The Transformation of Vertical Restraints: Per se Illegality, the Rule of Reason and Per se Legality

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Robert Bork may have had the single most lasting impact in antitrust law and policy in the past 50 years. To read the 1978 *Antitrust Paradox*[1] today, one is struck by how closely contemporary case law tracks Bork's policy prescriptions. The speed at which the transformation in law and policy occurred in antitrust is perhaps unprecedented across any area of common law.[2] The transformation of US antitrust law to Bork's "consumer welfare prescription"[3] is all the more interesting given that Bork was not the first to make most of his claims. However, he was the first to package his beliefs in an easy to understand manner.[4]

Like many academic pioneers, some of Bork's arguments and assumptions overreach.[5] Bork embraced economic analysis as a guiding principle for antitrust law. Yet, Bork's writing was based on the economics in a much simpler period – one that did not benefit from the game theory revolution.[6] Moreover, empirical industrial organization economics at the time of Bork's articles focused on the structure conduct performance (S-C-P) paradigm,[7] which was more hostile to concentration than present industrial organization economics.[8]

Bork's Chicago School understanding of antitrust[9] stood in contrast to some contemporaries who did not use economic analysis in their antitrust scholarship and who pushed

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[1] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[2] Antitrust may be the quickest doctrinal shift. The closest similar shift was in the area of government regulation, where starting in the late 1970s there was a shift from price regulation to market based regulation. BARAK Y. ORBACH, REGULATION: WHY AND HOW THE STATE REGULATES (2012).

[3] BORK, ANTITRUST PARADOX, *supra* note 1 at 66.

[4] Even relative to Bork's Chicago contemporaries using economic analysis, Bork had a larger impact even though his work was less economically sophisticated. Compare RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC ANALYSIS (1976) and BORK, ANTITRUST PARADOX, *supra* note 1.

[5] See generally ROGER D. BLAIR AND D. DANIEL SOKOL, INTERNATIONAL HANDBOOK OF ANTITRUST ECONOMICS (2014 forthcoming)(providing an overview).

[6] See JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION (1988)(providing an overview).

[7] See e.g., LEONARD W. WEISS, STRUCTURE, CONDUCT AND PERFORMANCE (1991); CARL KAYSEN AND DONALD F. TURNER, ANTITRUST POLICY, 1959; JOE S. BAIN, BARRIERS TO NEW COMPETITION (1956); Edward Mason, *The Current State of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265 (1949).

[8] Since the game theory revolution, the empirical literature has shifted to theory-driven structural models. See P. C. Reiss and F. A. Wolak, *Structural Econometric Modeling: Rationales and Examples from Industrial Organization*, *in* HANDBOOK OF ECONOMETRICS (James J. Heckman and Edward E. Leamer, eds.) 4277-4415 (2007).

[9] See e.g., George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964) Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); Ward S. Bowman, Jr., *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955); but see Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time To Let Go of the 20th Century*, 78 ANTITRUST L.J. 147 (2012). (suggested that the term "Chicago School" is overly simplistic and misleading).

an antitrust agenda based upon non-economic goals.[10] Antitrust of the time of Bork's early writing had little economic analysis to it by today's standards. Indeed, non-political factors affected case selection by the antitrust agencies and court decisions.[11] The American Bar Association, academics and others were critical of the agencies and some even called for the abolition of the Federal Trade Commission ("FTC").[12]

The tension of multiple competing goals of antitrust and of outcomes that chilled efficient business behavior in both academic and policy circles shaped Bork's writing and advocacy. Bork believed in an almost religious zeal that antitrust was in crisis; it was full of contradictions and needed well-reasoned clarity. Bork's believed that the Supreme Court (and lower courts) showed hostility to business and that this approach to antitrust law needed to change.[13]

Bork's vision laid out in the *Antitrust Paradox* became a blueprint for shifting case law and policy to reflect the Chicago School view. Bork's policy prescriptions became part of government policy starting in with the Regan administration.[14] Starting in 1981, leadership at both antitrust agencies embraced a Chicago approach to enforcement, which led to a significant drop in federal enforcement of vertical restraints. Since the Reagan revolution in antitrust, government enforcement in terms of the number of cases filed and decided has never recovered relative to where it had been the prior decade.[15] Similarly, the Bork position took control over the shape of judicial opinions.[16]

Bork's success, perhaps even genius, relative to Posner and others in the economic analysis of law movement was that Bork created simple rules. Bork promised that through the use of simple rules[17] and a simple singular goal of antitrust,[18] antitrust doctrine and practice could be improved.

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[10] See e.g., Louis B. Schwartz, *"Justice" and other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); MILTON HANDLER, ANTITRUST IN PERSPECTIVE (1957).

