

AFTERWORD: *LORAIN JOURNAL* AND THE ANTITRUST LEGACY OF ROBERT BORK

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The divergent voices in this symposium can agree on one thing: Robert Bork profoundly influenced the development of modern antitrust law. Enforcement against exclusionary conduct has been ground zero for the lively debate about the normative impact of his influence.¹ One way to evaluate the practical reach of Bork's antitrust legacy is to examine the cases challenging unilateral exclusionary conduct that the antitrust enforcement agencies have brought in recent years and how closely they conform to Bork's vision.²

This essay does this through the lens of one of the few unilateral exclusion cases about which *The Antitrust Paradox* had anything good to say—the Supreme Court's 1951 *Lorain Journal* decision. In Part I, I first describe the significance of *Lorain Journal* and why Bork singled it out as conforming to his views about the proper way to analyze alleged unilateral exclusionary conduct. Then, focusing on Bork's criticism of other exclusive dealing cases, I explain that—notwithstanding his support for *Lorain Journal*—Bork took a

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¹ Bork's own view was that then-current enforcement against exclusionary conduct “ha[d] proved more harmful to the integrity and rationality of antitrust” than enforcement against collusion. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 136 (1978). He recognized that his recommendations regarding enforcement against exclusionary conduct had more potential to change existing law than did his recommendations regarding collusive conduct. *Id.* at 160.

² I use the term “unilateral exclusionary conduct” or “unilateral exclusion” somewhat loosely to refer to cases where a firm at one level of the supply chain engages in exclusion without colluding with horizontal rivals. This term does not encompass cases where two or more suppliers at the same level collude to exclude rivals, but can encompass situations involving vertical agreements among participants at different levels of the supply chain. Whether a vertical agreement—rather than a strictly unilateral policy—is involved bears on the particular antitrust statute that can be used to challenge the conduct, but is often unimportant to competitive effects analysis.

narrow view of the role of antitrust enforcement against unilateral exclusion. This reflected Bork's heavy presumption against intervention in unilateral exclusion cases generally, but particularly where intervention is not grounded in the type of evidence-based competitive effects analysis that he admired in *Lorain Journal*.

In Part II, I briefly attempt to put Bork's influence in the context of others' contributions. Tracing Bork's precise influence on current agency case selection is an uncertain exercise well beyond the scope of this essay. Before analyzing how closely the agencies' recent unilateral exclusion cases conform to Bork's worldview, however, it is important to recognize that the line of causation is not a straight one, and that recent agency case selection reflects many different influences.

Part III begins by examining the spirited ongoing conceptual debate between those advocating a restrictive approach to unilateral exclusion enforcement and those supporting broader intervention. I argue that the scope of the debate has narrowed substantially since Bork started writing about antitrust. Next, as a way to assess empirically the extent to which actual agency enforcement has conformed to Bork's vision, I present a typology of the unilateral exclusion cases that the Federal Trade Commission and Department of Justice have brought in the 16 years beginning when the DOJ sued Microsoft in 1998. This shows that about two-thirds of the unilateral exclusion cases brought by the agencies bear a familial relationship to *Lorain Journal* in that the agencies alleged that exclusive dealing by a dominant firm injured the competitive process (not just the firm's rivals) and did not recognize any significant efficiency justifications. Moreover, most of the post-*Microsoft* agency unilateral exclusion cases that do not fit the *Lorain Journal* paradigm involved allegations of abuse of government process—an exception to Bork's general disdain for unilateral exclusion enforcement—or arguably similar conduct. Finally, I assess what the agencies' unilateral exclusion case selection may tell us both about Bork's continuing influence and its limits.

Bork's antitrust work continues, even after his death, to be a lightning rod for conceptual disputes. But when it comes to the type of unilateral exclusion cases the agencies have actually pursued, there has been significant consensus, largely along principles of which Bork approved. And *Lorain Journal* continues to explain a good portion of the unilateral exclusion enforcement world. The agencies have not consistently hewed to some of Bork's stronger views, however, such as his heavy presumption in favor of efficiency explanations for and lack of competitive harm from vertical restraints and his abiding belief in entry as a cure-all for most competitive concerns.

I. BORK AND UNILATERAL EXCLUSIONARY CONDUCT

A. *LORAIN JOURNAL*: A UNILATERAL EXCLUSION CASE THAT BORK LIKED

Although *Lorain Journal*³ is not always included in the pantheon of all-time most important antitrust decisions, it has proved foundational. The conduct there was as straightforward as it was brazen. The publisher of the *Lorain Journal* “enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising.”⁴ In response to the entry of WEOL, a radio station in a neighboring town, “the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who [the publisher] believed to be about to advertise on WEOL.”⁵ The publisher offered no coherent efficiency justification for its policy.⁶

In holding that the publisher had illegally attempted to regain its monopoly for disseminating news and advertising in Lorain, the Supreme Court explained how the publisher used its market power to pursue its desired result: Because “the Journal [was] an indispensable medium of advertising for many Lorain concerns,” “its publisher’s refusals to print Lorain advertising for those using WEOL for like advertising often amounted to an effective prohibition of the use of WEOL for that purpose.”⁷ The many Lorain County advertisers that wished to give WEOL a try “could not afford to discontinue their newspaper advertising in order to use the radio,” and loss of local Lorain advertising was “a major threat” to WEOL’s existence.⁸

Although Bork directed (typically scathing) criticism at nearly every other pro-plaintiff unilateral exclusion decision he discussed in *The Antitrust Paradox*, he called *Lorain Journal* “entirely correct.”⁹ (The other pro-plaintiff unilateral exclusion decisions to escape Bork’s censure involved abuse of government process.)¹⁰ To Bork, the conduct in *Lorain Journal* fell within a narrowly defined class of “deliberate predation” cases where antitrust enforcement is appropriate.¹¹ But just what set this case apart?

To answer this question, it is necessary to review Bork’s criticism earlier in the book of “the theory of automatic exclusion.”¹² Bork started with the pro-

³ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

⁴ *Id.* at 147.

⁵ *Id.* at 148.

⁶ *See id.* at 154 n.8 (rejecting proffered justification that policy “was part of the publisher’s program for the protection of the Lorain market from outside competition.”).

⁷ *Id.* at 152–53.

⁸ *Id.* at 153.

⁹ BORK, *supra* note 1, at 345.

¹⁰ *Id.* at 347–64.

¹¹ *See id.* at 405–06.

¹² *Id.* at 137–44.

position that all business practices are attempts either “to do business more efficiently” or “to exclude rivals on some basis other than efficiency.”¹³ Bork faulted both Judge Wyzanski in *United Shoe*¹⁴ and the Supreme Court in *Griffith*¹⁵ for positing an “intermediate case” where a monopolist might impose restrictions on its trading partners’ freedom to deal with others—the restrictive machinery leasing terms imposed by United Shoe or the exclusive exhibition rights that the theater chain procured in *Griffith*—neither to obtain efficiencies nor to engage in predation.¹⁶

Bork’s theory of automatic exclusion posited that this error was coupled with a “double-counting fallacy,” the assumption that a monopolist can both charge its full monetary monopoly price *and* foist unwanted restrictions on its counterparty’s operating freedom.¹⁷ According to Bork, however, a monopolist can only extract its monopoly profits once; if it insists on restricting its trading partner, it must set its monetary price at less than its monopoly monetary price to compensate for the imposition.¹⁸ In Bork’s view, because the courts in *Griffith* and *United Shoe* explicitly accepted that the defendants had not intentionally engaged in predation to exclude rivals, the defendants must have imposed the challenged restrictions for the purpose of obtaining efficiencies.¹⁹ Although Bork did not identify specific efficiencies from exclusive dealing, he referred to Phillip Areeda’s casebook, which enumerated ensuring markets for sellers, reducing selling costs, assuring supply and prices for buyers, promoting dealer loyalty, and achieving “quasi integration” between manufacturers and dealers.²⁰

Importantly, Bork’s views in *The Antitrust Paradox* regarding exclusion through restrictions on trading partners were not as absolutist as some perceive today. He did not argue, at least as a universal rule, that a dominant firm can *never* rationally decide to extract some of its monopoly rents in the form of restrictions that exclude the dominant firm’s rivals. Rather, he contended that absent strong, specific evidence to the contrary, restrictive provisions should be presumed to be motivated by efficiency objectives and not to sug-

¹³ *Id.* at 138

¹⁴ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953) (condemning machinery leasing terms as illegal exclusionary conduct), *aff’d per curiam*, 347 U.S. 521 (1954).

