

BORK AND MICROSOFT: WHY BORK WAS RIGHT AND WHAT WE LEARN ABOUT JUDGING EXCLUSIONARY BEHAVIOR

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ABSTRACT

In 1998, twenty years after publishing *The Antitrust Paradox*, Robert Bork wrote: “The antitrust case brought by the Department of Justice against Microsoft is rock solid.”

How could Robert Bork, who had labored for his whole professional life to cut antitrust down, come out in support of an aggressive monopolization suit against a leading high-technology firm, indeed, an innovating firm that had arguably generated huge benefits for those consumers whose welfare Bork thought should be antitrust’s only concern? Had Bork undergone some sort of conversion that led him to see the need to protect small competitors from the depredations of dominant firms? Or had Bork been bought?

This paper explores this episode in Bork’s writing about antitrust. The paper argues that Bork was neither converted nor bought, but, rather, was applying the principles he set out in the *Antitrust Paradox*. The paper further argues that this episode illuminates Bork’s approach to exclusionary behavior and provides some valuable lessons on how to judge exclusionary conduct.

The paper begins with a discussion of what Bork wrote about exclusionary conduct in *The Antitrust Paradox*. The second part of the paper discusses Bork’s views on *Microsoft* and his rebuttal of his critics at the time. The third part shows how Bork was basically correct in his analysis and sets out four “lessons learned.” The paper concludes by reminding us of the overtly political content of Bork’s approach to antitrust and argues that Bork’s political emphasis on free entry and open markets can help support more vigorous enforcement today against exclusionary conduct.

KEYWORDS: Antitrust, Section 2, monopolization, Bork, Microsoft, Netscape, Antitrust Paradox, exclusion, exclusionary conduct, predation, predatory pricing, Lorain Journal, Standard Fashion

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The antitrust case brought by the Department of Justice against Microsoft is rock solid.

— Robert H. Bork¹

Robert Bork nearly killed antitrust. As the 1960s populism of the Warren Court threatened to turn into Woodstock antitrust in the 1970s, with Congress contemplating legislation to deconcentrate oligopolies and put caps on corporate growth, and with the federal enforcement agencies getting expansive “fairness” authority, pursuing shared monopoly theories, and bringing monopolization litigation against major high technology firms, Bork was honing the case against antitrust as we knew it.² Starting with a polemical article in *Fortune Magazine*, co-authored with his Yale colleague, Ward Bowman, and then elaborated on in more scholarly format in the *Columbia Law Review*,

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¹ Robert H. Bork, *The Case Against Microsoft* at 1 (no date).

² See Industrial Reorganization Act, S. 3832, 92nd Cong., 2d Sess., S. 1167, 93rd Cong., 1st Sess. S. 1959, 94th Cong., 1st Sess. (declaring it unlawful “for any corporation or two or more corporations, whether by agreement or not, to possess monopoly power” in any line of commerce in any section of the country); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) (FTC’s jurisdiction to prohibit unfair methods of competition under Section 5 extends beyond antitrust laws; Commission can act like a “court of equity”); *In the Matter of Kellogg Co.*, [F.T.C. Complaints and Orders 1970-73] Trade Reg. Rep. (CCH) ¶ 19,898 (F.T.C. 1972) (charging four firms with illegally monopolizing the ready-to-eat cereal market); *In the Matter of Exxon Corp.*, [F.T.C. Complaints and Orders 1973-76] Trade Reg. Rep. (CCH) ¶ 20,388 (F.T.C. 1973) (charging eight oil companies with monopolizing southeastern United States petroleum market); Dep’t of Justice, *Memorandum Re Shared Monopolies*, Reprinted in 874 ATRR F-1 (July 27, 1978); Trade Reg. Rep. #345, Part III (Aug. 8, 1978) (setting out circumstances that facilitate collusive behavior in oligopolistic industries); *United States v. International Business Machines Corp.*, Civil Action No. 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969); *United States v. American Telephone & Telegraph Co.*, 427 F. Supp. 57 (D.D.C.1976) (filed Nov. 20, 1974).

Bork critiqued past antitrust decisions and argued for a reorientation of antitrust to serve a single goal—consumer welfare.³ Bork capped this effort with a book that presented a much fuller critique of antitrust doctrine and a clear prescription for a more narrowly-focused antitrust future. The book, *The Antitrust Paradox*, delayed by the “turbulence of the campus” in the early 1970s and Bork’s government service from 1973-1977, was finally published in 1978.⁴

The Antitrust Paradox came along at the right time. It was not the only critique and reassessment of antitrust to appear then, of course; Richard Posner’s book, providing an even more thorough economic-theory perspective on antitrust doctrine, was published two years before, for example.⁵ But *The Antitrust Paradox* drew the most attention, from a wide array of supporters and critics, and seemed to be the leading edge of the movement to turn antitrust upside down.⁶ Within two years, politics caught up and

³ Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, 68 FORTUNE 138 (1963); Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Robert H. Bork, *Contrasts in Antitrust Theory I*, 65 COLUM. L. REV. 401 (1965). For later articles, see Robert H. Bork, *The Supreme Court Versus Corporate Efficiency*, 76 FORTUNE 92 (1967); Bork, *Antitrust in Dubious Battle*, 80 FORTUNE 103 (1969). On Bork’s elusive use of the term “consumer welfare,” see Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L & ECON 133, 142-49 (2011). The Bork and Bowman articles were famously responded to in Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, FORTUNE 135 (Aug. 1964); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Harlan M. Blake & William K. Jones, *Toward A Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965).

⁴ ROBERT A. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) (hereinafter THE ANTITRUST PARADOX).

⁵ See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

⁶ See Ernest Gellhorn, *The Antitrust Paradox: A Policy at War with Itself by Robert H. Bork*, 92 HARV. L. REV. 1376, 1389 (1979) (praising book as generally persuasive—indeed “seminal”—especially on oligopoly theory, vertical arrangements and the Supreme Court’s merger doctrine, but taking issue with Bork’s focus on efficiency as the only goal of antitrust, assumption that price theory will always give clear answers, and proposal that all horizontal mergers except those that give a firm more than 70% of the market should be approved); Oliver E. Williamson, *Book Review*, 46 U. Chi. L. Rev. 526 (1979) (praising the completeness of Bork’s static economic analysis but arguing that antitrust should not ignore firms’ strategic considerations or the existence of entry barriers); Joseph E. Fortenberry, *The Antitrust Paradox: A Policy at War with Itself by Robert H. Bork*, 78 Colum. L. Rev. 1347, 1348 (1978) (disagreeing with Bork’s views on oligopoly and horizontal mergers, but commending Bork’s focus on the connection between antitrust law

moved antitrust to the right. Ronald Reagan had replaced Jimmy Carter—William Baxter was in, Sandy Litvack and John Shenefield were out; James Miller was in and Michael Pertschuk was out. The antitrust movement that Bork so disliked had come to an apparent halt.

How, then, to understand the epigraph that starts this Article? How could Robert Bork, who had labored for his whole professional life to cut antitrust down, come out in support of an aggressive monopolization suit against a leading high-technology firm, indeed, an innovating firm that had arguably generated huge benefits for those consumers whose welfare Bork thought should be antitrust's only concern? Twenty years after the publication of *The Antitrust Paradox* had Bork undergone some sort of conversion that led him to see the need to protect small competitors from the depredations of dominant firms? Or had Bork been bought?

An examination of the record shows that neither view is correct. Bork's position on Microsoft was not necessarily inconsistent with his prior work nor did his fee likely turn him into a mouthpiece for his client (in fact, Microsoft tried to hire him as well⁷). Indeed, a closer look at Bork's position on the Microsoft litigation sheds interesting light on the nature of his approach in *The Antitrust Paradox* and the extent to which his approach can help antitrust law deal with exclusionary behavior. For it turns out that

and economics); James R. Silkenat, *The Antitrust Paradox: A Policy at War with Itself*, 127 U. Pa. L. Rev. 273, 280 (1978) (finding merit in Bork's work "because it forces consideration of economic and business factors that might not be given sufficient weight," but disagreeing with many of Bork's arguments and concluding that "[f]ollowing all of Bork's prescriptions for policy would be even more myopic than rejecting all of his complaints."); Richard S. Markovits, *Monopolistic Competition, Second Best, and The Antitrust Paradox: A Review Article*, 77 Mich. L. Rev. 567 (1979) (disagreeing with Bork).

⁷ See David Segal, *In Netscape's Court Free-Marketeer Robert Bork Is Going Against Microsoft. But Not His Principles.*, WASH. POST, June 25, 1998, at B1 ("Not surprisingly, both sides in the browser battle vied for Bork's blessing.") (reporting the unsuccessful effort of Charles "Rick" Rule to hire Bork on behalf of Microsoft).

Bork was far more overtly political in his approach to antitrust than many other law and economics scholars have been and that he provided useful, but malleable, guidance on what types of exclusionary conduct ought to be the proper subject of antitrust intervention.

The purpose of this article is to understand what Bork has to tell us about how to deal with exclusionary conduct, an area of appropriate and increasing importance in antitrust.⁸ We begin with an exploration of what he wrote about the subject in *The Antitrust Paradox*, followed by an examination of his role in the Microsoft case and his analysis of why Microsoft violated Section 2 of the Sherman Act. Putting these two parts together will then allow us to see not only why Bork was correct in his view of Microsoft's conduct, but also what Bork and his views on Microsoft can teach us about judging exclusionary behavior. Perhaps ironically, one lesson learned is that Bork's approach to exclusionary conduct is not necessarily easier to apply, or more certain in result, than the multi-factor approach to antitrust that he so vociferously opposed. In fact, it is Bork's political philosophy, as much as his economics, that actually supports strong antitrust enforcement against exclusionary behavior.