[11] On the strategic implications of case selection by antitrust agencies, see D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy* , 85 S. CAL. L. REV. 689 (2012).

[12] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005)(providing a history of these criticisms).

[13] Robert H. Bork, *Schwinn Overruled*, 1977 SUP. CT. REV. 171, 172.

[14] Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics and Enforcement*, 7 J. COMPETITION L. & ECON. 733 (2011).

[15] Id.

[16] See ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (2008)(lamenting this trend in the courts).

[17] BORK, ANTITRUST PARADOX, *supra* note 1 at 72 ("The need of law generally is for the systematic development of normative business models which, while they cannot attain, will at least distantly approach the rigor of the descriptive model of basic economic theory. Until we have such models, criticism of the courts for having the wrong goals will generally be empty, the mere assertion of a different set of personal preferences.").

[18] BORK, ANTITRUST PARADOX, *supra* note 1 at 7, 50; Robert Bork, *The Goals of Antitrust Policy*, 57 AMERICAN ECON. REV. (Papers and Proceedings) 242 (1967); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966).

Bork's brilliance was in his clear writing that was analytically deceptive. In fact, economic analysis of antitrust is not simple nor was there ever a single goal.[19] He wrote that the sole goal of antitrust was consumer welfare, largely because "consumer" was an easier sell to a broader audience in terms of the goal (as the 1960s and 1970s saw the birth of the consumer movement).[20] However, by consumer welfare, Bork meant total welfare.[21] He merely appropriated the word consumer because this was easier for courts to understand the concept. To the present, many courts, including the Supreme Court, have confused consumer and total welfare in their antitrust jurisprudence.[22]

Bork promised easy solutions to antitrust by abandoning *per se* illegality for the rule of reason. Bork understood that in practice, the push to rule of reason would actually lead to practices that approximated presumptive legality or even *per se* legality (at least when restraints were only ancillary).

Bork focused much of early antitrust writing on vertical issues. He advocated a shift away from *per se* illegality to reflect Chicago based economic thinking on pro-competitive justifications (based in part on some empirical work).[23] Antitrust jurisprudence and economic analysis in the 1950s and 1960s was hostile to a pro-competitive interpretation of vertical relations.[24] Starting with Donald Turner, some have called this "antitrust's inhospitality tradition."[25] By the late 1970s, the economics literature more solidly suggested that most vertical restraints were procompetitive.

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[19] See e.g., Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013); Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471 (2013); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008).

[20] See e.g., RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965).

[21] BORK, ANTITRUST PARADOX, *supra* note 1 at 66, 97. For an excellent discussion of the meaning of Bork and goals of antitrust, see Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

[22] Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012). For an excellent analysis of the shift in the rule of reason, see Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012).

[23] See e.g., Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, part II*, 75 YALE L. J. 373 (1966); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L. J. 775 (1965); Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954).

[24] Herbert J. Hovenkamp, Bork on Vertical Integration: Leverage, Foreclosure, and Efficiency (June 1, 2013) available at SSRN: http://ssrn.com/abstract=2272977 at 5 ("While Bork exaggerated the degree of hostility toward vertical integration prior to the 1930s, by the time he was writing in the 1950s both the economic theory and the law had become far more critical.").

[25] Alan Meese, *Market Power and Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291, 1294 (2013). The original citation is to Turner's speech to the NY Bar Association in 1966 in which Turner said, "I approach customer and territorial restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust." Oliver Williamson, *Mergers, Acquisitions and Leveraged Buyouts, An Efficiency Assessment, in* CORPORATE LAW AND ECONOMIC ANALYSIS (Lucien Bebcuck ed. 1990).

In his seminal *The Rule of Reason and the Per se Concept: Price Fixing and Market Division Part II*,[26] Bork made his preference for *per se* legality for vertical restraints quite clear, "It is the thesis here that proper doctrine should hold ancillary price fixing and market division lawful in all cases in which the parties lack market control, and that all vertical market division and price fixing should be lawful regardless of the parties' market size."[27] He expanded the category of *per se* legality in the *Antitrust Paradox* to include all vertical restraints, where he wrote "Analysis shows that *every* vertical restraint should be completely lawful."(italics added for emphasis)[28]

This essay tracks Bork's influence on the development of vertical restraints in three areas of antitrust law - maximum resale price maintenance ("RPM"), vertical territorial restrictions, and Robinson Patman.[29] In practice, across these areas, the shift in legal rules has not been one of *per se* illegality to the rule of reason but a more dramatic shift from *per se* illegality to one of presumptive legality under the rule of reason to close to *per se* legality.[30]

I. Bork and the Chicago School Tradition

A. The Chicago School Framework

Bork blended a number of Chicago inspired themes in his writing on vertical restraints. Each theme impacted the doctrinal shift and enforcement priorities on vertical restraints. The Chicago School is based on price theory, informed by empirics, and coupled with a concern over error costs. Understanding these three tenants of the Chicago School provide context for understanding Bork's views and influence in the development of doctrine and firm conduct regarding vertical restraints.

