WAS THE CRISIS IN ANTITRUST A TROJAN HORSE?

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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 Antitrust,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.3 The Antitrust Paradox is undeniably the most influential

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work in modern antitrust and also the most controversial one. Robert Bork’s journey in antitrust was remarkably successful in changing the antitrust law and policy landscape. It provoked lawyers and economists, leaving no mind indifferent to the positions he expressed.¹

Bork’s remarkable success, however, was not predestined. Other antitrust giants of the era, such as Phillip 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 noneconomic considerations in antitrust, and perceived most vertical arrangements as legitimate business practices. Notwithstanding others’ intellectual contributions, however, Bork was probably most responsible for the change in the course of antitrust through his “consumer welfare” standard.

In the antitrust mythology, the success of Robert Bork in influencing antitrust policy is often attributed to his 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 “consumer-oriented law,”² deceiving the guardians of the old regime by stating that “[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription.”³ The Supreme Court, the narrative goes, endorsed this prescription without examining its nature or implications.⁴ I call these speculations and allegations “the Trojan Horse Hypothesis.”

Trojan horses represent the victory of both deceit and genius. The Trojan Horse Hypothesis posits that Bork’s success in bending antitrust to his will was such a victory. This essay examines the underlying sources of the Trojan Horse Hypothesis, its validity, and its significance to modern antitrust policy.

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,” “consumer welfare,” and “allocative efficiency” are largely equivalent. The first proposition has no factual support, and the second proposition is clearly flawed. To believers in the Tro-

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³ BORK, supra note 3, at 66.
⁴ BORK, supra note 3, at 66.
The Trojan Horse Hypothesis emerged from Bork’s depiction of an atmosphere of crisis. Bork portrayed a “war” between free-market and anti-market forces. He forcefully promoted the idea that internal contradictions in antitrust plagued the law with “schizophrenia” and established a “paradox.” “[A]ntitrust’s basic premises,” he observed “[were] mutually incompatible, and . . . some of them [were] incorrect.” 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.” Bork’s portrayal of this fog of war—the crisis in antitrust—created in the minds of many the impression that he could have used military-like tactics for antitrust. The Trojan Horse Hypothesis reflects this spirit.

While the Trojan Horse Hypothesis is largely an unwritten myth, its understanding is important to the continuing development of antitrust law and policy. The confusing terminology that inspired the Hypothesis, I argue, has remained a primary source of confusion in antitrust and has been used as a justification to bar antitrust plaintiffs from moving forward on substantive issues. For example, since *Matsushita*, but much more so during the Roberts Court years, the Supreme Court has been using false-positive errors to rationalize a greater reliance on procedural hurdles and immunities that reduce the
substantive scope of antitrust. But one of the reasons antitrust law could confuse courts is the confusing terminology that Bork introduced and the Supreme Court adopted.

More broadly, flawed economic premises and confusing economic terminology continue to play too large a role in antitrust discourse and decision making. The Trojan Horse Hypothesis illustrates the tendency of scholars and courts to give insufficient scrutiny to how norms and premises evolved and the reluctance to re-evaluate established doctrines and premises. Bork himself forcefully argued that “[o]ne lesson the study of antitrust teaches is that the law is capable of adopting wrong premises, freezing onto them despite repeated demonstration of their error, and then reasoning inexorably to . . . bizarre results.”

The study of the Trojan Horse Hypothesis confirms this point. A prime example of a failure in modern antitrust law and policy is the use of the term “consumer welfare,” which has no meaning in antitrust. Recently, in *Actavis,* the Supreme Court recognized again that the purpose of antitrust is to promote consumer welfare. The Court’s version of “consumer welfare,” however, was not the standard Bork promoted. The *Actavis* Court examined the legality of reverse payment settlements under antitrust law. Writing for the Court, Justice Breyer focused on the “potential for genuine adverse effects on competition.” Competition, he explained, serves “the consumer’s benefit,” whereas a settlement agreement that produces “monopoly return” benefits the settling firms and “the consumer loses.” This framing supposedly utilizes “consumer welfare” measured by consumer surplus as a means to identify harm to competition. Such references to “consumer welfare,” however, do not suggest that the Court seriously considered the meaning of the term in antitrust. Paradoxically, although Bork created this problem, its endurance and rationalization proves Bork’s original critique of antitrust policy: antitrust can be stagnant and intellectually undeveloped.