I. Bork and Exclusion

In the penultimate recommendations chapter in *The Antitrust Paradox* Bork sets out a three-point agenda for what the antitrust laws should “strike at”: 1) “nonancillary” horizontal agreements that suppress competition, such as price fixing and market division; 2) horizontal mergers leaving fewer than three significant rivals in any market; and 3) “deliberate predation engaged in to drive rivals from a market, prevent or delay the

⁸ See, e.g., Jonathan B. Baker, *Exclusion As A Core Competition Concern*, 78 ANTITRUST L. J. 527 (2013); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L. J. 1182 (2013).

entry of rivals, or discipline existing rivals.”⁹ Parts 1 and 2 of this agenda fit comfortably into Bork’s consumer welfare construct. Naked price fixing and market allocation agreements restrict output and have no productive efficiency benefits; horizontal mergers to duopoly will likely diminish consumer welfare because the expected reduction in output will likely exceed any productive efficiency gains.¹⁰ But what about Part 3? What does Bork have in mind as constituting “deliberate predation?” And why would he be willing to recognize such conduct as appropriate for antitrust enforcement, indeed, even when the predatory conduct only disciplines rivals rather than excludes them completely from the market? Why does Bork think this conduct is fit for antitrust attack?

We start with the arguments that Bork advances for why exclusion might be harmful. The first point is that Bork does not believe that “exclusion” *is* harmful: “All business activity excludes.”¹¹ What is harmful is “predation,” the “older and nowadays less significant” branch of antitrust law that “required some indication of wrongful intent” so as to separate “efficient behavior” from behavior that “inhibits competition improperly.”¹² For Bork, efficient behavior is good, of course; this is the main theme of *The Antitrust Paradox*. More interesting is why he thinks that “inhibiting competition improperly” is bad.

Bork advances two arguments against “competition inhibiting” predation. First is the fear of monopoly pricing. Bork writes that predation is “deliberate aggression”

⁹ THE ANTITRUST PARADOX, *supra* note 4, at 405-06.

¹⁰ *See id.* at 91 (“The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”)

¹¹ *Id.* at 137.

¹² *Id.*

undertaken with the expectation that “rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits.”¹³ This view of the harm from predation, one might think, would be enough for Bork to justify antitrust liability, for it is consistent with his overall concern for the maximization of consumer welfare as measured by price and output. But Bork does not rest there. He adds a second harm. Predatory aggression might be undertaken with the expectation that rivals will be “chastened sufficiently” so that they will abandon behavior that the predator finds “inconvenient or threatening.”¹⁴ This result, too, would be “detrimental to consumer welfare.”¹⁵

Bork never develops “inconvenient competition” as a separate harm, but that is likely because Bork is not very concerned with examining the harm from predation, almost taking it as obvious. He pays far more attention to when predation is likely. After all, for Bork, the whole task of antitrust analysis is to distinguish between good and bad business practices. His analysis is dichotomous—practices are either intentionally predatory or they are efficient, one or the other. There is no “intermediate case.”¹⁶ It follows, then, that if a practice is not intendedly predatory it must be efficient.¹⁷

¹³ *Id.* at 144. For discussion of the basic consumer welfare model, *see id.* at 107-10.

¹⁴ *Id.* at 144.

¹⁵ *Id.*

¹⁶ *See id.* at 171 (criticizing Judge Wyzanski’s view of United Shoe’s lease-only policies as being an “intermediate case” between “common law restraints” and “the skill with which business was conducted”).

¹⁷ In other parts of the book Bork recognizes that some conduct might be “neutral,” not being output-restricting or efficient. *See id.* at 122 (taking advantage of tax laws). As a tie-breaker, he argues for non-intervention on political grounds in cases where no bad effect can be shown. *See id.* at 133 (“when no affirmative case for intervention is shown, the general preference for freedom should bar legal coercion”).

For Bork, the real problem with the analysis of predation is one of misidentification. Much of his discussion of exclusionary practices revolves around his belief that the courts have confused efficient business behavior that happens to “exclude” competition with intentionally predatory behavior that kills or disciplines rivals. To properly sort these practices he focuses most of his attention on when predation might be a rational business practice and then examines the techniques that firms have used to engage in predation. In this way Bork can admit that predatory behavior is possible—indeed, should be a target of antitrust enforcement, if properly identified.

Thus Bork concentrates more of his analysis on what he calls a “theory of predation,” but which might more accurately be called the strategy of predation. Bork’s strategic view has two parts, one of which is better-known than the other. The better-known part takes the costs of predation as a rational investment in future profits, appropriately discounted to present value. Predation would then make sense if the flow of future profits (the gain) exceeds the investment in the predatory conduct (the costs). “So stated, there seems nothing inherently impossible in the theory”¹⁸—a grudging, if not enthusiastic, embrace of the existence of predatory conduct.¹⁹

The second part of his strategic theory of predation views predation through a war metaphor: “Predation is a war of attrition, with its outcome determined by the combatants’ relative losses and reserves. The war will be a blitzkrieg only if the predator

¹⁸ *Id.* at 145. The Supreme Court embraced this approach in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)

¹⁹ Bork does not discuss the possibility that firms might engage in predation “irrationally” or through miscalculation, but he had set aside non-profit maximizing behavior earlier in the book and presumably did not feel it necessary to return to challenge this assumption when discussing predation. *See* THE ANTITRUST PARADOX, *supra* note 4, at 95 (economic model does not account for psychological factors or the possibility that firms will “achieve a poorer approximation of the ideal”; but business people “generally prefer to succeed and will seek the solution to the economic equation that ensures their prosperity”).

has greatly disproportionate reserves or is able to inflict very disproportionate losses.”²⁰ Bork qualifies the importance of reserves—any potential victim can, in Bork’s view, borrow the money to finance resistance if resistance will likely be successful—but he sticks to his point about inflicting disproportionate harm. Inflicting disproportionate harm, Bork writes, is needed to “outlast the victim” and “win quickly,” so that the predator can have a “reasonable expectation that future gains will outweigh present losses.”²¹

Bork then examines three techniques of predation as a way to illustrate his general theory of when predation might be a successful strategy. The first, price cutting, Bork characterizes as an “exceedingly unattractive” predatory tactic, one “most unlikely to exist,” for three reasons.²² The predator’s losses will be higher than the prey’s (the predator will be required to expand output at its new lower price, selling more product at a lower price but at increasing marginal costs); the prey might respond with cost-cutting moves; and if it is easy to force the victim to exit, it will be easy for a new entrant to enter once price is restored. Better to look for predatory tactics more likely to succeed, Bork argues, such as a disruption of a distribution pattern or misuse of governmental processes. The former offers the possibility that the predator’s alteration of an efficient distribution system will impose higher costs on its victim (what we might now call “raising rivals’ costs”);²³ the latter is a “particularly effective way of delaying or stifling competition,”

²⁰ *Id.* at 147.

²¹ *Id.* at 148.

²² *Id.* at 149, 155.

²³ *See id.* at 156.

where the object may simply be to delay the appearance of a rival “in a lucrative market.”²⁴

Bork works out his theory of predation, and the types of cases in which predation is likely, by examining a number of well-known court decisions dealing with exclusionary practices. Two Supreme Court cases are particularly illustrative— *Standard Fashion Co. v. Magrane-Houston Co.*, decided in 1922,²⁵ with which Bork disagrees vehemently, and *Lorain Journal v. United States*, decided in 1951,²⁶ with which he agrees completely.

In *Standard Fashion*, a dress pattern manufacturer had required its retail distributors to sell its patterns exclusively, at set retail prices. A retailer breached its agreement; when sued, it counterclaimed that the contract violated Section 3 of the Clayton Act, forbidding exclusive agreements where the effect “may be to substantially lessen competition or tend to create a monopoly.”²⁷ The Supreme Court, in its first decision construing Section 3, unanimously agreed that the contract violated the Act.²⁸ Standard (and affiliated companies) controlled about forty percent of the 52,000 pattern agency outlets in the country. In small communities its exclusive agreement might give it a “monopoly of the business”; in larger cities, the ability to tie up the business of dealers

²⁴ *Id.* at 159.

²⁵ 258 U.S. 346 (1922).

²⁶ 342 U.S. 143 (1951).

²⁷ 15 U.S.C. § 14.

²⁸ Justice Day wrote an opinion in which Taft, Van Devanter, Holmes, McReynolds, Brandeis, Clarke, and Pitney joined.

“most resorted to” by fashion-conscious customers might facilitate further combinations and lead to one firm having “almost, if not quite, all the pattern business.”²⁹

Bork criticizes the Court’s decision on several grounds, but the key argument for his theory of predation is that, as a matter of economic analysis, “exclusivity is not an imposition, it is a purchase.”³⁰ Standard had a choice. Assuming that it had “the best line of dress patterns in the industry,” it could charge its retailers “all that the uniqueness of its line is worth” and leave the retailer free to carry other lines, or it could require the exclusive dealing agreement and take a lower price in return so as to induce the retailer to buy exclusivity the retailer otherwise did not want.³¹ Why would the seller choose the latter? Not to purchase its way to monopoly (competing sellers could easily respond and price cutting is “foolish and self-defeating”) and not to buy some lesser market position (non-monopoly shares are not so profitable).³² No, it can only be “a more sensible goal,” such as gaining the retailer’s exclusive efforts to promote its line. In other words, economic analysis shows that Standard’s exclusive dealing agreement was efficient not predatory.³³

²⁹ See 258 U.S. at 357 (quoting court of appeals’ opinion).

