DEPARTMENT OF JUSTICE

Antitrust 40 Years After the *Paradox*: No Longer "A Policy At War With Itself"

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The Antitrust Paradox

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Thank you Dean, and thank you to the Federalist Society for organizing this great event.

It's an honor to be here with some true legal luminaries, in particular Judge Ginsburg, one of my legal heroes and a former Assistant Attorney General for the Antitrust Division, and Judge Silberman, whose illustrious career includes service as United States Deputy Attorney General and Under Secretary of Labor. Both had the pleasure of serving alongside Judge Bork on the D.C. Circuit Court of Appeals.

Though not everyone here had a close relationship with Judge Bork, what all of us share in common is that for decades we have lived, worked, and served in Robert Bork's shadow.

It is easy for some of us to look back on Judge Bork and his incredible career and speculate as to what might have been, but we do greater justice to his legacy by celebrating the profound influence and lasting mark he left on antitrust law. In that regard, today's conference commemorating the 40th Anniversary of *The Antitrust Paradox*[1] is particularly fitting.

In recent weeks, I have reflected on Judge Bork's legacy and how we remember him today. In the legal academy and in the media, unfortunately, Judge Bork often is portrayed in polarizing terms, remembered mostly for his ill-fated nomination to the Supreme Court.

That view overlooks the reality that Judge Bork's contributions to constitutional law and antitrust law have had enormous staying power. Indeed, I believe that these two fields have run on parallel tracks since Judge Bork made some of his greatest scholarly contributions in the 1960s and 1970s.

Judge Bork helped bring a level of discipline and rigor to these two fields, both of which were sorely lacking in theoretical cohesion and neutral principles. His insights in antitrust and constitutional law have been accepted—embraced, even—across the ideological spectrum, because they offer common analytical principles that are flexible to evolving circumstances.

As a scholar of constitutional law, Judge Bork helped lead the movement to return courts' focus to the original meaning of the Constitution. Years before the Federalist Society was founded, Judge Bork recognized that constitutional law had lost its theoretical grounding. Characteristically, Judge Bork did not mince words about the state of affairs surrounding him. In his famous article, "Neutral Principles and Some First Amendment Problems,"[2] he wrote:

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[1] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1993 ed., orig. 1978).
[2] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

> A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional, and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.[3]

Judge Bork went on to offer and defend the use of "*neutral principles*" in constitutional interpretation, which were consistent with the Madisonian structure of the Constitution.[4]

The rest, of course, is history. And its impact immense and long-lasting.

Judge Bork helped light the spark of modern originalist thinking and scholarship. His principles gained prominence in courts, the academy, and in the public mind, thanks to the work of Judge Bork, Justice Scalia, Justice Thomas, and many others. They continue to be stimulated by civil discourse through the Federalist Society.

At her confirmation hearing, Justice Kagan stated "we are all originalists,"[5] and at last year's Federalist Society National Lawyers Convention Annual Dinner, Justice Gorsuch stated: "originalism has regained its place, and textualism has triumphed, and neither is going anywhere."[6] It is heartening to see that Judge Bork's neutral principles could bring those two formidable intellects together.

A few scholars have noted that there are many parallels between Judge Bork's influence on constitutional law and antitrust law,[7] and I believe these parallels deserve greater attention as we consider the past, present, and future of antitrust law.

Then-Professor Bork was finalizing *The Antitrust Paradox* at the same time that he published his famous 1971 article on "neutral principles" of constitutional law—the gap in their publication dates is deceptive. Professor Bork completed the first draft of *The Antitrust Paradox* in 1969, but "turbulence" on Yale Law School's campus and other personal matters prevented him

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[3] *Id.* at 1.
[4] *Id.* at 2.
[5] *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary, United States Senate*, 111th Cong., 2d Sess. 62 (2010).
[6] Robert Barnes, *Federalist Society, White House Cooperation on Judges Paying Benefits*, WASH. POST (Nov. 18, 2017), https://www.washingtonpost.com/politics/courts_law/federalist-society-white-house-cooperation-on-judges-paying-benefits/2017/11/18/4b69b4da-cb20-11e7-8321-481fd63f174d_story.html.
[7] *E.g.*, George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S11 & n.64 (2014).

from finalizing it before he left to serve as Solicitor General in 1973.[8] After completing his service in the executive branch, Professor Bork finally published his masterpiece in 1978, which is why we celebrate its 40th anniversary today.

It is important to remember the context in which Judge Bork first wrote *The Antitrust Paradox*. As always, Judge Bork did not mince words. He wrote that "modern antitrust has so decayed that the policy is no longer intellectually respectable."[9] For decades, courts had applied economically flawed analytical frameworks to antitrust analysis. Or, as Bork put it at the time, it was "wrong" to "assume" that the "received opinion about antitrust . . . [was] established theoretically and confirmed empirically by legislators and judges long ago"; in fact, this established opinion rested on "an intellectual base that [did] not exist."[10]

Judge Bork highlighted a number of economic errors and fallacies embedded in antitrust doctrine, including merger analysis, vertical price restraints, exclusive dealing, and predatory pricing.[11] He demonstrated with devastating logic that many practices deemed inherently anticompetitive, in fact, had pro-competitive benefits that warranted consideration, not condemnation.

The impact of these doctrinal errors was profound.