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[26] Bork, *Rule of Reason part II*, *supra* note 23.

[27] Id. at 391. Elsewhere Bork wrote, "[V]ertical restraints are, in economic terms, all of a piece. There are no distinctions to be made among them. They should be either all illegal per se or unqualified lawful. But legal doctrine is not in line with economic reality…" Bork, *Schwinn Overruled*, *supra* note 13 at 173.

[28] BORK, ANTITRUST PARADOX, *supra* note 1 at 288. People remember the famous Posner article on the move from *per se* illegality to *per se* legality. See Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. Rev. 6, 9, 23-26 (1981). Easterbrook had a similar goal. See Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1700-01 (1986); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 158-59 (1984). What many forget is that Bork was equally explicit about this goal and advocated this approach earlier than Easterbrook or Posner.

[29] Other vertical topics such as tying, bundling, exclusive dealing, etc. remain more contentious with regards to case law and economics today. Treatment of these other issues since the time of Bork's writing remains outside the scope of the present essay.

[30] Even though there is a rich literature of potential anti-competitive effects of vertical mergers, in practice there may be too few at the margin of being problematic to see a clearly measurable impact of the law. Michael A. Salinger, *Vertical Mergers, in* ROGER D. BLAIR AND D. DANIEL SOKOL, INTERNATIONAL HANDBOOK OF ANTITRUST ECONOMICS (2014 expected)(providing a literature review). Nevertheless, recent enforcement regarding vertical mergers as well as merger remedies suggests that the concerns that Bork articulated with strong vertical merger enforcement are a thing of the past. See 2004 Antitrust Division Policy Guide to Merger Remedies, available at http://www.justice.gov/atr/public/guidelines/205108.pdf; 2011 Antitrust Division Policy Guide to Merger Remedies, available at www.justice.gov/atr/public/guidelines/272350.pdf. For an overview of recent vertical merger enforcement see John Kowka & Diana Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 54 ANTITRUST BULLETIN (2012); ANTITRUST PARADOX , *supra* note 1 at chapter 11.

By the late 1960s, Bork and others in the Chicago School had pushed that naked cartels and significant horizontal mergers were the only areas of antitrust that demanded attention.[31] This emphasis also was a reaction to a series of Supreme Court cases that favored small and inefficient competitors over consumers.[32]

Bork's push for increased economic analysis changed this model of enforcement. Between the time of his writing on antitrust in the 1950s and 1960s that formed the basis for the *Antitrust Paradox* and the actual publication of the *Antitrust Paradox* in 1978, the building blocks for a revolution in case law and policy were in place for the antitrust revolution that quickly followed the release of his book.[33]

B. Economic Analysis in Antitrust Policy

Economic knowledge has to be diffused from the classroom into practice for it to shift policy. The Chicago School (along with a shift at Harvard towards economic analysis) changed academic thinking to an economics based approach among lawyers and case law.[34] As a result of the shift, case law changed. So too did how case law was taught. The leading antitrust case books used in law school have included significantly more economic analysis than books from the early 1970s. Indeed, every single major antitrust casebook today has at least one PhD economist among its co-authors.[35]

Critical to assisting lawyers with their understanding of economics and its implications for antitrust are economists. Economists, when engaged by the legal team, provide a screen of the sorts of cases to take or not take because of the potential competitive effects of case selection. One of the building blocks for the Chicago School in practice was the effective use of economists at the agency level. An increasingly powerful voice by staff economists changed how the antitrust agencies identified cases to bring and pushed for a greater emphasis on competitive effects.

The shift in the use of economic analysis by the antitrust agencies began in the 1960s by non-Chicagoans. Donald Turner created the role of Special Economic Assistant (today the DAAG for Economics) and Thomas Kauper created the Economic Policy Office at the

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[31] Richard A. Posner, *The Chicago School of Antitrust*, 127 U. PA. L. REV. 925, 933 (1979).

[32] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) at 2 ("[I]n the 1960s and 1970s the Supreme Court went overboard in protecting small business from larger firms, often at the expense of consumers."). See e.g., Albrecht v. Herald Co., 390 U.S. 145 (1968); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); FTC v. Procter & Gamble, 386 U.S. 568 (1967).

