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Robert Bork's controversial legacy

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Judge Robert Bork was undeniably one of the towering figures in antitrust history. His contributions to the field were revolutionary. He advanced the field positively in many respects, articulating a serious critique of excesses in an earlier social-political approach to antitrust. But as one of the conservative movement's intellectual godfathers he also shares responsibility for many of their own excesses that have transformed our nation in harmful ways.

Many of these problems are due to his overall approach to antitrust. As he eloquently observed in his masterwork, *The Antitrust Paradox*: "What is the point of the law – what are its goals? Everything else follows from the answer we give." Although others had advocated that antitrust should be concerned with economic efficiency, Judge Bork argued that the *only* legitimate goal of the antitrust laws is to enhance economic efficiency. Other conservatives quickly and enthusiastically relied upon his deeply flawed view of the antitrust laws' legislative history.

Not only did Bork and his followers value only efficiency: they were disposed to find efficiencies everywhere. Moreover, adhering to an unrealistic theoretical view of human behavior, they were ready to presume the existence of an efficiency rationale for almost any business decision- a presumption that gradually and largely replaced earlier presumptions, such as the presumption that a market containing a smaller number of firms could and often did collude more easily.

Bork famously called the efficiency view of antitrust the "consumer welfare" approach. But this name was Orwellianly deceptive, unless one deemed cartels and monopolies "consumers." In fact, under Bork's approach the interests of real consumers were ignored in favor of a hypothetical 'total' welfare of the society that in practice came down to maximizing corporate

profitability. When consumers were forced to pay higher prices for goods and services, this transfer of wealth to cartels and monopolies wasn't even considered in Bork's analysis. Nor did it matter when monopolies or cartels restricted the choices of consumers in the market.

The results of the modern practice of antitrust are often decided by starting presumptions, and Bork and his followers succeeded in convincing the antitrust world not only that almost every business decision should be presumed to be efficient, but also that the efficiency presumption should be paramount and perhaps even exclusive. Most mergers, for example, were presumed efficient and therefore were permitted. So were most ways a firm could attain or maintain a monopoly.

Judge Bork formulated an antitrust policy that does not care when consumers pay more and receive fewer choices, and this helped transform our country into one where a few large companies control most crucial industries, and where the firms that dominate these markets are much more likely to be free from the threat of new competition. Judge Bork has indeed had – and will continue to have – truly revolutionary effects on our antitrust system and on our nation. The debate over whether these effects have mostly been positive continues.

--Robert Lande is Venable Professor of Law at University of Baltimore School of Law and is a co-founder and director of the American Antitrust Institute