³⁰ THE ANTITRUST PARADOX, *supra* note 4, at 306-07. Bork also questioned how desirable it was to have more competitors in the industry. Noting that there were four firms in the industry with about ninety percent of the market, Bork concluded that the industry was “competitively structured.” See *id.* at 306. Bork also argued that the two-year exclusivity agreements meant that, on average, about 10,000 outlets would be up for grabs each year, concluding that the entry-barring properties of the contracts “had about the solidity of a sieve and the tensile strength of wet tissue paper.” *Id.* at 306.

³¹ *Id.* at 307. For an earlier discussion of the idea of purchasing exclusivity, see Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1956) .

³² See THE ANTITRUST PARADOX, *supra* note 4, at 307, 309.

³³ See *id.* at 307 (“all the case did was dismantle an efficient distribution system because of a false fear of monopoly”).

Lorain Journal was the polar opposite to *Standard Fashion*. The Journal was the only daily newspaper published in Lorain, Ohio, a city of 52,000 located twenty-eight miles west of Cleveland. The Journal had nearly seventy percent of the daily circulation of newspapers sold in Lorain; Cleveland papers had the rest, but the Cleveland papers carried no Lorain advertising and little Lorain news.³⁴ The Court spent little effort on close market definition (neither did the parties), accepting the district court’s description of the Journal as having a “commanding and an overpowering” position, and concluded that the Journal had a “substantial monopoly in Lorain of the mass dissemination of all news and advertising.”³⁵

At issue was the tactic that the Journal adopted for competing with the new technology of radio, specifically, with radio station WEOL, located in Elyria, Ohio, eight miles south of Lorain. WEOL had received its operating license in 1948, after which the Journal adopted a policy of refusing to deal with Lorain County advertisers that also advertised on WEOL. At trial the Journal advanced a number of rationales for this

³⁴ *See id.* at 146 n.3.

³⁵ *See* 342 U.S. at 146, 149.

practice, which the district court rejected;³⁶ on appeal the Journal added that it was just acting in “self-preservation.”³⁷

The Supreme Court paid virtually no attention to any of the Journal’s justifications.³⁸ Quoting the district court’s description of the Journal as having engaged in “bold, relentless, and predatory commercial behavior,”³⁹ the Court held that “a single newspaper, already enjoying a substantial monopoly in its area, violates the ‘attempt to monopolize’ clause of § 2 when it uses its monopoly to destroy threatened competition.”⁴⁰

Bork termed the Court’s decision “entirely correct.”⁴¹ The Journal had an “overwhelming market share” and “clearly displayed predatory intent.” There was also “no apparent efficiency justification” for its conduct. True, the exclusivity that the Journal “extorted” from its advertisers must have cost it something, but its conduct did not require the Journal to expand output (thereby losing more money) and the Journal

³⁶ The Journal argued that it decided not to carry ads from merchants advertising on WEOL because it was trying to protect merchants in its local “trading area” from competition from outside merchants and WEOL was based in Elyria. The district court termed this argument “incredible,” wondering about the Journal’s purported “benevolent desire” to protect Lorain merchants from themselves by denying them the additional advertising channel that WEOL provided. *See* 92 F. Supp. at 797. The Journal also tried to argue that it wanted to provide a “fair trial” for the effectiveness of radio advertising by allowing merchants to see what radio advertising could accomplish alone. The district court concluded that this argument was “too specious for any comment other than that it is unworthy of belief and unworthy of the astuteness and sharp business intelligence noticeably displayed on the witness stand by the defendant.” *Id.*

³⁷ *See* Brief for Appellants at 6, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (“The steady inroads made by WEOL into the Journal’s advertisers required the Journal to look ahead: Must it resign itself to their loss to the new radio station? Or could it act in self-preservation?”).

³⁸ *See* 342 U.S. at 154 n.8 (rejecting the argument that the Journal was protecting local merchants).

³⁹ *Id.* at 149.

⁴⁰ *Id.* at 154.

⁴¹ THE ANTITRUST PARADOX, *supra* note 4, at 345.

presumably had larger reserves than WEOL so that it would be able to outlast the radio station.⁴²

The two cases illustrate well Bork's consistent application of his approach to predation. First, his approach is fully grounded in an economic analysis of antitrust issues. Although the cases could be classified as being of a different legal type—exclusive dealing (*Standard Fashion*) and unilateral refusal to deal (*Lorain Journal*)—Bork usefully views them all with an economic theory lens.⁴³ Second, he applies a consistent economic theory for analyzing exclusion (it's a purchase that must cost the predator something) and a consistent approach to the sort of behavior that constitutes predation (focusing on intent and the costs of predation to the predator). Third, he sticks to his dichotomous approach—exclusionary conduct is either predatory or efficient.

Bork's approach may be consistent, but it is not without problems. First, his efficiency rationales are on their strongest ground when backed by facts. The *Lorain Journal*'s lack of justifications became clear after a full trial, but *Standard Fashion*'s justifications were not fully explored at trial and so are subject to post-hoc speculation.⁴⁴ Thus, Bork sees the exclusivity requirement as an efficient distribution practice;⁴⁵ others

⁴² See *id.* With regard to the price the *Journal* paid for its conduct, the *Journal* refused to carry WEOL's program logs as paid advertisements, see 92 F. Supp. at 796, canceled fifteen advertising contracts with Lorain County merchants, and refused advertising with others that were advertising with WEOL. See Record, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). at p. 531 (Finding of Fact ¶ 18). Most of the fifteen contracts, however, were reinstated after the advertisers complied with the *Journal*'s policy. See *id.* ¶ 19. Bork does not mention these facts, however.

⁴³ See *id.* at 346 (“The use of phrases like ‘exclusive dealing arrangement’ or ‘attempt to monopolize’ expresses a conclusion rather than an argument.”).

⁴⁴ See *Standard Fashion Co. v. Magrane Houston Co.*, 259 F. 793, 801 (1st Cir. 1919) (Brown, J., concurring) (complaining about the record being in “so incomplete a state of proofs”).

⁴⁵ Bork's efficient distribution argument does not account for the fact that National also sold to Magrane's competitor “nearly opposite” to Magrane's store with the same exclusivity requirement. See *Standard Fashion*, 254 F. at 500. In the usual efficient distribution story, the dealer provides extra services in return

have seen it as an effort by a fragile monopolist to increase the duration of its monopoly by retarding entry⁴⁶ or an effort by a “monopoly company” with a full line of products to impose greater costs on competitors that lacked a full line.⁴⁷ Second, even if a defendant is paying for exclusivity, Bork’s approach does not necessarily tell us what the defendant is buying or why the other side is selling. It may be for efficiency reasons (as Bork argues in *Standard Fashion*, although others disagree), but absent an efficiency rationale, Bork is less concerned about the value of the purchase or the motivations of the “sellers.” In *Lorain Journal* it is enough that the Journal could probably have won the war against WEOL and may have had its sights set on taking over WEOL’s radio license.⁴⁸ That neither of these events was likely did not detain Bork, nor does he make any close calculation on whether the benefits of this strategy were likely to outweigh its costs.⁴⁹

The indeterminacy of Bork’s analysis, and the lack of some precision in working through the arguments, may be a reflection of Bork’s overall aim in writing *The Antitrust*

for some degree of territorial exclusivity that allows it to gain adequate profits to finance its efforts. It is not clear how that would be possible for Magrane when its competitor was located directly across the street.

⁴⁶ See Richard A. Posner, *Keynote Address: Vertical Restrictions and “Fragile” Monopoly*, 50 ANTITRUST BULL. 499, 502 (2005).

⁴⁷ See Director & Levi, *supra* note 31, at 293.

⁴⁸ See *The Antitrust Paradox*, *supra* note 4, at 345.

⁴⁹ WEOL was not put out of business, see 342 U.S. at 153, even after a campaign that lasted at least two years, see Record, *Lorain Journal v. United States*, 342 U.S. 143 (1951), at p.531 (Finding of Fact ¶ 16). See also WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* 12 (“If the newspaper was trying to eliminate a competitor, it was doomed to failure.”). The suggestion that the Journal could have obtained WEOL’s Elyria radio license seems highly unlikely. The FCC had already denied the Journal a license in Lorain, based on its concern that the Journal’s owners would do in Lorain what they had done in Mansfield, Ohio, where they used their position as the “sole newspaper in the community to coerce its advertisers to enter into exclusive advertising contracts with the newspaper and to refrain from utilizing [the competing Mansfield radio station] for advertising purposes.” See *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 31-32, 37 (D.C. Cir. 1950) (affirming FCC denial of operating license for radio stations in Mansfield and Lorain).

Paradox. True, a major theme of the book is that antitrust should be exclusively concerned with advancing consumer welfare, but Bork is more concerned with restraining what he sees as antitrust's excesses than with laying out a good affirmative case for when antitrust should intervene. Throughout the book Bork worries about the too-ready identification of business practices as monopoly problems and the unwillingness to see efficiency rationales.⁵⁰ Thus, his reason for requiring "specific intent" to engage in predation does not come so much from wanting to stop intentionally bad behavior as it comes from wanting to be certain that efficiencies are not sacrificed too readily.⁵¹ This may lead Bork to err on the side of seeing efficiency rationales too readily (not that he would put it this way). In so erring, he does not make a close calculation of the costs of false positives and false negatives. Rather, he tilts the balance to further an agenda of resisting excessive governmental intrusion into private matters. "Antitrust," Bork writes, "was originally conceived as a limited intervention in free and private processes for the purpose of keeping those processes free."⁵² Bork's approach to exclusionary behavior is as much driven by that political goal as it is by economics.