[33] Timing is everything. Bork's book was particularly well received because its publication coincided with the first set of Supreme Court cases in the vertical area that pushed the Chicago School agenda.

[34] Bruce M. Owen, *The Evolution of Clayton Section 7 Enforcement and the Beginnings of U.S. Industrial Policy*, 31 ANTITRUST BULL. 409, 409-10 n.1 (1986)("[w]e are all, to some extent, Chicagoans."); Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark, in* HOW CHICAGO OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST POLICY (Robert Pitofsky ed., 2008) at 141.

[35] Blair & Sokol, *Welfare Standards*, *supra* note 20 at 2514.

Department of Justice Antitrust Division ("DOJ").[36] However, it was only around the time of the publication of the *Antitrust Paradox* when the shift to a greater role for economists actually took hold.[37] Before that time, economists played a negligible role in case selection, providing theories of harm in the analysis of the evidence or as economic witnesses. Indeed, Oliver Williamson commented that in the 1960s DOJ economists were treated as little more than "litigation support"[38] while Posner wrote that DOJ's economists were "handmaidens to the lawyers, and rather neglected ones at that."[39]

The change in the role of economists took longer at the FTC than at DOJ. The FTC had an economic division since its founding in 1914. The economists did several things (including some limited antitrust work), but they focused on producing investigative reports in the first decades of the FTC. The Bureau of Economics ("BE") was not very active in the 1950s, with the exception of a couple of important reports on pharmaceuticals and international oil cartels. The transformation of BE began in 1961, when Willard (Fritz) Mueller took over as Bureau Director and the antitrust economists who had been working in the various attorney shops at the FTC (1955-1961) were reunited in BE. Nevertheless, the 1969 ABA report was quite critical of the FTC and led to the repositioning of the FTC observed in the 1970's and 1980s.[40]

C. Bork's Error Cost Framework and Legal Process

A basis of the Chicago School is concern over error-costs.[41] The Harvard legal process approach added administrability to these Chicago concerns.[42] The combination of these two intellectual streams allowed for a revolution in antitrust. Bork embraced both parts of this revolution.[43]

Bork was concerned that mistakes in over-enforcement were more costly than under-enforcement.[44] Errors of over-enforcement are likely to be large. Bork applied this reasoning to

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[36] Thomas E. Kauper, *The Role of Economic Analysis in the Antitrust Division Before and After the Establishment of the Economic Policy Office: A Lawyer's View*, 29 ANTITRUST BULL. 111, 119 (1984).
[37] Ralph A. Winter, *Antitrust Restrictions on Single-Firm Strategies*, 42 CANADIAN J. ECON. 1207 (2009).
[38] Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, 17 ANTITRUST, Spring 2003, at 61, 62.
[39] Richard A. Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500, 532 (1971).
[40] See generally the FTC 2003 Bureau Director transcript on the FTC website, available at http://www.ftc.gov/be/workshops/directorsconference/index.shtm.
[41] David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 75 (2005); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 9-14 (1984).
[42] William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/ Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 14-15.
[43] Thomas C. Arthur, *The Influence of Levi's Legal Process on Bork's Antitrust Paradox*, 17 MISS. C. L. REV. 124 (1996); James May, *Redirecting the Future: Law and the Future and the Seeds of Change in Modern Antitrust Law*, 17 MISS. C. L. REV. 43 (1996).
[44] Bork, *Rule of Reason II*, supra note 23 at 373 ("Resources expended or misallocated in law enforcement and compliance are as effectively lost to consumers as resources, is allocated by cartels. Even if identification of price discrimination in the litigation context were ultimately possible, therefore it would be far from certain that the costs

the vertical restraints context. Bork believed that because most vertical restraints were pro-competitive, these restraints should not have *per se* illegal antitrust scrutiny. The concern over error costs justified a move to the rule of reason.[45] History has proven Bork correct. The empirical evidence to date regarding vertical restraints suggests that typically such restraints are pro-competitive.[46]

C. Procedural shifts coupled with shifts on economic substantive law.

In a number of types of vertical restraints, in practice the rule of reason has meant *per se* legality for business for a negative safe harbor for particularly egregious behavior,[47] akin to what Bork suggested in the 1960s.[48] With greater hindsight, we can observe how important Bork's writing has been to case law and antitrust policy. Some of this change in antitrust is due to shifts in procedural antitrust while some is due to shifts in substantive vertical restraints law and policy.

The structure of the rule of reason by the Supreme Court has made it more difficult for plaintiff side firms to win rule of reason cases. At the Court articulated in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[49] "[lower courts may] devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[50] In fact, the structure of the rule of reason has been one in which the proof required by courts to survive summary judgment has meant that many cases have not survived.