¹⁵ *United States v. Griffith*, 334 U.S. 100 (1948) (holding illegal “master agreement” covering both towns in which movie exhibitor enjoyed monopolies and towns where it did not).

¹⁶ BORK, *supra* note 1, at 138, 141–42.

¹⁷ *Id.* at 140–42.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 304–5; *see also* PHILLIP AREEDA, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 635–37 (2d ed. 1974).

gest predation.²¹ Indeed, presaging aspects of modern raising rivals' costs theory, Bork recognized "disruption of distribution patterns" that impose higher costs on rivals as conduct that "can and does occur" and as a "form of predation" that "the law can usefully attack" under certain limited conditions.²² To Bork, however, such conduct warranted intervention only "when the predator has overwhelming market size, perhaps 80 to 90 percent" and evidences a "specific intent to drive others from the market by means other than superior efficiency."²³

According to Bork, *Lorain Journal* "does not involve the fallacy of double counting which flawed" the Supreme Court's decision in *Griffith*.²⁴ Indeed, *Lorain Journal* fit Bork's predation scenario perfectly. The publisher, which enjoyed an "overwhelming market share," "clearly displayed predatory intent," and had "no apparent efficiency justification for its conduct."²⁵ Accordingly, under Bork's analysis, the publisher must have purchased the advertisers' exclusivity commitments for the purpose of excluding WEOL *on a basis other than efficiency*. Thus, the Court rightly held the conduct to violate Section 2 of the Sherman Act.

Bork identified two other features that distinguished *Lorain Journal* from monopolization cases he believed were wrongly decided. First, Bork recognized that procuring exclusivity concessions from advertisers had cost the publisher in the form of lower advertising rates. But unlike predatory pricing (which Bork found largely implausible and not a proper subject for antitrust intervention),²⁶ the publisher's conduct did not require it to expand output at artificially low prices.²⁷ Second, though Bork was very skeptical about the robustness of many types of supposed barriers to entry,²⁸ he pointed to a special barrier in *Lorain Journal*: a radio license "monopoly granted and protected by the government."²⁹ "If the Journal could bankrupt WEOL and gain

²¹ There has sometimes been confusion on this point, possibly because in his discussion of conduct such as vertical mergers and tying and reciprocal dealing, Bork suggested that essentially all possible antitrust objections were grounded in the double-counting fallacy. *Id.* at 225–45, 365–81. And as discussed in Part I.B, below, in his chapter addressing in detail exclusive dealing and requirements contracts, Bork was quite dismissive of antitrust concerns for similar reasons.

²² BORK, *supra* note 1, at 156–58.

²³ *Id.* at 157.

²⁴ *Id.* at 345 (citing *Griffith*).

²⁵ *Id.* Bork believed that "evidence that the conduct was not related to any efficiency," among other things, could suffice to show the requisite intent. *Id.* at 157.

²⁶ *Id.* at 149–55.

²⁷ *Id.* at 345.

²⁸ *Id.* at 310–19.

²⁹ *Id.* at 345; *see also id.* at 195–96 (arguing that "legal control of entry by government" is an "artificial barrier" to entry that should be of antitrust concern).

the license, it would . . . have a much better reason than most predators to be secure from further entry into [the] market.”³⁰

More broadly, although Bork did not explicitly make the point, the Court’s analysis was decades ahead of its time in crucial respects, which conformed both to Bork’s antitrust vision and modern-day antitrust norms. It linked the defendant’s exclusion to a specific exercise of market power, and upheld liability only after determining—based on actual evidence—that the conduct impaired the competitive process (not just rivals) and considering whether the conduct might be justified by efficiencies.

B. THE LIMITS OF BORK’S ENDORSEMENT OF INTERVENTION

Although *The Antitrust Paradox*’s discussion of *Lorain Journal* appears in Chapter 17, entitled “Boycotts and Individual Refusals to Deal,” Bork recognized that the conduct there “could be characterized as a demand for exclusive dealing.”³¹ He addressed other exclusive dealing cases in Chapter 15, “Exclusive Dealing and Requirements Contracts,”³² where he took a far dimmer view of intervention, much more in line with his views regarding antitrust intervention in most other contexts.

Chapter 15 begins with Bork’s trademark trenchant criticism of a pair of Supreme Court cases that—unlike *Lorain Journal*—condemned exclusive dealing without any evidence-based analysis of whether the conduct actually had injured or could injure competition. In *Standard Stations*,³³ the Court held illegal under Section 3 of the Clayton Act requirement contracts through which Standard Oil supplied 6.7 percent of all petroleum sold in seven western states; Standard Oil’s six largest competitors (which used similar contracts) supplied 42.5 percent.³⁴ The Court recognized that there was no proof that Standard Oil’s requirements contracts had actually reduced competition below the level that would otherwise have prevailed.³⁵ The Court nonetheless concluded that a mere showing that Standard Oil’s exclusive dealing contracts had foreclosed competition “in a substantial share of the line of commerce affected” was sufficient, without more, to satisfy Section 3’s requirement that the challenged contracts “probably lessen competition, or create an actual tendency to monopoly.”³⁶ Justice Frankfurter wrote for the Court:

³⁰ *Id.* at 345.

³¹ *Id.* at 346.

³² *Id.* at 299–309.

³³ *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

³⁴ *Id.* at 294–295.

³⁵ *Id.* at 310–11.

³⁶ *Id.* at 300, 314 (internal quotation marks omitted).

[T]o demand that bare inference [that the exclusive dealing contracts had injured competition] be supported by evidence [of] what would have happened but for the adoption of the practice . . . or to require firm prediction of an increase in competition as a probable result of ordering abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.³⁷

The Court offered no economic reasoning to support its conclusion. As Bork put it, “The case ultimately rests . . . not upon economic analysis, not upon any factual demonstration, but entirely, and astoundingly, upon the asserted inability of courts to deal with economic issues.”³⁸ “Yet the reason given [for relaxing Section 3’s anticompetitive effects requirement]—the helplessness of courts before economic controversies— would equally have supported the opposite holding, that such contracts are almost always lawful because courts cannot be sure they are bad.”³⁹

Bork then turned to *Brown Shoe*,⁴⁰ where the Supreme Court upheld an FTC determination that Brown had engaged in an unfair method of competition in violation of Section 5 of the FTC Act. Brown had entered into agreements with about 1 percent of all U.S. shoe retailers that provided “special treatment and valuable benefits” in return for promises not to carry shoes that “conflict[ed]” with Brown Shoe brands.⁴¹ The Court observed that Brown’s program “obviously conflict[ed] with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in [the] open market.”⁴² But the Court declined to determine whether the effect of the program might have been “to substantially lessen competition or create a monopoly” in violation of Section 3; the Court relied instead on the FTC’s broad powers under Section 5 to “arrest trade restrictions in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.”⁴³

In an observation that was surely more provocative in 1978 than it is today—thanks, in part, to the influence of Bork’s own work⁴⁴—Bork wrote: “There was, of course, no conceivable way in which Brown’s franchise pro-

³⁷ *Id.* at 309–10.

³⁸ *Id.* at 301.