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14 Bork, *Antitrust in Dubious Battle,* supra note 5, at 156.


17 *Id.* at 2234–35 (Breyer, J.), 2238 (Roberts, C.J., dissenting).

18 *Id.* at 2234 (quoting FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 460–61 (1986)).

19 *Id.*

20 For the ambiguity of the consumer welfare standard, see Orbach, *The Antitrust Consumer Welfare Paradox,* supra note 15.

21 Bork, * supra note 3, at 418 (“[M]odern antitrust has so decayed that the policy is no longer intellectually respectable.”). In the 1993 edition of *The Antitrust Paradox,* Bork withdrew this
Robert Bork’s antitrust framework suffers from a few serious mistakes that courts and many scholars have endorsed. I describe the evolution of the core mistakes related to the “consumer welfare” standard and argue that they were mostly a function of error, not intentional subterfuge. But, much more importantly, I believe that the validity of the Trojan Horse Hypothesis is not particularly important. Rather, the real issue is the broad endorsement of mistakes and the inability or unwillingness to correct them. Among other things, the endurance of the mistakes that inspired the Hypothesis emphasizes the Supreme Court’s preference to use procedural hurdles and immunities to avoid substantive analysis of antitrust issues. The Trojan Horse Hypothesis, therefore, is, in essence, a symbol of confusion, neglect, and doubt in and about antitrust.

I. THE RISE OF THE TROJAN HORSE

The Trojan Horse Hypothesis 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,” and second, Bork’s conclusion that “competition must be understood as the maximization of consumer welfare or, if you prefer, economic efficiency.” Both propositions are so flawed that some believe they must have been deceptive 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 the arguments regarding the strategic use of confusing terminology, consider the two following propositions:

(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.

In Bork’s antitrust framework “consumer welfare” means “efficiency.” In this framework, proposition (b) is supposedly the proper framing of proposition (a). Proposition (b), however, emphasizes the inadequacy of the use of

22 Bork, supra note 3, at 66.
23 Bork, Revised Edition, supra note 9, at 427.
“consumer welfare” for antitrust. Problems related to income inequality, externalities and trade in undesirable goods directly affect the welfare of consumers (as opposed, perhaps, to “consumer surplus”). Bork avoided this problem. He used the word “efficiency” in the discussion of “income distribution, externalities, and the purchase of goods that society does not want consumers to have.” Framing choices of this kind appears strategic. Why depart from the “consumer welfare” standard and use other terms?

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

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.’” Steven Salop observed that “Judge Bork’s . . . motivation for creating such confusion . . . is unclear.” Salop 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.” Herbert Hovenkamp posited that “[t]here is more than a little chicanery in such terminology.”

In one instance, Judge Vaughn Walker explicitly used the term “Trojan Horse” in arguing that “[a]ntitrust affords a remarkable example of ‘strict con-

25 BORK, supra note 3, at 106.
31 Id. at 348 n.30.
struction’ serving as a Trojan Horse for the policy preferences of its advocates.”

Judge Walker pointed out that Bork first published an article advocating consumer welfare as the sole legitimate goal of antitrust law and—only then—published his famous article about the legislative intent of the Sherman Act, where he argued that Congress intended allocative efficiency to be the goal of antitrust. He therefore posited that “Judge Bork’s policy insight . . . drove his reading of the statute’s history, not the other way around.”

But condemnation of Bork for employing a Trojan horse is far from universal. Judge Douglas Ginsburg, for example, presented a very different perspective. Arguing that Bork’s work “brought order to antitrust law,” Judge Ginsburg 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. Notably, Judge Ginsburg acknowledged that Bork’s historical arguments might not have been sound, but he seems to view that as a necessary evil. He 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.” 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.”

The debate over the reasons for Bork’s confusing terminology, has never ended. The critical point, however, is that the Supreme Court has endorsed this terminology without acknowledging its vagueness and has continued to do so—without re-examination—for the last 30 years.

34 Id. at 1217.
35 Id.
39 Id.
40 Id. at 231.
II. THE DELIVERY OF THE TROJAN HORSE

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 eliminating the role of non-economic considerations in antitrust and contributed to antitrust’s downsizing.