II. Bork and Microsoft

A. Bork Gets Involved

On April 20, 1998, a press conference was held at the National Press Club in Washington, D.C., to announce the formation of a group called the "Project to Promote Competition and Innovation in the Digital Age," or "ProComp." The group's purpose

⁵⁰ See THE ANTITRUST PARADOX, *supra* note 4, at 154 (criticizing the Areeda-Turner predatory pricing test because of a "high probability of mistake").

⁵¹ See *id.* at 158 ("specific intent must be shown if efficiencies are not frequently to be sacrificed").

⁵² *Id.* at 418.

was to convince the government to bring a broad antitrust case against Microsoft.

Although the group took a public interest name, it did not try to hide the fact that its corporate funders included Netscape, Sun, and Oracle, and that their business interests would be helped by a successful antitrust suit against their common rival, Microsoft.⁵³

There were two speakers at the press conference. One was Robert Dole, the defeated Republican presidential candidate from 1996. Those present were not surprised at Dole's appearance; his connection with the lobbying effort had been announced earlier and he was only one of a number of politicians that both sides were lining up for help in the political fight over suing Microsoft.⁵⁴ But the other speaker was Robert Bork and it was Bork's appearance that "caused a stir."⁵⁵

The genesis of Bork's representation goes back to a now-famous white paper written in 1996 by Susan Creighton, a partner in the law firm representing Netscape, and Garth Saloner, an economist. The white paper was prepared as a submission to the Antitrust Division to convince it to take action against Microsoft.⁵⁶ Its legal analysis began with *Lorain Journal*,⁵⁷ which Creighton knew as a case blessed by Bork.⁵⁸ "I

⁵³ See Rajiv Chandrasekaran, *Opponents of Microsoft Open Drive for Wider Antitrust Case*, WASH. POST, April 21, 1998, at C2.

⁵⁴ See *id.*

⁵⁵ Steve Lohr, *Small Browser Concession From Microsoft*, N.Y. TIMES, April 21, 1998, D2 (reporting on ProComp news conference, but not mentioning Dole). See also John R. Wilke & David Bank, *Bork Calls for Sherman Antitrust Case Against Microsoft, Will Advise Netscape*, WALL ST. J., April 21, 1998, at B10 ("Mr. Bork's pronouncement yesterday surprised antitrust experts").

⁵⁶ For discussion of the drafting of the white paper, see, e.g., GARY L. REBACK, FREE THE MARKET 198-202. The paper did not produce the desired effect on its first submission, but it was subsequently updated and resubmitted in 1997. See JOHN HEILEMANN, PRIDE BEFORE THE FALL 23 (2001). See also PAGE & LOPATKA, *supra* note 49, at 29 (White Paper "presented an unusually persuasive case").

⁵⁷ See Gary Reback & Susan Creighton, White Paper Regarding Recent Anticompetitive Conduct of Microsoft Corp. at 165 ("Not only is this [description of Microsoft's conduct] a simple (and true) story-it is

dreamed about showing [the white paper] to him some day and seeing if the light bulb went off,” she is reported to have said.⁵⁹

That day came in March 1998 when Mike Petit, the head of ProComp, and Christine Varney, a former FTC Commissioner then representing Netscape, met with Bork to ask him to represent Netscape.⁶⁰ Bork was shown Creighton’s white paper, with its reliance on *Lorain Journal*, and is said to have remarked: “‘You’re right. I wrote this. It applies. Perfectly.’”⁶¹

Two weeks after the April press conference announcing his representation Bork published an op-ed in the New York Times setting out the basic lines of his argument.⁶² “The question is not one of politics or ideology,” he wrote: “it is one of law and economics.” And that was why “an outspoken free marketer like me can be found arguing against Microsoft.” Bork then framed the case as one of predation, relying specifically on *Lorain Journal*. Microsoft “intended to preserve the company's monopoly of personal computer operating systems through practices that exclude or severely hinder rivals but do not benefit consumers.” With a market share “at 90 to 95 percent,”

a story that has been told before, to the Supreme Court, in *Lorain Journal*. All of the main elements are there.”) (July 1996) (author’s files).

⁵⁸ See REBACK, *supra* note 56, at 199-200. Despite the blessing, the white paper does not cite to *The Antitrust Paradox* for Bork’s affirmation of *Lorain Journal*.

⁵⁹ See HEILEMANN, *supra* note 56, at 79.

⁶⁰ See HEILEMANN, *supra* note 56, at 79. Petit had been a top Senate aid to Bob Dole, *See id.* at 78, which may explain Dole’s willingness to work for ProComp despite the fact that “[d]uring his unsuccessful campaign 18 months ago, Mr. Dole complained that the Government was wrong to pick on Microsoft.” Peter H. Lewis, *Software Fights Bring Former Foes Together*, N.Y. TIMES, May 4, 1998, at D4

⁶¹ HEILEMANN, *supra* note 56, at 79. Bork told the same story about his meeting with Netscape. *See* David Segal, *supra* note 7.

⁶² *See* Robert H. Bork, *What Antitrust Is All About*, N.Y. TIMES, May 4, 1998, A19.

Microsoft's effort "violates traditional antitrust principles" without any efficiencies, just as the *Lorain Journal*'s had, and was consequently a violation of Section 2 of the Sherman Act.⁶³ In fact, the parallel with *Lorain Journal* was not only "exact" but "even stronger" because there were many documents showing Microsoft's intent. To drive the point home, Bork then listed a number of practices demonstrating that Microsoft "specifically intended to crush competition": restrictions on the ability of original equipment computer manufacturers ("OEMs") to make changes in the boot-up screen, restrictions on the ability of Internet Service Providers to advertise or promote a non-Microsoft browser, and restrictions on what Internet content providers could promote. All Netscape was asking the Justice Department to do, Bork said, was to stop Microsoft from "stifling the innovations of others." The object "is to create a level playing field benefiting consumers. That is what antitrust is about."

If this was to be Bork's argument for bringing a Section 2 case against a major U.S. technology company—the first such government case in nearly a quarter-century—Bork was going to have to do better than this first cut. For one, he omits discussion of the heart of the case then being made against Microsoft, the bundling of Internet Explorer into the Windows operating system. For another, he was curiously cavalier about remedy, indeed, including a very un-Chicago goal of "leveling the playing field." And finally, if he was effectively to address the Mephistophelean argument that he had sold

⁶³ At trial, the Government alleged that Microsoft's worldwide share of the Intel-compatible PC market from 1991 to 2001 ranged between 90 and 96 percent. See Gov't Ex. 1, *available at* <http://www.usdoj.gov/atr/cases/exhibits/1.pdf>.

his soul to Netscape, he needed to do more than say he was “happy to note” that he had supported the *Lorain Journal* decision “20 years ago.”⁶⁴

Less than two weeks after his New York Times op-ed Bork tried again, responding to a Wall Street Journal editorial critical of his “latest foray” into antitrust. In a letter to the editor he praised Joel Klein as being in the same league as Bill Baxter (“no higher praise than that”), repeated his argument that *Lorain Journal* was an exact parallel to Microsoft’s conduct, and assured the Journal’s readers that “I am careful not to take any case I do not believe in or that contradicts my writings,” adding that he spent “several hours” with Netscape’s lawyers and technical personnel “to make sure their case was solid. It is.”⁶⁵ But these arguments were not much more convincing. Not only did they fail to make Bork’s case clearer; they were not particularly comforting in terms of his willingness to vouch for Netscape’s case. Spending “several hours” learning the facts in a case as complex as the one against Microsoft would not likely convince skeptical critics that he had analyzed the problem very thoroughly. To use Bork’s own dichotomous reasoning, if he didn’t take the case for the merits, then he must have taken it for the money.

B. Bork’s White Paper: A Consistent Analysis?

⁶⁴ Bork actually began the op-ed by noting that he had received a letter complaining “that I had sold my ‘sole.’” Bork, *What Antitrust Is All About*, *supra* note 62.

⁶⁵ See Robert H. Bork, *Letters to the Editor: The Charge Against Microsoft*, WALL ST. J., May 15, 1998, at A15. The editorial was *The Ahabs of Antitrust*, WALL ST. J., May 11, 1998, at A22. On the same day that his letter was published Bork was also quoted in the Wall Street Journal praising Joel Klein: “‘He’s been doing a great job,’ says former appeals court judge Robert Bork. ‘But I hope he carries this case further’ because if the remedy Mr. Klein seeks isn’t stringent enough, ‘we’re right back where we were before,’ with Microsoft’s power unchecked, Mr. Bork says.” John R. Wilke and Bryan Gruley, *Taking On Titans: Trustbuster Joel Klein, Once Viewed as Timid, Faces a Very Full Plate*, WALL ST. J., May 15, 1998, at A1.