³⁹ *Id.*

⁴⁰ *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

⁴¹ *Id.* at 317–18. Although the decision does not say so, Bork estimated, based on the Supreme Court’s earlier vertical merger decision in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), that Brown Shoe “still made and sold about 5 percent of the shoes sold in the United States.” BORK, *supra* note 1, at 302.

⁴² *Brown Shoe*, 384 U.S. at 321.

⁴³ *Id.* at 322–23 (internal quotation marks omitted).

⁴⁴ *See infra* Part II.

gram could harm competition, and it obviously provided efficiencies for both Brown and the dealers.”⁴⁵ To Bork, the Court’s “doctrinal gambit” of layering one incipency standard (Section 5) on top of another (Section 3) “merely show[ed] how far the Court w[ould] go to strike down an exclusive dealing contract.”⁴⁶

Bork went on to discuss more difficult cases involving exclusive dealing by oligopoly suppliers. His views here have found less acceptance.⁴⁷ And his treatment of these cases shows that Bork’s recognition in *The Antitrust Paradox* that exclusive dealing can harm competition extended little, if at all, beyond extreme cases like *Lorain Journal*, where the exclusion by a dominant firm was unmistakable and the defendant could not offer even a colorable procompetitive justification.

In *Standard Fashion*,⁴⁸ a dress pattern supplier and its affiliates held exclusive dealing contracts with about 40 percent of the retailer “pattern agencies” in the country. The dress-pattern industry was highly concentrated, with Standard and three other companies commanding the business of “about 90 percent of the pattern agencies, most of them under exclusive dealing arrangements.”⁴⁹ The Court quickly found that the agreements violated Section 3 of the Clayton Act. It reasoned that, in possibly thousands of small communities, the arrangements would give one pattern manufacturer a monopoly.⁵⁰ And in larger cities, exclusivity with the most fashion-forward pattern agencies might “tend to facilitate further combinations so that [Standard] or some other aggressive concern” might gain a near monopoly of the pattern business.⁵¹

Bork did not focus his analysis on whether the contracts could actually lead to monopoly; he thought it obvious based on theory and the record that they could not.⁵² Rather, he criticized an alternative basis for the outcome in *Standard Fashion* that his frequent sparring partners Harlan Blake and William Jones had posited: Through the exclusive dealing contracts, major dress pattern suppliers “by reason of their popularity and long lines of styles,” could keep “newer and smaller manufacturers with shorter and less well-known

⁴⁵ BORK, *supra* note 1, at 303.

⁴⁶ *Id.*

⁴⁷ *See, e.g., infra* note 59.

⁴⁸ *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922).

⁴⁹ BORK, *supra* note 1, at 305. Bork’s discussion of facts not in the Supreme Court opinion is taken from Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 442 (1965) (analyzing case record).

⁵⁰ *Standard Fashion*, 258 U.S. at 362–63.

⁵¹ *Id.* at 363 (quotation marks omitted).

⁵² BORK, *supra* note 1, at 305–07.

lines” out of “the best outlets.”⁵³ Thus, according to Blake and Jones, “While the *Standard Fashion* decision might not have been necessary to ward off monopoly, it was clearly helpful in facilitating entry into a concentrated industry and making possible the wider distribution of competitive lines.”⁵⁴

This concern is conceptually similar to that in *Lorain Journal*: when put to the choice of either dealing with one of the four major dress pattern suppliers exclusively or not at all, the dealers could not afford to give an incipient supplier a chance. The main difference, of course, is that because Standard was not an indispensable trading partner (a dealer could have gone with one of Standard’s three major rivals), the concern was not that Standard’s conduct (in the context of other exclusive dealing arrangements throughout the industry) would maintain a monopoly, but that it would entrench an *oligopoly*.⁵⁵

Bork pointed again to his “double-counting fallacy,” arguing that Standard could not “charge the retailer [the] full worth [of its line] in money and then charge it again in exclusivity the retailer [did] not wish to grant.”⁵⁶ According to Bork, Standard could not have purchased a monopoly through exclusive dealing, and there would be “no point in [its] purchasing a market position short of monopoly, for that is to buy a less profitable market share.”⁵⁷ Because he found it implausible that Standard would have bought restrictions for “the barring of entry,” Bork concluded that Standard must have done so to achieve “some more sensible goal, such as obtaining the special selling effort of the outlet.”⁵⁸

Thus, Bork assumed that it could not be a profitable strategy to purchase exclusivity in order to maintain an oligopoly. But depending on the particular circumstances, it seems plausible that maintaining an oligopoly through industry-wide exclusion that forecloses entry or expansion by rivals offering innovative products or disruptive pricing can be worth the price of doing so.⁵⁹

⁵³ Blake & Jones, *supra* note 49, at 442–43.

⁵⁴ *Id.* at 443.

⁵⁵ See C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 *YALE L.J.* 1182, 1188–89 (2013) (observing that the term “exclusion” is broad enough to embrace exclusion by multiple incumbents, but that in practice it has often been limited to exclusion by a single, dominant firm).

⁵⁶ BORK, *supra* note 1, at 306.

⁵⁷ *Id.* at 307.

⁵⁸ *Id.*

⁵⁹ See, e.g., *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner, J.) (observing that in a highly concentrated industry “any impediments to new competition may harm consumers by keeping prices at noncompetitive levels.”); Hemphill & Wu, *supra* note 55, at 1210–13 (describing potential harms from exclusion of incipient competitors from a concentrated market). Bork offered two other criticisms of *Standard Fashion* in addition to his “double-counting” argument. First, he argued that “[w]ith four major firms and a number of minor ones, the industry was competitively structured,” so the Court “incorrectly assumes the desirability of having more firms in the [market].” BORK, *supra* note 1, at 306. But he offered nothing to support his suggestion that excluding rivals that threaten to disrupt a stable oligopoly

Bork ultimately stated his general opposition to active enforcement against exclusive dealing in very strong terms, concluding that exclusive dealing is “a business practice carrying a very weak possibility of predation and a very strong probability of efficiency,” and asserting that “there is every reason to believe that exclusive dealing and requirements contracts have no purpose or effect other than the creation of efficiency.”⁶⁰ And, notwithstanding his endorsement of *Lorain Journal*, Bork argued: “The truth appears to be that there has never been a case in which exclusive dealing or requirement contracts were shown to injure competition.”⁶¹

Moreover, Bork was, if anything, *less* hostile toward antitrust intervention against exclusive dealing than he was toward intervention against other forms of unilateral exclusion (apart from those involving abuse of government process). In his chapter on tying and reciprocal dealing, Bork applied the “one monopoly rent” theory to reject the proposition that ties could ever injure competition in a tying or tied market, and claimed that antitrust had “no adequate grounds for objecting to [tying or reciprocal dealing] at all.”⁶² As to predatory pricing, Bork argued that successful price predation was so unlikely and the risks of condemning efficient price cutting so great that antitrust should never intervene; he rejected even the relatively permissive below average variable cost pricing rule advocated by Areeda and Turner.⁶³

II. BORK’S ANTITRUST LEGACY IN CONTEXT

Before using the cases the agencies have pursued in recent years to draw some conclusions about Robert Bork’s antitrust legacy, it is worth briefly putting Bork’s influence in context. As discussed in Part III, below, there has been a dramatic shift from the blindly interventionist approach that Bork so forcefully criticized to the current agency practice of assessing specific evidence regarding competitive effects and focusing enforcement activity on uni-

cannot harm competition. Second, he claimed that since contracts with pattern agencies turned over rapidly, “as barriers to entry these contracts had about the solidity of a sieve and the tensile strength of wet tissue paper.” *Id.* Although frequent contract turnover may forestall antitrust concerns where rival suppliers have bona fide opportunities to win exclusive contracts, *see, e.g.*, *Paddock Publ’ns, Inc. v. Chi. Trib. Co.*, 103 F.3d 42, 47 (7th Cir. 1996), frequent opportunities (in theory) to win dealers’ business make little difference where dealers are forced to make all or nothing choices and have no realistic option to switch all of their requirements to an incipient rival. *See United States v. Dentsply Int’l Inc.*, 399 F.3d 181, 194 (3d Cir. 2005). In addition, Bork failed to acknowledge that by putting the pattern agencies to the choice of either carrying its patterns exclusively or not at all, Standard (and its fellow oligopolists) raised entry barriers by effectively requiring new entrants to enter with a full line of patterns. *See Richard A. Posner, Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 230 (2005) (critiquing Bork’s analysis of *Standard Fashion*).