A. THE DELIVERED AGENDA

Robert Bork’s work in antitrust followed the vision of Aaron Director. In Bork’s words, Director’s antitrust course at The University of Chicago changed his “view of the entire world,” and he underwent a “religious conversion.” Upon graduation, Bork served as a research associate at Director’s Antitrust Project, where he wrote his first antitrust paper. The paper, published in 1954, argued that vertical integration should not be an antitrust concern. During his journey in antitrust, Bork produced three series of papers: (1) three essays published in Fortune magazine that introduced the “crisis” in antitrust; (2) scholarly articles about antitrust analysis of vertical restraints and the rule of reason; and (3) two papers about the goals of antitrust laws. These works were the cornerstones of the antitrust edifice that Bork later fully presented in The Antitrust Paradox.

41 See infra notes 42, 49–53 and accompanying text.
42 See, e.g., Bork, 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.”); Bork & Bowman, The Crisis, supra note 2, at 366 n.5 (pagination from Columbia Law Review version) (“The authors are indebted to Professor Director by whom they were introduced to the general economic approach to antitrust problems represented in this article.”); 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).
43 Kitch, supra note 42, at 183.
44 Bork, supra note 3, at ix; Bork, Vertical Integration and the Sherman Act, supra note 1.
45 Kitch, supra note 42, at 201.
46 Bork & Bowman, The Crisis, supra note 2; Bork, The Supreme Court versus Corporate Efficiency, supra note 9; Bork, Antitrust in Dubious Battle, supra note 5.
Director’s political philosophy rested on the proposition that “every extension of state activity should be examined under the presumption of error.” Consistent with this philosophy, Director was in the vanguard of advocating for much less antitrust intervention. His antitrust critique consisted of several arguments, summarized in the celebrated 1956 essay he wrote with Edward Levi:

1. Economics should direct antitrust analysis and indeed “antitrust laws have been greatly influenced by economic doctrine;”
2. As the law of antitrust evolved, courts sometimes resorted to noneconomic considerations, leading to uncertainty regarding the future direction of antitrust;
3. Economic principles could not support antitrust intervention in several areas where courts have endorsed intervention;
4. Antitrust laws became obsessed with condemning 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 someday there would be “a recognition of the instability of the assumed foundation for some major antitrust doctrines” and argued that this recognition would “lead to a re-evaluation of the scope and function of the antitrust laws.”

Director’s intellectual heirs, Chicago scholars, have developed this framework. These scholars, however, were not clones, and disagreed on a few antitrust issues. Among those scholars, Bork stood out. His framing was particularly effective because of the contrasts and contradictions he emphasized. These 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.

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49 Aaron Director, The Parity of the Economic Market Place, 7 J.L. & ECON. 1, 2 (1964). This proposition also defines Frank Easterbrook’s The Limits of Antitrust. See Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1 (1984); see also Baker, Error Costs, supra note 13.


51 Id. at 282.

52 Id. at 286.

53 Id.

54 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 on 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.”).

55 For example, in 1979, Richard Posner observed that the views presented in his 1976 antitrust book “closely resemble but are not identical to the more orthodox Chicago position espoused by Bork.” Id. at 926 n.2.
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 expression[s]” of his welfare standard. He presented antitrust as “consumer oriented law” but sought to promote efficiency. Did he fail to see the flaws in his analysis or was it a strategic framing? Put otherwise, did he intentionally design a Trojan horse?

1. The Introduction of the Confusing Terminology

During his antitrust journey, Bork made a significant revision to the conceptual framework he introduced in 1963. He switched his posited goal of antitrust from “the preservation of competition” to “consumer welfare.” Before the introduction of the consumer welfare standard, preservation of competition was understood to be the goal of antitrust. 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 economy.” 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 provides society with the maximum output that can be achieved at any given time with the resources at its command.” Bork’s choice to switch terminology to “consumer welfare” as a proxy for allocative efficiency led some to believe that it was a strategic maneuver.

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 certain 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 considerations guided the “main tradition” of the rule of reason, which he distin-
guished from the “Brandeis tradition.” The “main tradition,” he argued, “was shaped in the law’s formative period primarily by three men: Justice Peckham . . . Justice Taft . . . and Chief Justice White.”

Bork opposed the evolution of antitrust from the “main tradition” to the “Brandeis tradition” and believed that the Brandeis tradition was regressive because it incorporated non-economic considerations in antitrust analysis. In his view, the main tradition was unequivocally superior to the Brandeis tradition.