In July of 1998, roughly two months after the Justice Department and the states filed their suits against Microsoft, and after further jousting with opponents on the pages of the Wall Street Journal,⁶⁶ Bork issued a seventeen-page white paper, fittingly titled “The Case Against Microsoft.”⁶⁷ It begins with the familiar invocation of *Lorain Journal* as an “exact parallel”: When a monopolist “imposes conditions . . . that exclude rivals without any apparent efficiency justification . . . it violates §2 of the Sherman Act.”⁶⁸ But the white paper format allows Bork to move away from an op-ed sound bite to address the important question of Microsoft’s monopoly power, to explain why the integration of the Internet Explorer browser (“IE”) into the Windows operating system, along with the various agreements into which Microsoft entered, should be considered exclusionary, and to consider the impact of a then-recent court of appeals’ decision, in

⁶⁶ Compare George L. Priest, *U.S. v. Microsoft: A Case Built on Wild Speculation, Dubious Theories*, WALL ST. J., May 19, 1998, at A22 (licensing restrictions on advertising that Bork criticized are “probably harmless”; *Lorain Journal* “has little to say about the broader Justice Department claims against Microsoft”) and Holman W. Jenkins Jr., *An Antitrust War Horse Comes in From the Pasture*, WALL ST. J., July 15, 1998 (“it sounds like he [Bork] was minding his own business when Netscape showed up waving a fee and a passage from his writings”) with Robert H. Bork, *The Most Misunderstood Antitrust Case*, WALL ST. J., May 22, 1998, at A16 (Priest shouldn’t “pooh-pooh Microsoft’s restrictive agreements”; discredited monopolization theories Priest cites “have nothing to do with this case”) and Robert H. Bork, *Letters to the Editor: Don’t Insult Me or My Intelligence*, WALL ST. J., July 22, 1998, at A15 (“Perhaps because the law and the economics are so overwhelmingly against it, Microsoft’s apologists have taken to dabbling in the ad hominem. Mr. Jenkins’s column is the worst example so far . . .”).

⁶⁷ See Robert H. Bork, *The Case Against Microsoft* (no date) (author’s files). The paper is in monograph form and identifies Bork as “Consultant to Netscape Communications Corporation on Antitrust Issues.” For the release date, see Rajiv Chandrasekaran, *Microsoft Calls Antitrust Suits ‘Groundless,’* WASH. POST, July 29, 1998, at C9 (quoting from Bork’s “white paper” titled “‘The Case Against Microsoft,’” “released yesterday”). Only a part of the monograph is available online. See Full text of Bork’s ‘white paper’ on DOJ vs. MS, <http://www.zdnet.com/news/full-text-of-borks-white-paper-on-doj-vs-ms/100139>.

⁶⁸ *The Case Against Microsoft*, *supra* note 67, at 1.

which the Justice Department had unsuccessfully tried to prevent Microsoft from bundling IE into Windows (a case that later came to be called *Microsoft II*).⁶⁹

1. Monopoly Power

Bork's argument on monopoly power is straightforward. Microsoft's market share of ninety-seven percent of OEM-installed PC operating systems is far above the share defined as "monopoly" in the case law. There are also "very high" barriers to entry, created by Microsoft "for the specific purpose of defeating entry" and the "expansion of fringe firms."⁷⁰ These entry barriers, he explains, are the result of "the network effect" created by the increase in value to consumers that arises from the fact that applications writers are more likely to design programs for an operating system with a large market share. "The more application writers write for Windows, the more powerful Windows becomes, and hence the more applications writers will be drawn to it."⁷¹ Given this monopoly power, and the strength of the entry barriers, Microsoft "can charge higher-than-competitive prices without loss of market share."⁷²

2. Exclusionary Conduct

The real issue, as Bork points out, was not Microsoft's monopoly power (although Microsoft was certainly contesting it), but Microsoft's exclusionary practices.⁷³ Bork

⁶⁹ See *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (seeking to enforce earlier consent decree in which Microsoft had agreed not to bundle other software products into the Windows operating system unless the bundle was an "integrated product").

⁷⁰ See *id.* at 2-3.

⁷¹ *Id.* at 9.

⁷² *Id.* at 3. Note that Bork's statement is somewhat ambiguous as to whether he thought that Microsoft had, in fact, charged above competitive prices, or by how much.

⁷³ See *id.* at 4.

argues that Microsoft had waged an “exclusionary war” along two lines. One was to build the browser into the operating system and not allow the OEMs to remove it. The other was to use a “complex web of restrictive agreements” to block the entry or growth of rivals. To reach his conclusion that this conduct was exclusionary or predatory,⁷⁴ Bork then uses the approach he took in *The Antitrust Paradox*. He looks at the purpose and effect of the conduct, the potential for efficiency gains, the costs of the tactics to Microsoft, and the potential profitability of predation.

With regard to browser integration Bork points out the competitive danger that the browser posed to Microsoft’s continued monopoly in the operating system market. Relying on Microsoft documents, Bork argues that Microsoft was concerned that Netscape, along with the cross-platform Java technology, could become an alternate platform for applications writers, which could “commoditize” the underlying operating system and ““obsolete Windows.”” When Microsoft’s Internet Explorer failed to beat Netscape “in open competition” Microsoft “forced” buyers to take both IE and Windows in one package, deciding to price the browser at zero and thus below cost. Bork sees in Microsoft’s executives’ statements on integrating IE a “clear intent” not to compete on the relative values of the two products “but to drive Netscape out of the market altogether.”⁷⁵ The effect on the “much smaller Netscape,” Bork adds, “was devastating.”⁷⁶

⁷⁴ Although Bork uses both terms in the white paper, he does not discuss Microsoft’s conduct in terms of predation until page 11, near the end of his discussion of Microsoft’s exclusionary conduct.

⁷⁵ *Id.* at 5. Bork notes that the documentary excerpts on which he relies were taken from the Justice Department’s Memorandum in Support of Motion for Preliminary Injunction. *See id.* at 5 n.3.

⁷⁶ *Id.* at 5.

Bork's acceptance of Microsoft's contemporaneous statements of the reasons for integrating IE into Windows leads him to reject the explanations that Microsoft was then advancing for what it did (a "fictional version of historical reality"⁷⁷). He was also unwilling to accept the argument that even a monopolist should be free to decide the characteristics of its products. *Aspen Skiing*,⁷⁸ Bork points out, decided otherwise, finding a Section 2 violation when the monopolist's conduct lacked an efficiency justification and was done "for the purpose and with the effect of excluding a competitor."⁷⁹

Bork's discussion of Microsoft's second line of attack examines the agreements that Microsoft employed to forbid OEM alterations of the initial boot-up screen and the agreements requiring the exclusive (or near-exclusive) promotion or distribution of IE rather than Netscape by Internet access providers, content providers, and independent software vendors. He points out that the boot-up screen agreement was "designed to block" Netscape's ability to get "the viewer's attention" regarding browser choice. The exclusive agreements, which Microsoft's "content partners" accepted only because (in Microsoft's words) "we force them to in our contracts,"⁸⁰ "artificially maintain[]" the network effects that create the barriers to new entry into the operating system market.⁸¹

⁷⁷ *Id.* at 6. The explanation mentioned was that independent software vendors demanded integration, *see id.* For Microsoft's claims, Bork relies on an article that Charles ("Rick") Rule had written for Slate magazine. *See id.* at 3 n.1. Rule had earlier tried to hire Bork, *see supra* note 7, but after Bork chose Netscape Rule wondered whether Bork had been "'bought'" or was "'just tired,'" labeling Bork's arguments as "'crappy.'" HEILEMANN, *supra* note 56, at 78.

⁷⁸ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁷⁹ The Case Against Microsoft, *supra* note 67, at 7.

⁸⁰ *See id.* at 8, 9.

⁸¹ *See id.* at 9-10. Bork's reference to Java would later be known as Microsoft's effort to "pollute Java," tricking applications writers into using a Microsoft version of Java that would not actually be cross-

Just as with the bundling of Windows and IE, Bork sees these agreements as creating “little or no efficiency gains,” which means that “their purpose and effect can only be anticompetitive.”⁸²

Bork bolsters his logical proposition by examining whether a predatory strategy would make sense for Microsoft. As he argued in *The Antitrust Paradox*, exclusivity costs the party that insists on it; indeed, “the record shows numerous instances of Microsoft’s paying or offering discounts in return for exclusionary agreements.”⁸³ Bork likens these payments to “a form of predatory pricing,” but here worth the cost because they “block competitors and thereby preserve the monopoly.”⁸⁴ Customers and suppliers who might choose otherwise cannot, because there is “nowhere for [them] to turn in order to avoid the onerous terms.”⁸⁵

Acknowledging that usually price predation is unlikely to be tried and unlikely to succeed (how could he have argued otherwise?), Bork then points out why that is not the case for Microsoft. First, Microsoft and Netscape do not have roughly proportional reserves that would enable the victim (who loses less) to outlast the predator (who loses more). Microsoft’s reserves “dwarf” Netscape’s and Microsoft can continue to make “enormous profits” on its operating system while Netscape is being forced to give its

platform. *See* *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (finding the conduct exclusionary, in violation of Section 2).

⁸² *The Case Against Microsoft*, *supra* note 67, at 12.

⁸³ *Id.*, at 11.

⁸⁴ *Id.* at 11.

⁸⁵ *Id.*

product away for free.⁸⁶ Further, software is a product with flat (or very nearly flat) marginal cost curves, meaning that Microsoft would not bear extremely disproportionate losses in relation to Netscape when it lowers the price of Windows, nor would Microsoft need to increase its output greatly by virtue of the price cut (it already sells ninety-seven percent of the operating systems), nor would Microsoft have to keep the price down until Netscape is driven from the market because Microsoft would achieve its goal just by reducing Netscape's sales to the point where applications writers would no longer write programs for it.⁸⁷ Finally, Microsoft would still be enjoying monopoly returns while it was providing price concessions for the restrictive agreements that were "relatively inexpensive."⁸⁸

3. *Microsoft II*

The third part of Bork's white paper deals with the court of appeals' decision in *Microsoft II*, handed down a month earlier, in which the Justice Department had sought to enforce a 1994 consent decree that forbade Microsoft from bundling other software products into the Windows operating system unless the bundle was an "integrated product." The court of appeals, on procedural grounds, had vacated the broad preliminary injunction that the trial court had granted.⁸⁹ But the court of appeals had gone further, providing "guidance" on how the trial court should view the integration

⁸⁶ *See id.* at 10-11 ("We are still selling operating systems. What does Netscape's business model look like? Not very good.") (quoting Bill Gates statement from U.S. Justice Department complaint, ¶ 16.).