As Judge Bork explained, antitrust rules at the time "significantly impair[ed] both competition and the ability of the economy to produce goods and services efficiently."[12] The source of this harm, Judge Bork noted, rested in the lap of the judiciary. He explained that "the Supreme Court, without compulsion by statute, and certainly without adequate explanation, has inhibited or destroyed a broad spectrum of useful business structures and practices."[13]

Though Judge Bork pulled no punches in his condemnation of faulty economic reasoning in antitrust opinions, his prescription was one of judicial modesty coupled with judicial engagement with economic evidence. He actually understood applied economics. Judge Bork explained first that "[t]he responsibility of the federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions."[14] He

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[8] BORK, *supra* note 1, at xv; *see* Priest, *supra* note 7, at S13.
[9] *Id.* at 418.
[10] *Id.* at 15.
[11] *See id.* at 144-59, 198-263, 280-310.
[12] *Id.* at 4.
[13] *Id.*
[14] *Id.* at 51.

expanded on this, writing, "that antitrust must employ economic reasoning follows, of course, from the identification of consumer welfare as the law's sole legitimate goal."[15]

Like Judge Bork's contributions to constitutional law, this consumer welfare framework has proven remarkably flexible and has attracted support across the ideological spectrum.

Just as "we are all originalists now," we can safely say "we are all consumer welfare advocates now." *The Antitrust Paradox* has been cited in more than 50 district court rulings (including one last week), over 100 court of appeals rulings, and 18 Supreme Court opinions, written by Justices Burger,[16] Brennan,[17] Powell,[18] Blackmun,[19] Stevens,[20] Kennedy,[21] Breyer,[22] O'Connor,[23] Thomas,[24] and Scalia.[25] Likewise, leaders of the Antitrust Division and Federal Trade Commission have repeatedly reaffirmed that the consumer welfare standard guides their enforcement actions.

Despite this bipartisan consensus, as many of you know, Judge Bork's contributions to antitrust law have come under attack in the decades since *The Antitrust Paradox* was published; and even more so over the past two years. Some contend that the neutral principles of antitrust enforcement that he advocated fail to provide tools to protect competition in the digital era. Still others have invoked Judge Bork's criticisms of per se rules barring certain practices in order to argue that the very same conduct should be per se *legal*.

As these debates carry on, we ask: why has Judge Bork's antitrust framework achieved such resonance and staying power? I believe the answer lies in his embrace of economics and his receptiveness to innovation in economic methods of understanding competition.

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[15] *Id.* at 430.
[16] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); United States v. U.S. Gypsum Co., 438 U.S. 422, 442 (1978).
[17] Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 121 n.17 (1986).
[18] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).
[19] Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 700 n.* (Blackmun, J., concurring).
[20] Business Electronics Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 739, 758 (1988) (Stevens, J., dissenting); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (Stevens, J., dissenting); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 431 (1990); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-03 (1985); Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 187 n.5 (2006) (Stevens, J., dissenting).
[21] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993), Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007).
[22] *Leegin*, 551 U.S. at 914 (Breyer, J., dissenting).
[23] State Oil v. Khan, 522 U.S. 3, 16 (1997); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring).
[24] Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318 (2007).
[25] Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 337 (1991) (Scalia, J., dissenting); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 487 (1992) (Scalia, J., dissenting).

As Judge Bork wrote in a new epilogue to *The Antitrust Paradox* fifteen years after it was originally published, "Though the goal of the antitrust statutes as they now stand should be constant, the economic rules that implement that goal should not. It has been understood from the beginning that the rules will and should alter as economic understanding progresses."[26]

That insight forms the core of modern antitrust law. Enforcers and courts continue to rely on the latest economic tools in order to improve their understanding of what may, or may not, constitute harm to competition and, ultimately, to consumers.

Judge Bork's embrace of evolving economics was not hollow. In his post-judicial life, I had the honor of interacting with Judge Bork on the Microsoft case while I served as a counsel to the Senate Judiciary Committee. Judge Bork firmly believed that Microsoft's business practices intended to preserve the company's monopoly position in violation of Section 2 of the Sherman Act, and he set forth his views in a famous opinion piece published in the New York Times 20 years ago.[27] In that piece, he emphatically rejected the "widespread impression that the Microsoft controversy should be resolved by an ideological litmus test." As he put it, "the question is not one of politics or ideology; it is one of law and economics."

That statement, I believe, best encapsulates Judge Bork's lasting contributions to antitrust law. It is a principle I embrace and live by today, as we make consequential decisions at the Antitrust Division.

You may recall that around that time, many had argued that antitrust had no role in the dynamic software industry, and that Microsoft could not possibly violate the antitrust laws as a matter of conservative ideology.

The unanimous en banc D.C. Circuit would go on to uphold key parts of the ruling against Microsoft's practices, as Judge Ginsburg no doubt recalls well.[28] Not long after the D.C. Circuit issued its monumental decision in *United States v. Microsoft*, I was at a lunch with Judge Bork and others. One of the attendees claimed that the court of appeals got it wrong, and that the Justice Department should be precluded from settling the case. Judge Bork strongly pushed back, arguing that it was correct under the antitrust laws, and that there was no established principle to preclude the DOJ settlement.

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[26] BORK, *supra* note 1, at 430.

[27] Robert H. Bork, *What Antitrust Is All About*, N.Y. TIMES (May 4, 1998), https://www.nytimes.com/1998/05/04/opinion/what-antitrust-is-all-about.html.

[28] 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

The *Microsoft* case was not only correctly decided; it was a testament to Judge Bork's approach to antitrust law: the consumer welfare standard remains the goal, while our economic tools and their applications to new business models and digital markets continue to evolve.

Thanks to the influence of Judge Bork's *Antitrust Paradox*, today we can proclaim that modern antitrust law is *no longer* "a policy at war with itself."