Bork argued that “we can extrapolate [from the early cases] the policy . . . [of] maximization of wealth or consumer want satisfaction,” though he acknowledged that the “policy may never have been explicitly formulated in any judge’s mind.” Nonetheless, this caution quickly evaporated. When he discussed the “superiority” of the main tradition, his 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.” This statement was an exaggeration. Judges in antitrust’s formative era, including Justices Peckham, Taft, and White, did not perceive maximization of wealth as a meaningful goal for antitrust. They mostly feared the trusts. For example, Justice Peckham famously emphasized the interests of “the small dealers and worthy men.”

Importantly, at this point, Bork was still careful to acknowledge that the Sherman Act’s legislative history was not definitive regarding the goals of antitrust. Bork referred to the “the general muddiness of the legislative intent” of the Sherman Act. Like many others, Bork argued that 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

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63 Bork, The Rule of Reason and the Per Se Concept—Part I, supra note 9, at 783.
64 Id. at 833–47.
65 Id. at 830.
66 Id. at 838.
67 United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 323 (1897).
68 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).
69 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.).
71 Bork, The Rule of Reason and the Per Se Concept—Part I, supra note 9, at 784 n.23.
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.\footnote{Id. at 783 (emphasis added); see also Bork, The Rule of Reason and the Per Se Concept—Part II, supra note 47, 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.”).}

Just a few months after Bork took that view, however, in October 1966, The Journal of Law and Economics published Bork’s influential work on the legislative intent of the Sherman Act.\footnote{Bork, Legislative Intent and the Policy of the Sherman Act, supra note 48, at 7.} This paper presented a totally new approach to the legislative history of the Sherman Act, which departed from Bork’s earlier reading of the history.\footnote{Bork’s view was also inconsistent with Hans Thorelli’s earlier thorough study of the legislative history of the Sherman Act. HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1954).} Under the new reading:

Congress intended the courts to implement . . . only that value we would today call consumer welfare. To put it another way, the policy the 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.\footnote{Bork, Legislative Intent and the Policy of the Sherman Act, supra note 48, at 13.}

This reading has no support in The Congressional Record.\footnote{See generally Orbach, How Antitrust Lost Its Goal, supra note 7.} Indeed, there were three problems with Bork’s interpretation of the record, all of which he knew about. First, Bork’s study focused on statements of Senator John Sherman, whose antitrust 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 that Senator Sherman did not really like.\footnote{See Thorelli, supra note 74, at 211 (“That Sherman was not the author of the [Sherman Act] is clear to any intelligent reader of the Congressional Record.”); see generally Orbach, How Antitrust Lost Its Goal, supra note 7, at 2258–61.} Bork argued, however, that “[i]t can be shown . . . that the policies of the drafts were the same so that the debates are fully applicable to the Act as it stands today.”\footnote{Bork, Legislative Intent and the Policy of the Sherman Act, supra note 48, at 7.} 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 concepts.\textsuperscript{79} Indeed, Bork observed 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.”\textsuperscript{80} He insisted, however, that “the tariff approach to domestic competition was never suggested by [Senator] Sherman or others who supported his antitrust objectives.”\textsuperscript{81} Third, when Congress debated the Sherman Act, economists were divided over the question whether the trusts presented an economic problem that required government intervention.\textsuperscript{82} Members of Congress did not have in mind free markets, let alone a sophisticated understanding of economic efficiency. They were determined to take action against the trusts to stop wealth transfers from the public.\textsuperscript{83}

As Judge Walker has pointed out,\textsuperscript{84} Bork’s flawed historical claim conveniently happened to serve the normative framework he introduced a few months earlier.

2. The Choice of Vehicle

Bork’s choice of the term “consumer welfare” has intuitive appeal, but it is misleading. 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 antitrust legislation would accomplish that. But that only begs the question whether Bork’s conception of “consumer welfare” comports with Congress’s notion of what it meant to protect consumer interests.

As Bork understood the virtue of competition, it enhances allocative efficiency, thereby expanding prosperity in society and benefiting all individuals. \textit{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 prosperity only by sharing in the general increase of wealth. Competition allows us to use our resources most effectively to this end.\textsuperscript{85}

In Bork’s economic framework, which was rather simplistic, the maximization of allocative efficiency served consumer interests. Therefore, he argued 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 to posit that allocative efficiency necessarily benefits individuals (“consumers”) and is gained through competition. It is also clear that Congress adopted antitrust legislation; namely, a statute aiming at trusts. Hence, restating the relationships among these values: consumer welfare = allocative efficiency = competition = antitrust. If this outcome is confusing, it is because it makes no sense. As stated at the outset, Bork’s antitrust framework rested on profoundly flawed propositions. Their endorsement and survival are indeed perplexing.