⁶⁰ BORK, *supra* note 1, at 156, 309.

⁶¹ *Id.* at 309.

⁶² *Id.* at 365–81.

⁶³ *Id.* at 154–55.

lateral exclusionary conduct that is most likely to injure competition significantly and least likely to generate substantial efficiencies. But how much of this transformation is the product of Bork's undeniable influence,⁶⁴ as opposed to the influence of others who have played critical roles? I will not try to answer that complex question comprehensively, but I offer a few observations.

The theoretical work underlying exclusionary-conduct enforcement today comes from multiple sources. Many of the arguments that Bork made in *The Antitrust Paradox* were not ones he originated. As he gratefully acknowledged in the preface, Bork derived many of them from the work of Aaron Director, his professor at the University of Chicago, and his sometimes co-author, Ward Bowman,⁶⁵ both of whom labored far from the general public's eye. Director—whom Richard Posner has called the “doyen of Chicago antitrust thinking”⁶⁶—laid the intellectual foundation for many of the non-interventionist arguments regarding vertical restraints that Bork later popularized.⁶⁷ And Bowman attacked the law's traditional antipathy to tying arrangements, among other things.⁶⁸

But the Chicago School is far from the only source of the intellectual framework underlying unilateral exclusion enforcement today. As former FTC Chairman William Kovacic has observed, the contributions of Bork and other Chicago School scholars go hand-in-hand with those of Harvard School academics, such as Phillip Areeda, Stephen Breyer, and Donald Turner.⁶⁹ The Harvard School greatly influenced the development of substantive legal rules that have scaled back intervention—especially against price cutting, refusals

⁶⁴ See William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, *supra* this issue, 79 ANTITRUST L.J. 855, 855 (2014) (“Among academics who have written about antitrust since the Sherman Act's adoption in 1890, Robert Bork's influence on doctrine, policy, and debate in the United States is unequalled.”); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust*, 78 ANTITRUST L.J. 471, 476 (2012) (“Over 100 court cases today cite Bork explicitly when referring to the ‘consumer welfare’ goal of the antitrust laws.”).

⁶⁵ BORK, *supra* note 1, at xv–xvi.

⁶⁶ Posner, *supra* note 59, at 229.

⁶⁷ Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, *supra* this issue, 79 ANTITRUST L.J. 881, 888–89 (2014). In certain respects, Director's views were somewhat more moderate than Bork's. See, e.g., Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1956) (articulating single monopoly rent theory, but recognizing that even for a firm “with only some monopoly power,” “coercive restrictions on suppliers and customers” “might be valuable if the effect of [them] would be to impose greater costs on possible competitors.”); *infra* note 82 and accompanying text.

⁶⁸ Richard A. Epstein, *Bork's Bowman: “Not Gone But Forgotten,” supra* this issue, 79 ANTITRUST L.J. 903 (2014).

⁶⁹ 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 (2007).

to deal, and refusals to share essential facilities;⁷⁰ the Harvard School also contributed a “cautiou[sness] about the administrability of legal rules and the capacity of the institutions entrusted with implementing them” that plays a major role in modern antitrust enforcement.⁷¹ Moreover, “post-Chicago” scholars have been influential in challenging assumptions underlying Chicago School non-interventionist doctrine and focusing decision makers on conditions under which exclusion can be a profitable strategy.⁷²

In addition, at the beginning of the Reagan Administration, William Baxter went from teaching antitrust at Stanford to serving as Assistant Attorney General for the DOJ Antitrust Division; as reflected most prominently in the DOJ’s dismissal of its long-running lawsuit against IBM, Baxter brought a substantially more skeptical view of antitrust intervention to the DOJ than his recent predecessors had.⁷³ Other antitrust scholars, some of whom served as senior DOJ Antitrust Division officials, later became appellate court judges and authored important opinions in a variety of exclusionary conduct cases. These scholars include Stephen Breyer,⁷⁴ Michael Boudin,⁷⁵ Frank Easterbrook,⁷⁶ Douglas Ginsburg,⁷⁷ Richard Posner,⁷⁸ Ralph Winter,⁷⁹ and Diane Wood.⁸⁰

For all of Bork’s contributions as a scholar, he probably achieved greater influence as a popularizer, condensing a sweeping reach of content into *The Antitrust Paradox*, a highly readable (even entertaining), one-stop handbook.

⁷⁰ *Id.* at 43–51, 64–71.

⁷¹ *Id.* at 14.

⁷² *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 *YALE L.J.* 209 (1986).

⁷³ *See* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 *N.Y.U. L. REV.* 936, 945 (1987) (arguing that “Baxter set about to change the vocabulary and the central paradigm of antitrust. To a large extent, he succeeded.”) (footnote omitted).

⁷⁴ *See* *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) (price squeeze); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (exclusive dealing, predatory pricing).

⁷⁵ *See* *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993) (exclusive dealing).

⁷⁶ *See* *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) (predatory pricing); *Paddock Publ’ns, Inc. v. Chi. Trib. Co.*, 103 F.3d 42 (7th Cir. 1996) (exclusive distribution).

⁷⁷ *See* *Covad Commc’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005) (refusal to deal, product pre-announcement, sham litigation).

⁷⁸ *See* *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986) (purported duty to assist rival); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984) (exclusive dealing).

⁷⁹ *See* *E&L Consulting, Ltd. v. Doman Indus., Ltd.*, 472 F.3d 23 (2d Cir. 2006) (exclusive distribution, tying).

⁸⁰ *See* *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (exclusive dealing, group boycott).

Like it or loathe it (and symposium contributors do plenty of both), Bork offered relatively simple rules and prescriptions for reform—articulated with clarity, bravado, and certainty in the rightness of his positions—that courts found accessible and easy to apply.⁸¹ It is instructive in this regard to compare Bork’s fiery rhetoric and clear prescriptions to the much humbler pronouncements of his fellow Chicago School scholars Aaron Director and Edward Levi, who concluded their famous 1956 call for reevaluation of the antitrust laws by acknowledging that “the problems are difficult” and disavowing any “suggest[ion] that the law must of necessity conform to the prescriptions of economic theory.”⁸² Moreover, Bork took his unique path from Yale to the Office of the Solicitor General to the D.C. Circuit and published *The Antitrust Paradox* just as the Reagan Revolution was bringing receptive audiences to the antitrust agencies and the courts. This put Bork in an ideal position to influence the development of antitrust doctrine from the early 1980s onward.⁸³

Christopher Leslie thoughtfully observes that in *The Antitrust Paradox* Bork showed a fondness for strawman targets and overstated the disrepair of then-current antitrust doctrine; notably, the Supreme Court issued *Sylvania* in 1977, the year before *The Antitrust Paradox* came out.⁸⁴ But insofar as the tide was already beginning to turn by 1978—a possibility Bork acknowledged⁸⁵—Bork’s earlier writings surely had something to do with that.⁸⁶

⁸¹ See D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason and Per Se Legality*, *supra* this issue, 79 ANTITRUST L.J. 1003 (2014).

⁸² Director & Levi, *supra* note 67, at 296.

⁸³ See Sokol, *supra* note 81, at 1008.

