions have survived and are still rationalized.

Although the mistakes in Bork’s work have always been known in the antitrust community, courts have largely ignored them. The Trojan Horse Hypothesis, therefore, stands for mistakes and errors in modern antitrust and reflects intellectual weakness in antitrust law.

It has been argued that these mistakes and the vagueness they create have no meaningful effect on the operation of antitrust. For example, Herbert Hovenkamp argues that the academic debate over the consumer welfare standard created “an impression of policy significance . . . [but few] if any decisions have turned on the difference [between general welfare and consumer welfare].”¹¹⁹ Professor Hovenkamp therefore maintains that “[w]hen one considers both efficiency and administrability, consumer welfare

¹¹⁶ See, e.g., Kenneth W. Dam, *Consumer Protection: An Overview*, 39 ANTITRUST L.J. 917 (1970); Arnold B. Elkind, *Product Safety*, 39 ANTITRUST L.J. 943 (1970); Richard A. Posner, *Antitrust Policy and the Consumer Movement*, 15 ANTITRUST BULL. 361, 365 (1970); Bruce B. Wilson, *Consumer Protection Goals of the Antitrust Division and the Proposed Nixon Administration Consumer Protection Legislation*, 15 ANTITRUST BULL. 347 (1970).

¹¹⁷ Posner, *id.*, at 365.

¹¹⁸ See, e.g., Williamson, *Economies As an Antitrust Defense*, *supra* note 79; Oliver E. Williamson, *Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105 (1969). See also Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L.REV. 1191 (1977).

¹¹⁹ Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471, 2474 (2013).

emerges as the most practical goal of antitrust enforcement.”¹²⁰ Similarly, Daniel Crane posits that “[t]he core of Bork’s argument—that antitrust law should discard objectives other than the promotion of competition leading to superior market performance—had weathered the critics and stood the test of time.”¹²¹ Such arguments effectively rationalize vagueness and error in the premises and narrative of modern antitrust law. It appears odd to argue that antitrust works well even though it relies on flawed propositions and terms that have no actual meaning, chiefly all those related to the “consumer welfare” standard.

Robert Bork’s primary instrument of influence, his true Trojan horse if you wish, was an effective depiction of a crisis. In hindsight, we know that his success came with his embrace of flawed propositions. To a large extent, the persistence of these flawed propositions ironically proves Robert Bork’s general critique that antitrust can become infected with error that leads it astray.

¹²⁰ *Id.* at 2946.

¹²¹ Crane, *supra* note 62, at •.