In The Antitrust Paradox, Bork offered a theoretical foundation for his consumer welfare standard and explained why, although antitrust serves “a pro-consumer policy,” it does not require welfare tradeoffs. Bork expressly dismissed the basic economic distinction between “consumer surplus” and “producer surplus,” framing it as a distinction between classes of consumers. 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. “The consumer welfare model,” he explained, “views consumers as a collectivity [and] does not take . . . income effect into account.” 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.”

Did Bork intend to deceive others? The record of his journey in antitrust presents an evolving error regarding the goals of antitrust. Bork constructed an elaborate framework for antitrust, intending to resolve the “crisis in antitrust” that, in his view, threatened the economy and the nation as a whole. His genius was in the effective—albeit controversial—framing. Using this framework, Bork is able to make the consumer welfare standard seem a logical consequence of the array of propositions Bork developed and their sequence. And he was able to do this notwithstanding that some of his propositions are incorrect.

The Trojan Horse Hypothesis presents the flaws in Bork’s work as a shrewd strategic maneuver designed to benefit from the intellectual weak-

86 Bork, supra note 3, at 7, 90–107.
87 Id. at 110–12.
88 Id. at 110.
90 Id.
90 See, e.g., Gellhorn, supra note 8; Williamson, supra note 90.
necesses of others. Bork’s maneuvers, I believe, were, instead, largely efforts to stabilize an ambitious academic framework he was developing. This publication of unstable academic frameworks is not an unusual phenomenon. The only unique aspect in Bork’s instance is the endorsement of the framework by courts and scholars.

III. THE MEANING OF THE CRISIS

The perception that Robert Bork created a Trojan horse owes much to his depiction of an apocalyptical crisis in antitrust. Bork painted antitrust policy with the 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. Both perceptions of crisis have contributed to 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 caused by 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 myth, therefore, resulted from 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.” 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 . . . [and would] have consequences,” “dubious battles”—major campaigns against desirable economic activities by protectionists and anti-free-market forces who were “steadily broadening and consolidating their victory;” and a Supreme Court that was “a fallible human institution” and pre-

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92 See, e.g., First, supra note 1, at 1 (“Robert Bork nearly killed antitrust.”).
93 Bork & Bowman, The Crisis, supra note 2, at 138; see also Bork, supra note 3, at 3, 408 (“Antitrust is a subcategory of ideology.”); Bork, Contrasts in Antitrust Theory: I, supra note 47, at 401 (“Antitrust has become far more than economic regulation. It displays many of the signs of a secular religion.”); Bork, The 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.”).
94 Bork, The Supreme Court versus Corporate Efficiency, supra note 9, at 156.
95 See, e.g., Bork, Antitrust in Dubious Battle, supra note 5.
96 Bork & Bowman, The Crisis, supra note 2, at 138.
ferred the “protection of the inefficient to competitive vigor.”97 “[U]n-
suspected by most Americans,”98 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 courts. In failing to do that, they [did] not represent[ ] us well.”99
With these concerns in mind, Bork declared that “modern antitrust has so
decayed that the policy [was] no longer intellectually respectable.”100 Time
was “running out” for “rational, pro-consumer antitrust policy.”101 With
doomsday around the corner, the consumer welfare standard emerged to cre-
ate order out of chaos and save us all. The rhythm Bork set for his own writ-
ing invited Trojan horse metaphors.

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, contrasts and inconsistencies between new and older legal
norms may co-exist at any time. 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 judge-made, inevitably pro-
gresses inconsistently.102

In the Chicago tradition, the common law tends to generate efficient
rules.103 Bork, therefore, tried to explain why antitrust common-law evolution
did not lead to efficient rules. He attributed the crisis to the tendency of anti-
trust courts to “write afresh with each case,” rather than maintaining the com-
mon law tradition that “places great value upon continuity of doctrine.”104 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.”105