⁸⁴ Christopher R. Leslie, *Antitrust Made (Too) Simple*, *supra* this issue, 79 ANTITRUST L.J. 917, 919 (2014) (citing *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (upholding vertical restraint on retail sales locations under rule of reason)); see also Kovacic, *supra* note 64, at 858 (criticizing Bork’s “institutional irrationality narrative” as explanation for antitrust decision-making with which Bork disagreed).

⁸⁵ BORK, *supra* note 1, at 5 (“A majority of the current Supreme Court has recently taken a significant step toward reforming a part of antitrust, and prospects for an intelligible, pro-consumer law may now be brighter than they have been for several decades.”); *id.* at 419 (referring to *Sylvania* as a “hopeful development”); *id.* at 425 (citing “a new stirring in the intellectual community, a new distrust of statist solutions, and a new willingness to reconsider old economic policies and pieties” that “is true in the antitrust debate as elsewhere.”).

⁸⁶ In *Sylvania*, the Court cited Bork, along with Richard Posner, for the critical proposition that “[e]conomists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products.” 433 U.S. at 56 (citing Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division—Part II*, 75 YALE L.J. 373, 403 (1966), Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 287–88 (1975)).

III. BORK'S WORLDVIEW AND AGENCY UNILATERAL EXCLUSION ENFORCEMENT

A. THE ONGOING—BUT NARROWED—CONCEPTUAL DEBATE

The era since the DOJ sued Microsoft in 1998 seems an appropriate one for taking stock of agency enforcement against unilateral exclusion. It is short enough to be manageable, yet provides a reasonable sample size and captures roughly equal periods of Democratic and Republican leadership of the DOJ and the FTC.

This post-*Microsoft* era has seen no lack of controversy about standards for evaluating unilateral exclusionary conduct in concept, and the agencies have actively participated in the debate. Perhaps most prominently, after the DOJ and the FTC conducted a series of joint hearings on dominant firm conduct, three of the four FTC commissioners refused to join the DOJ's report. The Section 2 report, which cited *The Antitrust Paradox* ten different times, advocated a non-interventionist approach toward most types of exclusionary conduct.⁸⁷ The three commissioners sharply criticized the report for, among other things, (i) overstating the risk of over-enforcement relative to under-enforcement and (ii) advocating a baseline standard and conduct-specific bright line rules and safe harbors that the commissioners believed were weighted too heavily against intervention.⁸⁸

Less than a year later, one of Christine Varney's first acts as Assistant Attorney General was to withdraw the Section 2 report. She argued that "it raised [too] many hurdles to Government antitrust enforcement."⁸⁹ Moreover, Varney believed the report reflected too little faith in antitrust enforcers' and courts' abilities "to distinguish between anticompetitive acts and lawful con-

⁸⁷ U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) (withdrawn), available at www.justice.gov/atr/public/236681.pdf; Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at www.justice.gov/atr/public/_releases/245710.htm.

⁸⁸ See Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf; see also Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), available at www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf (declining to endorse the DOJ Section 2 Report on other grounds).

⁸⁹ Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the U.S. Chamber of Commerce: Vigorous Antitrust Enforcement in This Challenging Era 6 (May 12, 2009), available at www.justice.gov/atr/public/speeches/.pdf.

duct” and too much concern about “‘over-deterrence’ with regard to potentially procompetitive conduct.”⁹⁰

These debates are important: diverging ideologies have consequences. Antitrust enforcement policy is substantially informed by judgments regarding how best to weigh risks of over- and under-deterrence, and competing views about the institutional competencies of the agencies and courts to ensure that the antitrust laws are a force for enhancing, rather than impeding, competition. In cases where the facts or economics are ambiguous, the conclusions enforcers reach will naturally reflect their policy preferences.⁹¹ Indeed, levels of enforcement against unilateral exclusionary conduct have varied by administration, with the DOJ commencing no unilateral exclusion cases during the George W. Bush administration.

As discussed in Part III.B, below, however, we have not seen any dramatic increase in agency unilateral exclusion cases following the withdrawal of a report that was heavily influenced by Bork’s writings. And the cases that the agencies have brought over the last 16 years have mostly been ones of which Bork might have approved. This stems in part from the enduring legacy of Bork’s work. As Judge Ginsburg observes, “[B]y the mid-1980s, Bork’s [consumer welfare] thesis had undeniably changed the Supreme Court’s most fundamental understanding of the Sherman Act.”⁹² That has limited the range of enforcement actions that the agencies can realistically pursue. Enforcement actions no longer concern conduct that simply made it harder for smaller rivals to compete; the agencies invariably contend that, based on real evidence, the conduct at issue actually harmed or is likely to harm the competitive process (e.g., by bringing higher prices or lower output, quality, or innovation). The agencies likewise do not seek to use antitrust enforcement to pursue non-efficiency objectives, such as checking the political power or economic influence of large companies, protecting small business, or preserving rivalry for its own sake.⁹³ In addition to being consistent with Bork’s vision, the agencies’ enforcement practices are also in keeping with *Lorain Journal’s* focus

⁹⁰ *Id.*

⁹¹ See Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST L.J. 601, 603 (2014) (“Ideological differences can lead enforcers, courts, and economists to diverge systematically from one another in the conclusions drawn from a given set of facts.”); Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 668 (2014) (“While . . . differing ideologies may be irrelevant where the economics of a practice is unambiguous, they do matter where economic theories and empirical evidence are indeterminate, as they often are on important issues pertaining to exclusion claims.”).

⁹² Douglas H. Ginsburg, *Bork’s “Legislative Intent” and the Courts*, *supra* this issue, 79 ANTITRUST L.J. 941, 945 (2014).

⁹³ *Cf. Brown Shoe v. United States*, 370 U.S. 294, 344 (1962) (“Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved [those] competing considerations in favor of decentralization.”).

on harm to the competitive process, insistence on genuine evidence of actual or likely anticompetitive effects, and inquiry into potential efficiency justifications.

Though the notion that agencies would pursue cases on bases other than economic efficiency might seem fanciful today, during much of the time Bork was writing about antitrust, the agencies were still challenging (and courts were condemning) a broad range of conduct having no more potential to harm the competitive process than the conduct at issue in *Brown Shoe*.⁹⁴ As the contributions to this symposium show,⁹⁵ academic debate still rages over Bork's reading of the antitrust statutes and their political and legislative history and over his strict focus on allocative efficiency. But these debates—regarding questions like whether wealth transfers, unaccompanied by output restrictions, should be of antitrust concern—have only limited implications for real-world antitrust enforcement, at least compared to prior debates regarding whether antitrust should pursue non-economic objectives, such as protection of small business, dispersion of political power, or “fairness” for its own sake.⁹⁶

The division among the FTC commissioners in the recent *McWane* matter illustrates the narrowed scope of today's debates surrounding unilateral exclusion enforcement. Both the Commission's opinion condemning McWane's exclusive dealing policy and Commissioner Wright's dissenting statement carefully analyzed—and clashed over—whether complaint counsel had proven that McWane's conduct had actually harmed competition in the relevant market for domestically produced pipe fittings.⁹⁷ The disagreement turned in significant part on the extent to which the commissioners were willing to draw implications about harm to the competitive process from the record evidence. Their disagreements in this regard may reflect different

⁹⁴ See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (holding per se illegal exclusive-territory provisions ancillary to private-label product program); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (condemning vertical territorial restraints as per se illegal, without any inquiry into actual competitive effects); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 548–52 (1966) (finding combined market share of 4.49% “sufficient” to condemn horizontal merger).

⁹⁵ Compare Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, *supra* this issue, 79 ANTITRUST L.J. 835, 836 (2014) (offering “a modest defense of Bork against his sharpest critics on the question of antitrust's goals.”), with Orbach, *supra* note 67, at 893–95 (arguing that Bork erred in asserting that the objective of the antitrust statutes was allocative efficiency).