⁸⁷ *See id.* at 12-13.

⁸⁸ *See id.* at 13.

⁸⁹ *See id.* at 940 (injunction forbidding Microsoft from bundling Windows and Internet Explorer applied to current and all successor versions of both programs).

issue for purposes of interpreting the consent decree on remand, with obvious implications for how this integration might be viewed under Section 1 tying law.

Bork is quick to distinguish *Microsoft II* as a legal matter, because the court's holding was on a matter of procedure,⁹⁰ but he also argues that the court's guidance regarding integration was not fatal to the governments' case in any event. Bork emphasizes that the consent decree litigation was at a preliminary stage and had not brought out Microsoft's "many predatory contracts" or "the internal documents" that made Microsoft's predatory intent in bundling in IE "clear."⁹¹ That predatory intent, as Bork had already indicated, was to exclude Netscape and to preserve Microsoft's monopoly in the operating system market. With regard to technical issues relating to software design, Bork simply writes that "[a]ny functionality that enhances the efficiency of the operating system could be added separately, without adding the full browser," but he does not elaborate on what those "functionalities" might be or what he meant by a "full browser," something that was not necessarily easy to define.⁹²

Nevertheless, Bork's discussion of the court of appeals' decision makes clear that he disagrees with that court's self-described "deferential approach" to software design. Bork writes that although the court spoke "in welcome tones of judicial restraint," its approach—which would seem to allow software integration that had any justification, no

⁹⁰ See *United States v. Microsoft Corp.*, 147 F.3d 935, 938 (D.C. Cir. 1998) (holding that the district court judge had acted precipitously in granting a preliminary injunction without proper notice and lacked authority to appoint a special master). Bork correctly notes that the court of appeals' discussion of tying was dicta "in the strictest sense." *Id.* at 14

⁹¹ See *id.* at 14.

⁹² See 147 F.3d at 950-51 (including as benefits of integrating the two software programs, allowing applications to call on browser functionality without having to separately start and open a browser application, providing system-wide services unrelated to web-browsing, such as an HTML [HyperText Markup Language] reader, and various other operating system upgrades).

matter how small the benefit—amounts to giving Microsoft “a judicially created exemption from the antitrust laws.”⁹³ Relying on *Jefferson Parish*’s “separate demand” approach to determine that the browser and operating system are two separate products, Bork argues that the benefits of bundling “can be obtained, if consumers want them, by promoting the combined product,”⁹⁴ presumably by offering the products either separately or combined (although Bork does not make this clear).

4. Consistency

How consistent is the white paper with Bork’s writing in *The Antitrust Paradox*? His analysis of Microsoft’s exclusionary practices sticks fairly close to the approach he took in the book, particularly in his emphasis on when predation might be a rational strategy and on the use of intent to understand whether the conduct might have an efficiency rationale. On the other hand, his willingness to credit anticompetitive motivation to the browser integration and the exclusive dealing agreements, and his lack of interest in searching for procompetitive justifications, seems inconsistent with the spirit of his book.⁹⁵ Further, in *The Antitrust Paradox* Bork more generally expressed concern over excessive judicial interference with business behavior that might be efficient and a concern for the costs of mistaken intervention. These concerns were precisely what animated the D.C. Circuit to say that a “plausible claim that it [integration]

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 16.

⁹⁵ See Segal, *supra* note 7 (“[Bork] never said there aren't good antitrust cases to bring, only that in practice it's hard to bring those cases . . . in a way that doesn't signal that aggressive competition is disfavored' ‘That's why his stand on Microsoft is consistent with the letter of his writing, but not the spirit.’”) (quoting William Kovacic). For a more positive take, see Wilke & Bank, *supra* note 65 (Bork “‘is not refuting his previous position but rather extending his analysis into a new market situation, one involving the dynamics of networks and the size and scope of Microsoft's monopoly’”) (quoting Stephen Salop).

brings *some* advantage” would be enough to escape liability for tying.⁹⁶ Bork’s rejection of that approach would thus seem to be substantially out of synch with the message of *The Antitrust Paradox*.

C. Fighting With His Critics

Not surprisingly, the release of Bork’s white paper did not satisfy his critics. Commentators continued either to mock him or excoriate him for his position.⁹⁷ Michael Kinsley, writing in *Slate* after the white paper was distributed, complained about Bork’s hypocrisy (“utterly impossible . . . to imagine that Bork himself would ever have threaded through this maze of rationalization if he weren't being paid by Netscape”) and criticized his economics (network effects are not an entry barrier but “an efficiency of a monopoly in operating systems” that is a “genuine benefit to consumers”).⁹⁸ Richard Epstein, responding to Bork’s praise of Judge Jackson’s recently-issued findings of fact, complained of Bork’s reliance on “the shopworn theory of tie-ins that his own earlier

⁹⁶ *United States v. Microsoft Corp.*, 147 F. 3d at 950 (emphasis added). *See id.* at 950 n.13 (expressing concern for “the limited competence of courts to evaluate high-tech product designs and the high cost of error” which should make courts “wary of second-guessing the claimed benefits of a particular design decision”).

⁹⁷ Some were bemused. *See Segal, supra* note 7 (“Retainers sometimes reshuffle ideologies,” cackles consumer activist Ralph Nader.”).

⁹⁸ *See* Michael Kinsley, *Book Bork, Browser Book*, *Slate.com*, Dec. 11, 1998, http://www.slate.com/articles/news_and_politics/readme/1998/12/book_bork_browser_bork.html. Kinsley was the editor of *Slate* and former editor of the *New Republic*; Microsoft owned *Slate* at the time.

work had largely discredited,”⁹⁹ writing later that Bork's “pointed defense of Netscape again confuses the welfare of Netscape with the welfare of consumers.”¹⁰⁰

Bork responded sharply to his critics. Titling his reply to Kinsley “I’m no Netscape Shill,” Bork recounts the efforts of a “lawyer from Microsoft” to convince him that Microsoft’s practices were efficient, offering him a retainer to represent Microsoft, which he turned down without inquiring as to its amount. He then judges Kinsley’s “economic analysis . . . no better than his personal attack.”¹⁰¹ Epstein, he says, “displays a thorough incomprehension of antitrust theory and hence of the case against Microsoft.”¹⁰²

Bork did not flag in arguing his case. After Jackson released his findings of fact but before the remedy phase of the trial, Bork argued in favor of considering Microsoft’s break-up, pointing out in the *National Review* that “the advantages to a structural remedy should not be overlooked by free-market advocates.” A structural remedy, Bork argued, would avoid detailed regulation by court decree, whose effects could be “deadening” and which would be “vulnerable to Microsoft’s demonstrated capacity to maneuver around

⁹⁹ See Richard A. Epstein, *Microsoft, Macro-screwed, The Decline of Antitrust*, NATIONAL REVIEW, Dec. 6, 1999, at 31 (analogizing the tie of IE and Windows to a car manufacturer’s tie of cars and tires). Epstein later thought better of the governments’ Section 2 case for willful maintenance of the monopoly in the operating system market, approving the D.C. Circuit’s decision upholding much of Judge Jackson’s determinations relating to that claim. See RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE 84-91 (2007).

¹⁰⁰ See Richard A. Epstein, *Against Microsoft – A Primer for Conservatives*, NATIONAL REVIEW, Feb. 7, 2000 (replying to Bork’s reply).

¹⁰¹ See Robert A. Bork, *Browser Bork Replies —I’m No Netscape Shill*, SLATE, Dec. 30, 1998, http://www.slate.com/articles/briefing/articles/1998/12/browser_bork_replies.html. The lawyer was presumably Rick Rule, see *supra* note 7.

¹⁰² NATIONAL REVIEW, *supra* note 100.

prohibitions.”¹⁰³ When the Justice Department and the states proposed splitting Microsoft into an operating company and an applications company, Bork wrote an op-ed in the Wall Street Journal arguing not only that a structural remedy “is better than the other alternatives,” but also that the applications company would have an incentive to write applications for operating systems other than Windows, thereby breaking the “applications barrier to the emergence of new competition.”¹⁰⁴ When Microsoft appealed the case to the D.C. Circuit Bork submitted an amicus brief on behalf of AOL and Netscape industry groups that followed in major part the analysis he developed in his white paper for why predation was economically rational for Microsoft and also argued in favor of the structural decree that Judge Jackson had entered.¹⁰⁵

D. Conclusion: Did Bork Matter?

However consistent and vigorous Bork’s advocacy was, did Bork matter? If the question is posed in terms of an actual impact on the case, the answer would be no. Bork apparently met with Joel Klein two times in the early stages of the case (although it is unclear whether that was before or after the Justice Department filed suit), but there is no indication that Bork affected Klein’s views.¹⁰⁶ Neither Judge Jackson in his conclusions

¹⁰³ *Id.*

¹⁰⁴ See Robert H. Bork, *There's No Choice: Dismember Microsoft*, WALL ST. J., May 1, 2000, at A34. In the op-ed Bork also complained that “[i]t is hard to walk through the Capitol without tripping over Microsoft’s lobbyists” and that “[t]here is so much Microsoft money flowing through the system that the danger for nonpoliticized law is very real.” This was a curious charge for Bork to make, given his own role, for which Slate subsequently took him to task. See *Bork Borke Microsoft*, Slate.com, May 2, 2000, http://www.slate.com/articles/news_and_politics/press_box/2000/05/bork_borks_microsoft.html.