97 Bork, The Supreme Court versus Corporate Efficiency, supra note 9, at 158.
98 Bork & Bowman, The Crisis, supra note 2, at 138.
99 Bork, The Supreme Court versus Corporate Efficiency, supra note 9, at 93.
100 BORK, supra note 3, at 418.
101 Bork, The Supreme Court versus Corporate Efficiency, supra note 9, at 158.
102 See generally William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the
flexibility, Congress adopted what is in essence enabling legislation that has permitted a com-
mon-law refinement of antitrust law through an evolution guided by only the most general statu-
tory directions.”); TAFT, supra note 68, at 3 (The Sherman Act “was drafted by great lawyers . . .
with the intention that [it] should be interpreted in the light of common law.”); see also Daniel A.
103 This is the spirit of the Coase Theorem. See R.H. Coase, The Problem of Social Cost, 3 J.
Legal & Econ. 1 (1960); see generally George L. Priest, The Common Law Process and the
Selection of Efficient Rules, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, Why Is the Common
Law Efficient?, 6 J. LEGAL STUD. 51 (1977). Contrary to the theory, empirical evidence shows
that the law does not necessarily converge and does not necessarily embody efficient rules. See
generally Anthony Niblett, Richard A. Posner & Andrei Shleifer, The Evolution of a Legal Rule,
39 J. LEGAL STUD. 325 (2010).
104 Bork, The Rule of Reason and the Per Se Concept—Part I, supra note 93, at 780.
105 Bork, The Goals of Antitrust Policy, supra note 9, at 250.
Antitrust, he charged, was erratic and at 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. Antitrust is designed to serve an economic goal—the preservation of a competitive economy. But judges used noneconomic considerations, such as “the protection of viable, small, locally owned businesses,” and the perception that “economies cannot be used as a defense to illegality” to decide cases.

This characterization of antitrust common law, in Bork’s view, explained why the “Brandeis tradition” was inferior to what he identified as the “main tradition.” But the examples Bork provided did not always support his arguments that antitrust was increasingly becoming an irrational field and, indeed, seemed to suggest that, in the evolution of antitrust, doctrines that did not preserve competition were understood as such did not survive. For example, in The Crisis, Bork and Bowman observed that “[t]he rule that price fixing and similar cartel arrangements are illegal per se . . . must be ranked [as] one of the greatest accomplishments of antitrust.”

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.” The per se ban against price fixing, a creation of 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 modern economic insights to evaluate the robustness of judicial decisions from eras when different economic insights dominated. His critique often benefited from a hindsight bias. To illustrate, consider Judge Learned Hand’s opinion in Alcoa. 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. Bork used these remarks as one of the prime examples of the use of noneconomic considerations in antitrust. But in 1945, when Judge Hand wrote the decision, even Chicago economists believed that antitrust should be used to ad-

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108 Bork & Bowman, The Crisis, supra note 2, at 139.
110 Hindsight bias is the tendency to believe that others should have been able to predict the future more accurately than the future could have been predicted based on information available when the prediction was made. See generally Baruch Fischhoff, Hindsight? Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, 1 J. Exp. Psych. 288 (1975).
111 United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945) (Alcoa).
112 Id. at 427–29.
113 See, e.g., Bork, supra note 3, at 51–52, 166–67; Bork & Bowman, The Crisis, supra note 2, at 140, 192.
dress business size.\textsuperscript{114} By contrast, Bork was quite generous with the Justices of the “main tradition” and ignored their missteps.\textsuperscript{115}

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 offer criticism. 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.”\textsuperscript{116} 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.”\textsuperscript{117} But it was Bork’s effective presentation of a supposed crisis in antitrust that established him as the single most influential individual in modern antitrust.\textsuperscript{118} In effect, this presentation served as his apparatus to influence the course of antitrust’s evolution.

\section*{B. The Luck Factor}

The stars aligned to make Bork’s journey in antitrust exceptionally successful. Bork finished the first draft of \textit{The Antitrust Paradox} in 1969 but could not complete the book until after his service as the U.S. Solicitor General.\textsuperscript{119} Quite importantly, Frank Easterbrook joined him in the U.S. Solicitor General Office and was writing briefs referring to antitrust works of Robert Bork.\textsuperscript{120}