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of enforcing a ban on price discrimination did not greatly exceed its benefits."). A more sophisticated version of this argument is that when there is a lot of uncertainty about competitive effects, the antitrust system screens based on the relative costs of Type I and Type II errors. Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 135-6 (1984)("There are limits on the ability of courts to sort the beneficial from the deleterious manifestations of these practices, and most of the time it is better not to try than to try and fail.").

[45] James C. Cooper et al., *Vertical Antitrust Policy As a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005)(arguing for concern regarding Type I errors in vertical restraints); Frank Easterbrook, *The Limits of Antitrust*, 65 TEX. L. REV. 1, 9-10, 14-16 (1984).

[46] Francine Lafontaine & Margaret Slade, *Franchising and Exclusive Distribution: Adaptation and Antitrust, in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., 2014 forthcoming)(providing a review of the literature); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007); Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in Report: The Pros and Cons of Vertical Restraints* 40, 76 (2008).

[47] There is a similar de facto presumption of legality in the corporate law setting regarding the business judgment rule (BJR). If the court applies BJR, defendant almost surely wins. Thus the fight in corporate law is about being able to show conflict of interest (duty of loyalty) or other breach of fiduciary duty that would shift the level of judicial review from deference to require the defendant to prove entire fairness, or to show defensive tactics or putting the company up for sale or primarily interfering with the vote which would trigger intermediate scrutiny under *Unocal*, *Revlon* or *Blasius*. See generally, Robert B. & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747 (2004) (providing data suggestive of such cases seldom leading to positive recovery).

[48] This point was originally made in a limited manner with regard to territorial restrictions. See Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1991).

[49] 551 U.S. 877 (2007).

[50] Id. at 898–99.

Shifts in procedural antitrust mirror changes in substantive antitrust. Higher procedural hurdles as a result of *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.* [51] and *Bell Atlantic Corp. v. Twombly*[52] have made it more difficult for plaintiffs to succeed in antitrust cases. A shift in the procedural default to favor defendants makes it more costly for plaintiff to bring cases. The higher costs will lead to fewer overall cases and eliminate all but those cases with a significant probability of success. Rising litigation costs also add to the importance of the procedural shifts.[53] As a result, businesses have begun to reshape how they think about vertical strategies in the United States.

III. Shifts in Practice of Behavior Due to Shifts in the Case Law on Vertical Restraints

A. The Difficulty of Proving a Shift in Business Strategy From Legal Outcomes

Business adapt to changes in legal rules in antitrust and in other areas of law. This, of course, is the day to day counseling for which many client alerts have been written. That vertical mergers and vertical contracting are now far more permissive, per Bork's vision, *may* have had significant changes across the US economy. However, direct demonstrations of these changes are difficult.

A case can be made that the law of vertical restraints has changed business strategy for operations and decision-making. One would expect a significant change in organizational form given the huge change that has occurred in the law due to the structural shift to rule of reason from *per se* illegality, but such studies tend to be indirect only.

Decided cases impact business behavior as clarity in case law changes antitrust risk for certain business practices.[54] One may find an important effect from a disproportionate reduction in either private of public enforcement. Summary judgment and even motions to dismiss have big effects on future cases, as potential future plaintiffs are emboldened or chastened. Similarly, substantive case law may reduce the total number of cases.

Proving that the move from per se illegality to the rule of reason has shifted business decision-making to presumptive legality or even *per se* legality in practice is difficult to measure. One could presumably look at earlier studies and then compare, correcting for other trends, but that would be difficult. The closest to a study of contracting are the survey papers that Francine

[51] 475 U.S. 574 (1986).
[52] 550 U.S. 544 (2007).
[53] ABA Section of Antitrust Law, Report of the Task Force on Controlling Costs of Antitrust Enforcement and Litigation, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky.authcheckdam.pdf.
[54] Decided cases do not address issues of quality vs. quantity of enforcement. One could legitimately argue that ignoring quality can lead to misleading inferences.

Lafontaine and Margaret Slade have produced— but these surveys definitely do not look at trends over time.[55]

Direct illustrations of this shift to more aggressive use by firms of vertical restraints are difficult. The direct empirical work has been concentrated on cross-section studies testing the economic determinants of contact form, e.g., in franchising, petroleum, etc. However, most of this work relies upon data prior to 1980.[56]

There are a number of indirect measurements that can be taken to understand this shift that has led in practice to an antitrust risk assessment of *per se* legality (or close to it through presumptive legality under the rule of reason) treatment of certain vertical restraints. One is survey evidence of business people. The limits to survey data of managers and others involved in firm level decision-making is that it measures perceptions rather than outputs. However, where the outputs are not easily measurable, survey data provides insights into the nature of economic reality of how markets work and how antitrust law and policy shape markets.[57]

Another indirect measurement is to examine the impact of decided cases.[58] One limit to the use of cases is that the number of cases brought might measure uncertainty in the law rather than uncertainty in business behavior. Second, there may be an endogeneity problem if shocks from important Supreme Court or lower court cases shift the enforcement composition of antitrust.