¹⁰⁵ See Brief of America Online, Inc. et al. as Amici Curiae Supporting the United States and State Appellees, *Microsoft Corp. v. United States*, 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212, 5213), 2001 WL 36047066 (C.A.D.C.) (Appellate Brief).

¹⁰⁶ See Segal, *supra* note 7 (statement of Robert Bork). Segal also wrote that Klein said in an interview that Bork’s views “‘have been constructive and illuminating.’” *Id.*

of law nor the en banc D.C. Circuit in its opinion cite to Bork's writing; both opinions cite *Lorain Journal*, but only one time each and not in any central way.¹⁰⁷ Bork's "exact parallel" persuaded no one.

If we view Bork's efforts in the political and lobbying context, however, Bork's appearance for Netscape was important, certainly more so than Bob Dole's. Bork was a symbol of non-intervention in antitrust, and, of course, a powerful political symbol to conservatives. Who else could have said, at the same time, that the Justice Department was "the most corrupt in living memory" but that the suit against Microsoft made good economic sense?¹⁰⁸ It is no wonder that much of the debate in which Bork engaged was played out on the pages of the *Wall Street Journal* and the *National Review*.

A decade's-plus distance from the Microsoft case makes it easy to forget the political dimension of the litigation. The government plaintiffs were very aware that pressure from the other branches of government could thwart their efforts. Hearings on Microsoft's behavior held by Senator Hatch and the involvement of Republican Attorneys General in the state case helped buffer opposition.¹⁰⁹ So did Microsoft's heavy-handed lobbying efforts, which backfired seriously when Microsoft attempted to

¹⁰⁷ See *United States v. Microsoft Corp.*, 87 F. Supp. 30, 41 (D.D.C. 2000); *United States v. Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001).

¹⁰⁸ See Bork, *Dismember Microsoft*, *supra* note 104 ("Granted, the Clinton Justice Department is the most corrupt in living memory. But many lawyers within the department are men of integrity, and that most assuredly includes Joel Klein and his staff. Mr. Klein is by no means an antitrust fanatic let loose upon the economy.").

¹⁰⁹ See HEILEMANN, *supra* note 56, at 80-84 (discussing hearings held by Senator Hatch in 1998); *Left and Right With Bill Gates*, N.Y. TIMES, May 20, 1998, at 22 (discussing array of political figures supporting both sides and noting the presence of six Republicans among the twenty Attorneys General who filed suit against Microsoft, including the Republican Attorney General from New York; terms Bork "by far the most startling antagonist of Microsoft"). See also KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* 7 (2001) ("Klein was bolstered by Orrin Hatch and several zealous states attorneys general, giving him crucial political cover").

get the Justice Department's budget cut in the early days of the litigation.¹¹⁰ Having Robert Bork on your side, however cynical his critics were of his involvement, helped show that the antitrust case was neither legally frivolous nor politically captured.

III. Why Bork Was Right

It turns out that Bork's analysis of the *Microsoft* case in his white paper was pretty much on target, at least as judged by the subsequent D.C. Circuit opinion reviewing Judge Jackson's decision on liability. Indeed, in many ways, that court's unanimous en banc opinion tracked a good deal (but not all) of Bork's analysis and his result, the latter being a surprise at the time considering that the panel included three judges of at least moderately conservative views on antitrust, two of whom had been on the panel in *Microsoft II*.¹¹¹

The first area in which Bork got it right was his economic analysis of Microsoft's monopoly power. Bork relied on Microsoft's high market share; so did the court of appeals.¹¹² More importantly, the court of appeals emphasized the importance of what had come to be called the "applications barrier to entry," describing the same phenomenon that Bork did of applications writers being more willing to write to Windows, which then made consumers more likely to purchase it, which then led to even

¹¹⁰ See John M. Broder & Joel Brinkley, *U.S. Versus Microsoft: The Strategy*, N.Y. TIMES, Nov. 17, 1999, at 1 (discussing Microsoft's failed effort in 1999 to reduce the Antitrust Division's budget; quoting Justice Department official as saying that "Even the mob doesn't try to whack a prosecutor during a trial.").

¹¹¹ Of the three, the two judges on the *Microsoft II* panel were Williams and Randolph; the third, Judge Ginsburg, generally had moderately conservative views. Judge Randolph was an assistant to the Solicitor General when Bork was Solicitor General and was "an important adviser" to Bork during his unsuccessful confirmation hearings; Judge Ginsburg was a former head of the Antitrust Division whom President Reagan had intended to nominate to the Supreme Court after Bork's nomination failed. See Stephen Labaton, *U.S. vs. Microsoft: The Court; Company Is Taking Its Case Into More Familiar Judicial Waters*, N.Y. TIMES, Sept. 27, 2000, at C14. Labaton's article, however, does not draw attention to the Bork connection.

¹¹² See *United States v. Microsoft Corp.*, 253 F. 3d at 54.-56 (ninety-five percent share of the market).

more applications being written.¹¹³ This entry barrier, in Bork’s analysis and in the court’s, was key to Microsoft’s dominance.

The second important area of agreement was in judging Microsoft’s exclusionary practices. With mostly minor exceptions, the court of appeals found that Microsoft’s contracting practices and the way it integrated IE into Windows had an exclusionary effect on those competitors that threatened Microsoft’s monopoly and that both lacked efficiency justifications. This was true for the restrictions on the boot up screen and desk-top icons, for the various exclusive agreements that Microsoft insisted on (whether purchased or coerced), and for designing Windows so that IE could not be removed.¹¹⁴ Indeed, on the issue of bundling IE and Windows, it was Microsoft’s refusal to allow dis-integration that was the critical point on which the court’s discussion focused, something that Bork mentioned as well, although he never fully developed it.¹¹⁵

The third area of agreement was the importance of Microsoft’s intent. Intent to exclude Netscape (and Java) was critical for Bork’s conclusion that Microsoft had engaged in predatory conduct. The court of appeals did not quite put it this way (indeed, it barely mentioned the word “predation”), but it did examine Microsoft’s intent to help it assess the likely competitive effects.¹¹⁶ Just as Bork relied heavily on the documents available to him when he wrote his analysis, the court of appeals relied heavily on the

¹¹³ See *id.* at 54-56. The court also examined direct proof of monopoly power, see *id.* at 56-58.

¹¹⁴ See *id.* at 60-64 (initial OEM licensing restrictions), 67-74 (agreements with Internet Access Providers, Internet Content Providers and Independent Software Vendors); 64-67 (browser integration).

¹¹⁵ See *id.* at 65- 67 (holding that exclusion of IE from Add/Remove utility and commingling of code violated Section 2; commingling meant that deleting browser code would also delete code supplying operating system functionality, thereby crippling Windows). Compare *The Case Against Microsoft*, *supra* note 67, at 4 (Microsoft built IE into Windows “and will not allow computer manufacturers to remove it”).

¹¹⁶ See 253 F. 3d at 59.

lengthy record of emails and testimony that the government plaintiffs introduced into evidence at trial. The court read Microsoft just like Bork did.

The fourth area of agreement was in seeing the case as basically a Section 2 case. Bork's analysis in the white paper was fuzzy on separating the Section 1 and Section 2 issues, but he really only wrote about judging Microsoft as a monopolist. The court of appeals wasn't so fuzzy. It agreed with the plaintiffs' Section 2 claim regarding the operating system market, including the way Microsoft integrated IE and Windows, but it reversed and remanded the district court's decision that there was a Section 1 tying violation as well.¹¹⁷

What about the relevance of the panel's decision in *Microsoft II*? Here Bork and the court of appeals are two for three. First, the court makes the legal point that Bork makes. The panel decision was not a Section 1 decision and it was done without a record, so it is not binding on how to evaluate the tying claim under Section 1.¹¹⁸ Second, the en banc court rejects the idea that courts are institutionally incompetent to review product design decisions, just as Bork did.¹¹⁹ Third is the disagreement. Bork stands by the Supreme Court's approach to two products in *Jefferson Parish*; the court of appeals rejects it, holding that a rule of reason needs to be applied for platform software that integrates functions that had previously been separate.¹²⁰

¹¹⁷ See *id.* at 84.

¹¹⁸ See *id.* at 92.

¹¹⁹ See *id.* at 65 (“Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful.”) (going on to evaluate the technical justifications for the way it integrated IE into Windows, see *id.* at 65-67).

¹²⁰ See *id.* at 92-96. *But cf. id.* at 89 (“In light of the monopoly maintenance section, obviously, we do not find that Microsoft's integration is welfare-enhancing or that it should be absolved of tying liability.”)

If the court of appeals' decision in *Microsoft* shows that Bork's conclusions were basically right, the decision also highlights an important weakness in Bork's approach, specifically, his emphasis on strategic rationality and his reliance on war metaphors. True, Microsoft's efforts to deal with Netscape were colloquially called the "browser wars"—Microsoft executives even called their efforts a "jihad" to win the "browser war."¹²¹ If the goal is to assess rational decision-making, however, war metaphors seem curiously misplaced. If anything, the history of war shows that blitzkriegs (to which Bork referred) do not inevitably end in final victories and that leaders can easily underestimate how costly it will be to vanquish foes and how long it might take. Whether wars are rational or not they still occur, of course, and can still cause damage. So, too, with exclusionary business strategies.