⁹⁶ See Crane, *supra* note 95, at 848–51.

⁹⁷ Compare Opinion of the Commission at 18–30, *McWane, Inc.*, FTC File No. 9351 (Jan. 30, 2014) [hereinafter *McWane* Commission Opinion], available at www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf, with Dissenting Statement of Commissioner Joshua D. Wright at 23–48, *McWane, Inc.*, FTC Docket No. 9351 (Jan. 30, 2014), available at www.ftc.gov/system/files/documents/cases/140206mcwanestatement.pdf.

underlying views about how best to balance risks of over- and under-deterrence. Critically, however, the commissioners—who represent a broad spectrum of current antitrust thinking—agreed that whether McWane’s conduct harmed competition was the ultimate question for determination. None of them argued that proof of harm to competition was unnecessary. The majority, moreover, closely examined whether McWane’s proffered efficiency justifications could provide a basis to uphold its conduct—notwithstanding harmful effects on potential rivals—before concluding that the justifications were not cognizable.⁹⁸ This was a much narrower debate than might have taken place in the 1960s or during much of the 1970s at the FTC or in court, when harm to actual or potential rivals (standing alone) might well have been enough to condemn McWane’s exclusive dealing policy.⁹⁹

B. THE CRUCIBLE: AGENCY ACTIONS SINCE MICROSOFT

In her speech announcing withdrawal of the Section 2 report, Varney extensively praised *Lorain Journal* as “la[ying] down a marker for Section 2 enforcement.”¹⁰⁰ She also discussed favorably *Aspen’s* condemnation of a monopolist’s apparent willingness to sacrifice short-run profits for long-term exclusion in refusing to deal with a rival.¹⁰¹ In addition, she cited *Microsoft* in stating that the DOJ “will need to look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm’s conduct, weigh those factors, and determine whether on balance the net effect of this conduct harms competition and consumers,”¹⁰² an approach for which *Lorain Journal* sowed some seeds.

⁹⁸ *McWane* Commission Opinion, *supra* note 97, at 30–32 (rejecting proffered justifications that exclusive dealing was necessary to ensure a sufficient volume to support a domestic foundry and to keep customers from “cherry-picking” high-volume products from a rival offering a narrower product line).

⁹⁹ That the agencies have alleged harm to competition does not mean, of course, that they have proven such harm. The great majority of agency challenges in unilateral exclusion (and other) cases have not been litigated. But in *Microsoft* and *Dentsply*, a subsequent litigated exclusive-dealing case, the courts found both that the DOJ had met its burden to prove harm to competition, and that the adverse effects on rivalry could not be justified by procompetitive benefits from the exclusive dealing. See *United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir. 2001) (en banc); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 196–97 (3d Cir. 2005); see also *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (exclusion based on horizontal agreements). On the other hand, the courts have rejected exclusive dealing claims in private litigation where the plaintiff failed to prove that the exclusive dealing actually threatened competition. See Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311 (2002) (providing detailed assessment of modern judicial treatment of exclusive dealing).

¹⁰⁰ Varney, *supra* note 89, at 9–11.

¹⁰¹ *Id.* at 11–13.

¹⁰² *Id.* at 13.

In practice, in the post-*Microsoft* era, most of the unilateral exclusion cases the agencies have pursued fit more or less within the *Lorain Journal* paradigm; that is, a dominant firm was alleged to have imposed conditions on a trading partner that excluded actual or potential rivals, thereby injuring the competitive process, and (at least according to the agency) had proffered no substantial procompetitive justification. Most of the exceptions, moreover, might have met with Bork's approval.

The DOJ's 1998 case against Microsoft falls within this agency enforcement heartland in some respects, but outside it in others. As Harry First recounts, in urging the DOJ to sue Microsoft for monopolization, Robert Bork repeatedly characterized Microsoft's conduct as an "exact parallel" to *Lorain Journal*.¹⁰³ Indeed, in the first page of his white paper to the DOJ on *Microsoft*, Bork relied solely on the "controlling legal precedent" of *Lorain Journal* for the proposition that when a monopolist "imposes conditions . . . that exclude rivals without any apparent efficiency justification . . . it violates § 2 of the Sherman Act."¹⁰⁴ The DOJ's case against Microsoft included a heavy dose of allegations that Microsoft imposed contractual restrictions that made it difficult or impossible for Microsoft's trading partners to distribute rival browsers, which could have undermined Microsoft's operating system monopoly.¹⁰⁵ But the case also included allegations going well beyond the *Lorain Journal* paradigm—allegations relating to exclusionary product design, predatory pricing, technological tying, and deception. Notably, Bork (albeit as an advocate for Netscape, a Microsoft browser competitor) endorsed theories of exclusionary product design and predatory pricing, which he never recognized in *The Antitrust Paradox* as valid bases for antitrust intervention.¹⁰⁶

I have identified 20 unilateral exclusionary conduct cases the agencies have brought since *Microsoft*.¹⁰⁷ Six actions fit squarely within the *Lorain Journal*

¹⁰³ Harry First, *Bork and Microsoft: Why Bork Was Right and What We Learn About Judging Exclusionary Behavior*, *supra* this issue, 79 ANTITRUST L.J. 1017, 1030 (2014).

¹⁰⁴ Robert H. Bork, *The Case Against Microsoft 1* (n.d.) (on file with the author). 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").

¹⁰⁵ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

¹⁰⁶ See Bork, *supra* note 104, at 5–7, 11–12. Bork argued that "the reason price predation is usually a losing game" did not apply to browsers and other software because variable costs of production and distribution are close to zero. *Id.* at 12. Bork did not specifically address product design as a form of exclusion in *The Antitrust Paradox*; insofar as Microsoft's integration of Internet Explorer into the Windows operating system resembled tying, however, it seems fair to conclude that this theory is contrary to Bork's views in *The Antitrust Paradox*.

¹⁰⁷ For this breakdown of unilateral exclusion cases, I have not included complaints alleging agreements among current or potential competitors to exclude a party to the agreement or third

paradigm; they are based substantially or entirely on allegations that a supplier or distributor with market power flatly prohibited trading partners from dealing with rivals, leading to exclusion and competitive harm, and the agency recognized no substantial efficiency justifications.¹⁰⁸

Seven others involved more nuanced alleged factual scenarios but—at least in significant part—fit within a broadened notion of the *Lorain Journal* paradigm. In these cases, the agency did not allege that a defendant with market power had completely prohibited trading partners from dealing with rivals. Rather, it alleged that the defendant had made it prohibitively difficult for rivals to challenge its dominance by (a) imposing penalties on, or giving less favorable treatment to, disloyal customers or input suppliers;¹⁰⁹ (b) granting

parties. For example, I do not include the FTC's reverse payment cases (which involve both exclusionary and collusive aspects) or cases alleging concerted refusals to provide access to business inputs or concerted efforts use self-regulatory processes to exclude. This exercise is, to be sure, an inexact one. Actual cases involve unique facts, and the conduct alleged is sometimes difficult to classify as falling neatly within one category or another. *See, e.g.*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (horizontal agreements among members of joint ventures required permitting banks to issue only Visa or MasterCard credit cards, thereby denying rival credit card networks access to issuing banks). For a comprehensive list of FTC and DOJ civil non-merger complaints from 1993 to 2012, see Salop, *supra* note 91, at Appendix.