Given these caveats, some initial thoughts on counting case outcomes may be made. Over time, fewer cases and of the cases that do exist, more pro-defendant cases (less uncertainty for a *per se* legal position) may be used as a proxy for firms to undertake certain conduct not

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[55] See Lafontaine & Slade, *Franchising and Exclusive Distribution*, *supra* note 46. This growing empirical work shows a remarkable departure from just a decade earlier when Rey and Stiglitz noted that "in our perusal of the literature on efficiency-enhancing effects of vertical restraints, we have been impressed with the almost total reliance on theoretical arguments showing the possibility of such effects, and the paucity of cases providing persuasive evidence of their importance." Patrick Rey & Joseph Stiglitz, *The Role of Exclusive Territories in Producers' Competition*, 26 RAND J. ECON. 431, 446 (1995).

[56] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION (2006).

[57] See e.g., D. Daniel Sokol, Cartels, *Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201 (2012)(surveying antitrust lawyers on cartels); D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055 (2010)(surveying antitrust lawyers on mergers).

[58] Measurements of all cases filed are difficult. Some empirical work has been undertaken on private antitrust litigation. A number of papers emerged from a project that created a data set of every antitrust case filed in New York, Chicago, San Francisco, Kansas City, and Atlanta from the period 1973 to 1983. Using these data, Salop and White found that private antitrust cases played an integral part to the total caseload of the field. Most antitrust cases settle, and of cases that reach a court decision the plaintiffs won 28 percent of time (although if dismissals are included plaintiffs won only 11 percent of the time). Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: Introduction and Framework*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (Lawrence J. White ed., 1988). Calkins found that during this period, the percentage of antitrust cases that were resolved via motions for summary judgment (most often on the part of the defendant) increased dramatically. Stephen Calkins, *Equilibrating Tendencies in the Antitrust System, with Special Attention to Summary Judgment and to Motions to Dismiss*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (Lawrence J. White ed., 1988).

taken before the shift in the case law. One can thereby test the effects of *GTE Sylvania*[59] regarding the use territorial restraints, *State Oil*[60] regarding maximum RPM, and Robinson Patman post *Volvo Trucks*[61] and *Brooke Group*.[62] Minimum RPM post *Leegin* may be a different story because state level RPM laws are still in place.[63] A number of minimum RPM cases get filed and litigated post *Leegin*. The same is not true in the maximum RPM setting post *State Oil*. Similarly, one might also note fewer vertical mergers overall have been challenged as a proxy.[64]

A. Maximum Resale Price Maintenance

In *State Oil Co. v. Khan*,[65] the Supreme Court made maximum resale price maintenance subject to the rule of reason from *per se* illegality. Khan had contracted with State Oil to lease and operate a gasoline station. Under the contract, State Oil set a maximum profit margin. Khan sued alleging a violation of the Shearman Act. The Supreme Court found that the agreement should not have been held to be *per se* illegal given that "[t]he great weight of scholarly opinion"[66] was that maximum RPM had procompetitive effect.

Since *State Oil*, there is little antitrust risk regarding maximum RPM. The situation in which maximum RPM might still be illegal might be where the RPM operates not be a maximum price but a minimum price agreement where there is a cartel to raise the price. This is like what was suggested in *Maricopa County*.[67] In practice, we do not see such cases.[68]

There have been over 225 federal decided cases that have cited to *State Oil*. Of these cases, nearly all citations to *State Oil* provide a citation to the case for the broad proposition that *State Oil* stands for the rule of reason. Only six cases dealt with actual claims of maximum RPM. Four cases were decided in favor of the defendant based on the facts and two based on antitrust injury grounds.