In fact, the court of appeals did not spend any time assessing whether Microsoft's strategies were rational in the sense that Bork emphasized. Nor did the court address the question of Microsoft's ability to outlast Netscape, or whether Microsoft would incur equal or disproportionate losses, or whether Microsoft had equal or unequal "reserves," all of which were critical to Bork's analysis. Indeed, the court recognized (as did Judge Jackson) that it was uncertain whether Netscape and Java would ever have become a platform that could make Windows obsolete.¹²² What was important for the court was

¹²¹ See U.S. Dep't of Justice Complaint ¶ 10, *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (No. 98-1232) (quoting Microsoft executives), <http://www.justice.gov/atr/cases/f1700/1763.pdf>. See also Plaintiff States' First Amended Complaint ¶ 46, *New York v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (No. 98-1233) (referring to "browser wars") (author's files).

¹²² See *United States v. Microsoft Corp.*, 253 F. 3d at 79 (Netscape and Java were "nascent threats" when Microsoft engaged in its anticompetitive conduct); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 111 (D.D.C. 1999) ("There is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems.") (Finding of Fact ¶ 411).

that the conduct occurred and that it had an exclusionary effect without any efficiency justifications.

IV. What We Learn About Judging Exclusion

The Antitrust Paradox was mostly written to be critical of antitrust doctrine and to narrow the scope of antitrust enforcement. Bork's attention to debunking antitrust leaves him with little time and only modest interest in providing strong theories that would support antitrust intervention in exclusion cases.¹²³ His emphasis on "excluding a competitor on some basis other than efficiency" is never put forward in the book as a working test for enforcement, even though the Supreme Court picks it up as a "test" in *Aspen Skiing*.¹²⁴ Indeed, the malleability of this language makes it a less than powerful test because it leaves open the question of how to assess the efficiency of a particular practice.¹²⁵ This malleability gave Bork the room to look at the facts in *Microsoft* and reach a judgment on efficiency. In this sense, Bork's overall approach is similar to the rule of reason analysis that the court of appeals followed in *Microsoft*—not a clear ex ante rule but a judgment made ex post.

Nevertheless, Bork's views on predation in *The Antitrust Paradox*, combined with his analysis of *Microsoft's* conduct, do provide us with four valuable lessons about how to handle exclusionary conduct.

¹²³ Cf. Donald Dewey, *Antitrust and Economic Theory: An Uneasy Friendship*, 87 YALE L.J. 1516, 1518 (1978) (book review of *The Antitrust Paradox*) (Bork's justifications for attacking predatory behavior "are strictly ad hoc").

¹²⁴ See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 605 (citing *The Antitrust Paradox*).

¹²⁵ Cf. A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles*, 73 ANTITRUST L. J. 375, 388-89 (2006) (criticizing test of excluding a less efficient competitor as not sufficiently precise or sufficiently administrable).

First, exclusionary conduct exists. It is tempting to add, even Bork says so, but, in fact, antitrust history is filled with examples of exclusionary conduct.¹²⁶ Exclusionary practices are properly within the bounds of antitrust enforcement (even Bork says so).

Second, distinguishing exclusionary conduct from “hard competition” requires a judgment grounded in the facts and informed by economic theory. Our search for some magic hard and fast rule has been painful, but perhaps unnecessary. We can get pretty far if we find out what the monopolist was doing (rather than assuming that we know what it was doing based on assumptions from economic theory) and if we examine the monopolist’s justifications beyond its desire to hold on to its business. Economic theory can allow us to understand that a monopolist might pay for exclusion (as Microsoft did), but judgment about the effect on competition is still necessary (what did the payments buy?).

Third, intent is useful. Bork focuses on proof of a specific intent to exclude a competitor as one of two possible explanations for behavior. We need not buy this dichotomous approach to conduct (it’s either exclusionary or efficient) to see the wisdom of trying to understand (and prove) what the monopolist was trying to do. Of course, figuring this out can be messy (although the lack of psychological filters on today’s methods of communication is making that task easier).

Fourth, institutions matter, and two institutions that matter greatly to antitrust decision-making are courts and markets. The wisdom behind Bork’s argument for structural remedies involved a concern for judicial regulation and a skepticism about a court’s ability to constrain Microsoft through supervision. He preferred the incentives of

¹²⁶ See Hemphill & Wu, *supra* note 8, at 1191-99 (discussing cases).

the marketplace. The nearly ten-year history of the Microsoft settlement decree bears out Bork's fears to a large extent, although it is hard to say whether marketplace competition would have done better.¹²⁷

Putting the matter charitably, Bork's failure to fill in some important details leaves a broad agenda for further development. One area is the difference between coerced and bargained-for agreement. Coerced agreements lack the efficiency justification of bargained-for exchange and so should be more suspect (an argument Bork implicitly makes with regard to some of Microsoft's agreements); but purchased exclusion is not, therefore, good.¹²⁸ Another area is to pour more content into what constitutes an efficiency justification. Without returning to the standards war of the recent past, categorizing different kinds of behavior can help courts distinguish appropriate justifications from inappropriate ones, a form of "structured rule of reason."¹²⁹

The most important part of the unfinished agenda is to make clearer what is bad about exclusion. Bork's focus is on gaining or protecting monopoly profits, which is fine, but he pays inadequate attention to the effect of exclusion on innovation. He never mentions it in his book, although he does mention it briefly in his Microsoft analysis.

That is not surprising. Bork wrote about the issues that he was most concerned about in

¹²⁷ The decree was originally entered on November 12, 2002, and terminated on May 12, 2012. *See* Second Modified Final Judgment, *United States v. Microsoft Corp.*, Civ. 98-1232 (CKK), § V.A. The effort did little to increase competition in the operating system market. *See* Harry First, *Netscape is Dead: Remedy Lessons from the Microsoft Litigation*, NYU Law and Economics Research Paper No. 08-49 (2008), <http://ssrn.com/abstract=1260803>.

¹²⁸ *Cf.* *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (payments made by patentee to alleged infringer to settle patent litigation may violate Section 1 of the Sherman Act).

¹²⁹ *See* Baker, *supra* note 8, at 551-56 (discussing application of "truncated" or structured approach to exclusionary conduct); Hemphill & Wu, *supra* note 8, at 1201-09 (discussing different types of exclusionary mechanisms).

the 1960s and 1970s. Innovation is much more the concern *du jour* and more recent commentators are much more focused on it, appropriately so.¹³⁰

Bork's embrace of *Lorain Journal* also reminds us of the need to reconstruct the broader arguments for why a fair opportunity to compete is important. Why do we find it so hard to embrace what the Supreme Court said there: A monopolist violates Section 2 when it "uses its monopoly to destroy threatened competition."¹³¹ The phrase that "it is competition not competitors" that the antitrust laws protect has become a shibboleth that is now interfering with sensible antitrust decision-making. However useful this idea was at one point, it should not stand in the way of careful policy making today. There was nothing wrong in Bork noting that the effect on Netscape of Microsoft's exclusionary conduct was "devastating." We need not bleed for Netscape's owners to be concerned when a dominant firm finds ways to make sure that a challenger can no longer offer its product to consumers. Competitor efforts that dominant firms find "inconvenient or threatening" (to use Bork's words) are just what markets require.

IV. Conclusion

Robert Bork's arguments against Microsoft did not deserve the derision they received. His views on Microsoft turned out to be mostly correct. He understood what Microsoft was up to and he saw the competitive harm. In taking on the representation of Netscape he did not think he was doing anything more than acknowledging what he saw as the rare case of exclusion. He wrote all the words in *The Antitrust Paradox* and used

¹³⁰ See Baker, *supra* note 8, at 559-61 (exclusion poses threat to economic growth and innovation); Hemphill & Wu, *supra* note 8, at 1210-11 (loss of innovation through exclusion is a "much more important effect" than price elevation).

¹³¹ 342 U.S. at 154.

them in his analysis. He did change the music, though, and that is what made his advocacy surprising.

The controversy over his representation, however, should not obscure either the strengths of his views of exclusionary conduct or their weaknesses. Bork did see exclusion as a problem and condemned exclusionary conduct that was not efficiency-justified. His book often preferred economic hypotheses over factual analysis, but his focus on intent showed that facts could matter. His representation showed that they do.

Bork's emphasis on economics in *The Antitrust Paradox* should also not obscure the political value judgments that he makes at length in the book. Bork is actually very frank about those judgments. He begins and ends his book by reminding readers that “antitrust is a subcategory of ideology” necessarily connected to “the central political and social concerns of our time.”¹³² His concern is to maintain a “liberal, democratic, and capitalist order” and he worries about trends in antitrust that move decision-making away from “democratic processes toward political choice by courts” and away from “the ideal of free markets toward the ideal of regulated markets.”¹³³ It is not surprising, therefore, that his proposed approach tilts antitrust in those political directions, not just for economic reasons but as a matter of political philosophy.

Bork favored “the still valid antitrust philosophy of free entry, open markets, and vigorous competition.”¹³⁴ What antitrust advocate could quarrel with this philosophy?¹³⁵

¹³² See THE ANTITRUST PARADOX, *supra* note 4, at 3, 409.

¹³³ *Id.* at 418.

¹³⁴ *Id.* at 407.

¹³⁵ For more extended treatment, see Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORD. L. REV. 2543 (2013).

Bork was worried about government power being misused to exclude, which can certainly be a problem.¹³⁶ But the Sherman Act was passed primarily because of a concern about private economic power. Reclaiming exclusion as a key problem in antitrust would go a long way to addressing that concern. It would even be consistent with Bork's "still valid" view of antitrust's philosophy.

¹³⁶ Bork gave the issue extended treatment in chapter 18, "Predation Through Governmental Processes." See THE ANTITRUST PARADOX, *supra* note , at 347-64. Easterbrook later wrote that this was the only part of Bork's position that failed to win prosecutorial acceptance. See Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 447 (2008).