¹⁰⁸ *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (artificial tooth monopolist required dealers to deal exclusively); *McWane Commission Opinion*, *supra* note 97, at 18–30 (affirming ALJ determination that monopolist in market for domestically produced pipe fitting maintained monopoly by refusing, with only minor exceptions, to supply distributors dealing with rival supplier); Complaint ¶ 23, *IDEXX Labs, Inc.*, FTC File No. 1010023 (Dec. 21, 2012), available at www.ftc.gov/enforcement/cases-proceedings/1010023/idexx-laboratories-inc-matter (alleging monopolist supplier of veterinary diagnostic products entered contracts with distributors allowing it to “discontinue providing a category of products to the distributor if the distributor sells any product, with small exceptions, that competes with an IDEXX product within the category.”); Complaint ¶ 26, *Pool Corp.*, FTC File No. 1010115 (Nov. 21, 2011), available at www.ftc.gov/enforcement/cases-proceedings/1010115/pool-corporation (alleging dominant distributor of various pool products “responded to . . . new competition by notifying all major manufacturers [of those products] that it would stop dealing with any manufacturer that sold any of its products to the new entrant.”); Decision and Order ¶¶ 19–28, *Transitions Optical, Inc.*, FTC File No. 0910062 (Mar. 3, 2010), available at www.ftc.gov/enforcement/cases-proceedings/091-0062/transitions-optical-inc (alleging monopolist for photochromatic lenses required marketing partners and customers to deal exclusively) (The author's law firm represented Transitions Optical in the FTC proceedings.); Complaint, *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25 (D.D.C. Dec. 21, 1998) (No. 9810146), available at www.ftc.gov/enforcement/cases-proceedings/9810146/mylan-laboratories-inc-cambrex-corporation-profarmaco-sri-gyma (alleging generic drug manufacturer entered into exclusive agreement with dominant active ingredient supplier in return for portion of monopoly rents from excluding competing generics).

¹⁰⁹ Complaint, *United States v. United Reg'l Health Care Sys.*, No. 11-cv-00030 (N.D. Tex. Feb. 25, 2011), available at www.justice.gov/atr/cases/unitedregional.html (alleging monopolist hospital required insurers to pay pricing penalties if they contracted with rival facilities); Complaint ¶¶ 51, 53, *Intel Corp.*, FTC File No. 0610247 (Dec. 16, 2009), available at www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter (alleging, among other things, that Intel “threatened OEMs that considered purchasing non-Intel CPUs with . . . increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects,” and “offered market share or volume discounts selectively to OEMs to foreclose competition.”) (The author and his firm represented Intel in the FTC proceedings.);

discriminatory discounts conditioned on favored retailers devoting the large of majority of their spice shelf space to the dominant spice manufacturer's products;¹¹⁰ (c) prohibiting merchants from promoting use of competing credit cards;¹¹¹ or (d) procuring most favored nations provisions that effectively kept trading partners from giving favorable pricing to the dominant firm's smaller rivals.¹¹²

The agencies appear to have brought eight unilateral exclusionary conduct cases alleging only conduct that does not fit some notion of the *Lorain Journal* paradigm. These encompass a wide array of alleged exclusionary conduct: predatory pricing;¹¹³ misconduct regarding patents used to exclude competition from generic pharmaceuticals;¹¹⁴ using monopoly power in a product

Agreement Containing Consent Order, Columbia River Pilots, FTC File No. 9410047 (Dec. 14, 1998), available at www.ftc.gov/enforcement/cases-proceedings/9410047/columbia-river-pilots (alleging association of marine pilots excluded competition by adopting policies imposing severe penalties on member marine pilots joining rival group). There is an ongoing debate over whether loyalty discounts and similar practices, such as those alleged in *Intel*, are properly evaluated under an exclusive dealing framework. See, e.g., Sean P. Gates, *Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts*, 79 ANTITRUST L.J. 99 (2013) (evaluating debate over proper characterization of loyalty rebates and bundled sales); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Remarks at Bates White 10th Annual Antitrust Conference: Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts (June 3, 2013), available at www.ftc.gov/sites/default/files/_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf. That question is beyond the scope of this essay.

¹¹⁰ Complaint, McCormick & Company, Inc., FTC File No. 9610050 (Mar. 8, 2000), available at www.ftc.gov/sites/default/files/documents/cases/2000/03/mccormickcmp.htm (alleging secondary line Robinson-Patman Act violation).

¹¹¹ Complaint, United States v. Am. Express Co., No. 10-cv-04496 (E.D.N.Y. Oct. 4, 2010), available at www.justice.gov/atr/cases/americanexpress.html (alleging American Express, MasterCard, and Visa, each of which held market power, restricted merchants from offering consumers discounts or otherwise encouraging use of competing cards).

¹¹² Complaint, United States v. Blue Cross Blue Shield of Mich., No. 2:10-cv-15155 (E.D. Mich. Oct. 18, 2010), available at www.justice.gov/atr/cases/f263200/263235.htm (alleging that dominant health insurer contracts requiring hospitals variously to charge rival insurance companies either no less or more than they charged dominant insurer reduced rival insurers' competitiveness or completely excluded them from certain markets); Complaint, United States v. Med. Mut. of Ohio, No. 98-cv-2172 (E.D. Ohio Sept. 23, 1998), available at www.justice.gov/atr/cases/indx55.htm (alleging most favored nation provisions in dominant insurers' contracts with certain hospitals required hospitals to charge rival significantly more than they charged dominant insurers or incur significant penalties).

¹¹³ United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (alleging predatory pricing by dominant firm on air routes).

¹¹⁴ Complaint, Bristol-Myers Squibb Co., FTC File No. 0110046 (Mar. 7, 2003), available at www.ftc.gov/enforcement/cases-proceedings/0110046/bristol-myers-squibb-company-matter (alleging, in addition to anticompetitive agreement with generic manufacturer to delay generic entry, branded drug manufacturer misled the FDA, abused FDA regulations, engaged in improper conduct before the U.S. Patent & Trade Office, and filed baseless infringement lawsuits); Complaint, Biovail Corp., FTC File No. 0110094 (Apr. 23, 2002), available at www.ftc.gov/enforcement/cases-proceedings/011-0094/biovail-corporation (alleging branded drug manufacturer illegally acquired an exclusive patent license, wrongfully listed that patent in the Orange Book,

market to demand licenses to technology that customers might have used to introduce new competition in the product market;¹¹⁵ obtaining monopolies in technology markets based on deceit during a standard-setting process;¹¹⁶ and attempting to exclude or raise the costs of rivals in a downstream market by seeking injunctions based on patents that the patentee had committed to license on reasonable and nondiscriminatory terms.¹¹⁷

Notably, six of these eight cases outside the *Lorain Journal* paradigm are arguably consistent with Bork's policy prescriptions. They involved allegations of exclusionary deceit, abuse of government process, or misconduct related to standard setting that was inexpensive to execute and had no potential to promote competition.¹¹⁸ Bork supported enforcement against abuses of government process, such as sham litigation or misuse of administrative processes to prevent or delay rival entry.¹¹⁹ He called this conduct "an increasingly dangerous threat to competition," in part because it enabled the predator to forestall entry for only "the price of litigation" and did not "require . . . the predator . . . to impose larger costs on the victim" than on itself.¹²⁰ Unlike the exclusion cases that Bork criticized, these cases typically neither involve conduct requiring expensive investments in exclusion nor risk chilling procompetitive business behavior.

I have identified just two agency cases in the last 16 years (both brought in 1998) that involved only alleged conduct neither falling within the *Lorain*

and submitted a misleading declaration in response to an FTC inquiry about the propriety of the listing, all to prevent generic competition of one of its pharmaceutical products).

¹¹⁵ Complaint ¶ 13, Intel Corp., FTC File No. 9510028 (June 8, 1998), available at www.ftc.gov/enforcement/cases-proceedings/9510028/intel-corporation-matter (alleging Intel "refus[ed] to provide technical information about Intel products for the purpose of forcing . . . customers to grant Intel licenses to microprocessor-related technology developed and owned by those customers.").

¹¹⁶ *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (alleging deceitful failure to disclose patent applications during standard-setting process); Decision and Order, Union Oil Co., FTC Docket No. 9305 (July 27, 2005), available at www.ftc.gov/enforcement/cases-proceedings/0110214/union-oil-company-california-matter (similar). The author's law firm represented Rambus in the appeal of the FTC's Order in the *Rambus* matter.