The paucity of cases suggests that maximum RPM cases should have never been *per se* illegal. Moreover, that some cases were decided on antitrust injury grounds provides evidence to

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[59] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). For a defense of the *per se* rule in this context, see Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978).
[60] State Oil Co. v. Khan, 522 U.S. 3 (1997).
[61] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).
[62] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[63] Michael A. Lindsay, *From the Prairie to the Ocean: More Developments in State RPM Law*, Antitrust Source (Aug. 2012), available at http://www.dorsey.com/files/Upload/antitrust_lindsay_ RPM_080712.pdf
[64] Steven C. Salop, What Consensus? Ideology, Politics and Elections Still Matter (2013), available at http://ssrn.com/abstract=2255531 or http://dx.doi.org/10.2139/ssrn.2255531.
[65] 522 U.S. 3 (1997).
[66] Id at 13.
[67] Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).
[68] The reasoning behind the overturned *Albrecht* was flawed. See Roger D. Blair & John E. Lopatka, *The Albrecht Rule After Khan: Death Becomes Her*, 74 NOTRE DAME L. REV. 123 (1998); Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

support the theoretical claim made first by Blair and Lang in 1991 (before *State Oil*) that "It is readily apparent that the victim of maximum resale price fixing has not suffered antitrust injury."[69]

B. Non-price vertical restrictions

Sylvania was not merely an antitrust case about territorial restrictions. Rather, *Sylvania* signaled a broad shift across antitrust to rule of reason for *per se* illegality. It also had specific effects on the issue of non-price territorial restrictions.

In an examination of decided cases up through 1991, Judge Douglas Ginsburg examined all federal appellate decisions that cited *Sylvania* that ruled on rule of reason cases on the merits. His study of 45 cases found that defendants were successful in more than 90 percent of the cases.[70] Ginsburg concluded that non-monopolists in such cases have moved to a de facto *per se* legality. This work has not been updated. However, since publication of Ginsburg's article, there have been fewer decided cases regarding territorial vertical restraints. This suggests fewer overall challenges and greater business certainty regarding implementation of territorial restrictions. It also suggests higher procedural hurdles and higher costs of litigation.[71]

A study of litigated cases is not the only evidence as to the transformational effect in practice with business decision-making post-*Sylvania*. More recent marketing scholarship has tracked business marketing and distribution decisions regarding territorial restrictions through the use of survey data of managers across manufacturers in two industry categories by SIC code (1. industrial machinery and equipment and 2. electronic and electronic equipment).[72]

The investigation found that "business efficiency considerations play a significant role in the decision to use territorial restrictions."[73] The overall regression analysis suggested that the move to rule of reason was in fact consistent with efficiency enhancing arguments. This survey work provides some hints into why cases came out as they did in Judge Ginsburg's analysis of appellate decisions. If there are pro-efficiency reasons for territorial restrictions, plaintiffs are likely to lose on the merits. The results from the cases and survey analyses further suggest that in the area of territorial restrictions, Bork's push to rule of reason brought antitrust practice closer to the *per se* legality that he desired.

C. Robinson Patman

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[69] Roger D. Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 VAND. L. REV. 1007, 1021 (1991).
[70] Ginsburg, *Vertical Restraints*, *supra* note 48 at 71.
[71] Perhaps the facts of *Sylvania* invited additional litigation. Sylvania's market share was a mere 5 percent at the time of trial. See *Sylvania*, 433 U.S. 36, 38.
[72] Shantanu Dutta et al, *Vertical Territorial Restrictions and Public Policy: Theories and Industry Evidence*, 63 J. MARKETING 121 (1999). The study received a response rate of 32 percent from 147 firms (9 questionnaires per firm for a total sample of 460 questionnaires sent).
[73] Id. at 132.

Robinson Patman Act[74] enforcement risk impacts the use of price discrimination by firms. Bork attacked Robinson Patman because price discrimination may be good for competition.[75] Yet, some of criticisms of Robinson Patman were long standing.[76] The critique against Robinson Patman has continued. The Antitrust Modernization Commission called for its repeal.[77]

If the original intent of the Shearman Act, at least according to Bork, was consumer welfare, then the origin of the Robinson Patman Act was clear but very different – competitor welfare. The United States Wholesale Grocers Association, proposed the initial legislation at its 1935 annual meeting in which its intent was unmistakable. The Act's original name—"Wholesale Grocer's Protection Act" to protect against the growth of the A&P supermarket chain.[78] The Supreme Court has clearly noted the purpose of the Act:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages …[79]

With this level of protectionism a given, antitrust agencies (and private plaintiffs) used Robinson Patman aggressively to prevent pro-competitive price discrimination at the time that Bork first wrote about vertical restraints.

Though Bork wrote about the evils of Robinson Patman in 1978, change was already under way in the Robinson Patman area in terms of case contraction from the FTC. Under Regan there were 5 FTC Robinson Patman complaints but under Cartel there were just 8. This is in comparison to 518 under the Kennedy/Johnson administrations.[80]

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[74] 15 U.S.C. § 13.

[75] BORK, ANTITRUST PARADOX, *supra* note 1 at 382-94. See also Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 143–44 (2000)(providing a critique of the misguided assumptions of Robinson Patman).