In the years between the drafting of \textit{The Antitrust 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 factors contributing to the Trojan Horse Hypothesis. By the time \textit{The Paradox} was published in 1978, the phrase “consumer welfare” had gained substantial popular currency because of its (superficial) association with the protection of consumers. The circumstances turned an academic mistake into a successful

\begin{itemize}
\item \textsuperscript{114} See George J. Stigler, \textit{The Case Against Big Business}, \textit{Fortune}, May 1952, at 123; see generally Barak Orbach & Grace Campbell Rebling, \textit{The Antitrust Curse of Bigness}, 85 S. Cal. L. Rev. 605 (2012).
\item \textsuperscript{115} See supra notes 67–70 and accompanying text.
\item \textsuperscript{116} Donald F. Turner, \textit{Some Reflections on Antitrust}, 1966 N.Y. State Bar Ass’n Antitrust L. Symp. 1, 1–2.
\item \textsuperscript{117} Bork, Revised Edition, supra note 9, at ix–xii.
\item \textsuperscript{119} See supra note 3.
\item \textsuperscript{120} See generally Orbach, \textit{How Antitrust Lost Its Goal}, supra note 7, at 2272–75.
\end{itemize}
frame of influence. The chart below shows that the use of the term “consumer welfare” grew substantially from the time Bork started using it up to the 1978 publication of *The Antitrust Paradox* and thereafter.

![Figure 1: “Consumer Welfare” Usage in U.S. Publications (English Language): 1880–2008](chart)

**Source:** Google NGram

Economists often use the word “welfare” to refer to the economic term “surplus.” Bork too used the word “welfare” in this common (though misguided) economic meaning. For non-economists, however, the term “welfare,” resonates as a pro-regulatory sentiment. In connection with the Trojan Horse Hypothesis, however, 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

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121 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).


123 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 includes 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 15.
consumer interests to serve the movement, although antitrust laws protect only certain consumer interests. This confusion was 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 (welfare). Richard Posner, for example, argued that “attempts to press antitrust into the service of the new consumer movement are essentially opportunistic.”

During his 15-year journey in antitrust, Bork might have considered the possibility that his framing of allocative efficiency as consumer welfare was flawed. Discussions in the literature of allocative efficiency stressed the distinction between efficiency and consumer surplus (or welfare). He had a draft of The Antitrust 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 Antitrust Paradox, however, presents an elaborate set of legal and economic propositions in support of the consumer welfare standard. Fundamentally, Bork published an academic framework that reflected strong political views. Such frameworks suffer from inherent weaknesses.

IV. CONCLUSION

The study of a largely unwritten myth perhaps requires explanation. The Trojan Horse Hypothesis posits that, through the purposeful use of confusing terminology, Robert Bork was able to promote his agenda and turn it into the law of the land. This agenda was highly skeptical of the merits of antitrust law. The terminology itself built on a set of flawed economic premises and an incorrect historical account of legislative history. In 1979, the Supreme Court adopted Bork’s confusing terminology without any meaningful scrutiny.

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126 Posner, supra note 125, at 365.
With the terminology, the Court also adopted its flawed premises. The Hypothesis, therefore, mostly emphasizes the use of flawed terms and premises in antitrust law. Bork’s state of mind is not that important today.

Robert Bork was not an economist, yet he constructed an elaborate 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, some mistakes may have been 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.

The significance of the mistakes and the vagueness in antitrust is a matter of perspective. Several prominent antitrust scholars argue that the confusion Bork created has 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].” However, he maintains that “[w]hen one considers both efficiency and administrability, consumer welfare emerges as the most practical goal of antitrust enforcement.” 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—has weathered the critics and stood the test of time.”

The rationalization of vagueness and error in legal premises and narrative contradicts established legal presumptions regarding the value of clarity and logic. Indeed, Robert Bork criticized antitrust for such rationalization. The conscious use of confusing terminology and flawed premises requires, I believe, good justifications. To the best of my knowledge, such have never been offered.

In the decades that have followed the adoption of the “consumer welfare” standard, the Supreme Court has been increasingly using concerns regarding false-positive errors in antitrust to justify the use of procedural hurdles to narrow the scope of antitrust. This trend has several layers and explanations, including confusing terminology and flawed premises that the Court itself adopted.

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131 Id. at 2496.
132 Crane, supra note 73, at 853.
133 See supra notes 12–13 and accompanying text.
Robert Bork’s primary instrument of influence, his true Trojan horse if you will, was an effective depiction of a supposed crisis in antitrust. In hindsight, we know that his success came with his embrace of flawed propositions. To a large extent, it is ironic that the persistence of these flawed propositions proves Robert Bork’s general critique that antitrust “is capable of adopting wrong premises [and] freezing onto them.”

134 Bork, Antitrust in Dubious Battle, supra note 5, at 156.