[76] DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 132 (1955); American Bar Association's Report of the Commission to Study the Federal Trade Commission 67-68 (Sept 15, 1969); RICHARD POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES (1976); DEP'T OF JUSTICE, DEP'T OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT (1977).

[77] Antitrust Modernization Comm'n, Report and Recommendations at iii (2007).

[78] D. Daniel Sokol, *Limiting Anti-Competitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 117, 128 (2009).

[79] FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948).

[80] William E. Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 411 (2003).

The Chicago revolution furthered the demise of Robinson Patman in case law. As a result of *Volvo Trucks*[81] and *Brooke Group*,[82] Robinson Patman cases more closely resemble Sherman Act analysis based on competitive harm rather than harm to competitors.

One can measure the continued importance (or lack thereof) of Robinson Patman to businesses strategy indirectly through litigated cases since publication of the *Antitrust Paradox*. Federal Robinson Patman enforcement is relatively dead, with only one government case (McCormick) since 1992.[83] This change in government brought cases, with no cases in over a decade, is a fundamental structural shift.[84] In comparison, in the 1965-68 period (a period in which a number of Bork's important articles on verticals were written), the FTC undertook 97 Robinson Patman investigations a year and issued an average of 27 complaints a year during that period.[85]

The empirical scholarship on private Robinson Patman decided cases shows a significant shift in its use within the United States. First, a few caveats. Decided cases do not examine all cases filed nor do they examine settlements between parties. However, the nature of the shift in the law affects settlement leverage as only those cases that are uncertain are likely to be litigated.[86] It is in this context that the significant drop in the number of private Robinson Patman cases is significant. One study that collects 28 years of data from private Robinson Patman decided cases finds a shift in case frequency and in outcome starting in 1982.[87] From the period 1982 to 1993 (up through *Brooke Group*), private plaintiffs were successful in 35 percent of decided cases. In sharp contrast, in the 2006-2010 period (post *Volvo*) plaintiffs were successful in the 47 decided cases less than 5 percent of the time and in none of the primary line Robinson Patman cases.[88]

If the decided cases are the close cases and/or they shape future business behavior, this suggests that businesses have taken a more aggressive stance regarding price discrimination than they did at the time of *Antitrust Paradox*. This outcome may signal a shift to a pricing policy

[81] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).
[82] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[83] McCormick & Co., FTC Reports (CCH) ¶ 24,711, Proposed Consent Order and Complaint, File No. 961-0050 (Mar. 8, 2000). DOJ ceded all Robinson Patman enforcement to the FTC in the 1970s. See Thomas E. Kauper, The *Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 99 (1990) ("[DOJ] used its understanding with the FTC that the latter would be responsible for government enforcement of the Robinson-Patman Act to avoid any involvement under a statute it thought economically unwise").
[84] Not all of the impact of FTC enforcement can be traced to the mere stupidity of the Robinson Patman Act from an economic perspective. FTC priorities shifted during this time. The FTC looked for big cases starting in the 1970's and big cases "found" the FTC as firms filed mergers under Hart Scott Rodino.
[85] AMC Report at 316.
[86] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 15-17 (1984).
[87] Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MGMT. SCI. 2123 (2010). Adding to the difficulty of more aggressive Robinson Patman enforcement has been the impact of *J. Truett Payne*, which eliminated automatic damages in private suits. See Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981).
[88] Id. at 2130.

position risk assessment of antitrust risk for Robinson Patman that is closer to an outcome of *per se* legality (or at the least presumptively legal), with a negative presumption only in outlier cases.[89]

Conclusion

Robert Bork's writing had a tremendous impact in antitrust policy before agencies and the courts.[90] Through elegant language and crafty arguments, Bork shifted policy, at least in certain vertical restraints, from *per se* illegality to a rule of reason that in practice makes a number of practices presumptively legal. This presumptively legal rule of reason in combination with procedural rules that benefits defendants brings certain antitrust conduct closer to Bork's stated goal on *per se* legality for vertical restraints. It remains to be seen if with more time the Borkian revolution will become complete with *per se* illegality eliminated for all but naked cartels and replaced with *de facto* presumptive legality under the rule of reason or even *per se* legality.

[89] Beech-Nut Nutrition. Corp. v. Gerber Prods. Co., 69 Fed. Appx. 350 (9th Cir. 2003); Wiegand Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 2006 WL 847557, at 1–2 (E.D. Pa. 2006).
[90] George L. Priest, *The Abiding Influence of the Antitrust Paradox*, 31 HARV. J.L. & PUB. POL'Y 455 (2008).