¹¹⁷ Complaint, Robert Bosch GmbH, FTC File No. 1210081 (Nov. 26, 2012), available at www.ftc.gov/enforcement/cases-proceedings/1210081/bosch-robert-bosch-gmbh (alleging stand-alone FTC Act § 5 violation based on patentee seeking injunction on RAND-encumbered patents); Complaint, Motorola Mobility LLC, FTC File No. 1210120 (Jan. 3, 2013), available at www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter (similar).

¹¹⁸ See *Biovail*, FTC File No. 0110094; *Bosch*, FTC File No. 1210081; *Bristol-Myers Squibb*, FTC File No. 0110046; *Motorola Mobility*, FTC File No. 1210120; *Rambus*, 522 F.3d 456; *Union Oil Co.*, FTC Docket No. 9305; see also Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 984–86, 988, 991 (2005) (former FTC officials characterizing *Biovail*, *Bristol-Myers Squibb*, *Rambus*, and *Unocal* as "cheap exclusion" cases).

¹¹⁹ BORK, *supra* note 1, at 347–64.

¹²⁰ *Id.* at 347–48.

Journal paradigm nor constituting “cheap exclusion.” One was a predatory pricing case, which the DOJ lost on appeal.¹²¹ The other involved allegations that a monopolist denied or threatened to deny technical information and took other action against customers that refused to license to the monopolist technology they might have used to compete with it.¹²² That case ended with a consent decree. Moreover, two additional cases involved mixes of allegations falling within a version of the paradigm and allegations far outside it. Those are *Microsoft*¹²³ and the FTC’s 2009 *Intel* case.¹²⁴ In *Intel*, the Commission (relying heavily on its stand-alone Section 5 authority) combined allegations falling within a broadened *Lorain Journal* paradigm—with allegations of predatory product design, product bundling, unconditional refusal to deal, and deceit.

C. CONFORMITY WITH BORK’S VISION AND ITS LIMITS

Reviewing the unilateral exclusion cases the agencies have actually brought since *Microsoft* allows us to draw some conclusions about both Bork’s influence and its limits.

1. *Conformity with Bork’s Vision*

Perhaps most fundamentally, Bork advocated an enforcement emphasis on horizontal collusion rather than unilateral exclusion.¹²⁵ Thus, the fact that the agencies have brought a relatively small number of exclusionary conduct cases—of any type—compared to collusion cases is consistent with Bork’s policy prescriptions.¹²⁶ Indeed, the agencies have brought unilateral exclusion cases at a rate of less than two per year since 1998.

The reasons for this are over-determined. Firms may simply be avoiding the sort of exclusionary conduct that is likely to bring agency scrutiny; the FTC and the DOJ may have concluded that investigations of collusive conduct are

¹²¹ *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

¹²² Complaint, *Intel Corp.*, FTC File No. 9510028 (June 8, 1998).

¹²³ *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

¹²⁴ *See supra* note 109.

¹²⁵ Although Bork approved of enforcement against a narrow range of “[d]eliberate predation,” he believed increased enforcement resources should be directed at “[s]uppression of competition by horizontal agreement” and “[h]orizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market).” BORK, *supra* note 1, at 405–06.

¹²⁶ *See* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 576 (2013). The text of an early 2014 speech by Assistant Attorney General Baer discussing DOJ antitrust enforcement during the Obama administration devotes about eight pages to enforcement actions against cartels and other alleged horizontal agreements, about six-and-a-half pages to merger enforcement, and only about a page to exclusionary conduct enforcement. Bill Baer, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for Delivery to the N.Y. State Bar Ass’n: Reflections on Antitrust Enforcement in the Obama Administration (Jan. 30, 2014), available at www.justice.gov/atr/public/speeches/303269.pdf.

more likely to find conduct that impairs rivalry without bringing significant efficiencies; the agencies may have concluded that enforcement against cartels and mergers brings more deterrence for the buck; or restrictive legal rules may make intervention impossible or create a greater risk of loss in litigation than the agencies wish to bear.¹²⁷ The agencies' enforcement emphasis may also reflect a Borkian view that, compared to collusion, enforcement against exclusionary conduct is more likely to result in erroneous determinations about whether conduct is harmful and that the harm from false positives will be more costly to society.¹²⁸ Based in part on the controversy over the DOJ Section 2 report and the varying levels of enforcement activity against unilateral exclusion, it appears that the role these rationales play in enforcement decisions may wax and wane depending on the leadership at the agencies.

In assessing agency case selection, we must bear in mind that, whatever their normative preferences, the agencies make enforcement decisions in the shadow of case law. Some types of conduct the agencies might otherwise pursue more frequently are governed by non-interventionist legal tests that are typically difficult for a plaintiff to satisfy. These include standards for predatory pricing¹²⁹ and unconditional refusals to deal,¹³⁰ both of which have been informed by Bork's work and (arguably more so) by the scholarship of Phillip Areeda and Donald Turner (among others).¹³¹ Moreover, where oligopolists independently engage in exclusion that in the aggregate injures competition—but do not enter into horizontal agreements to do so—it may be difficult to reach the conduct under either traditional monopolization theories or statutory

¹²⁷ See generally Baker, *supra* note 126, at 577–80.

¹²⁸ See *id.* at 575–76 (rejecting propositions); cf. Kovacic, *supra* note 69, at 72–73 (arguing that “Chicago/Harvard” approach “assumes that [over-inclusive] applications of antitrust law to control dominant firm conduct pose greater hazards to economic performance than [under-inclusive] applications” and favors “administrable rules that tend to exculpate” based on “doubts about the capabilities of enforcement agencies and courts and antipathy toward what is posited to be unduly expansive system of private rights of action.”).

¹²⁹ See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (requiring below-cost pricing and reasonable prospect of recoupment for predatory pricing claims); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986) (citing *The Antitrust Paradox*, among other authority, to support proposition that “predatory pricing schemes are rarely tried, and even more rarely successful.”).

¹³⁰ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408–09 (2004) (distinguishing *Aspen* on grounds that dominant firm there was willing “to forsake short-term profits to achieve an anticompetitive end.”); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605–10 (1985) (citing *The Antitrust Paradox* to define predation as “attempting to exclude rivals on some basis other than efficiency” and for importance of lack of business justification as evidence that defendant engaged in profit sacrifice).

¹³¹ See *Trinko*, 540 U.S. at 410–15 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 773e, at 150 (2003 Supp.); 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 240c3, at 12 (2d ed. 2000); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989)); *Aspen Skiing*, 472 U.S. at 605 & n.32 (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

provisions requiring an agreement.¹³² That may be one reason the agencies have pursued few challenges to unilateral exclusionary conduct in oligopoly markets, which Bork discounted as an antitrust concern.¹³³

Also consistent with Bork's vision, not only have the agencies focused on assessing evidence regarding actual economic effects, but most of their unilateral exclusion cases have challenged conduct that (at least in their view) did not bring significant cognizable efficiencies to weigh against exclusion of rivals.¹³⁴ This is not particularly surprising. Given limited resources for exclusionary conduct enforcement, enforcers of most philosophical stripes are likely to focus principally on conduct that most unambiguously threatens competition and is easiest to challenge in court. Indeed, in *Lorain Journal* paradigm cases that have been adjudicated on the merits, the courts have had little trouble determining that, as in *Lorain Journal* itself, the defendants had proffered no serious efficiency justification at all.¹³⁵

2. Limits of Conformity with Bork's Vision

It would be a mistake to conclude that all of Bork's views relevant to unilateral exclusion cases are reflected in the agencies' case selection process. As discussed, Bork dismissed the possibility that exclusive dealing to protect an

¹³² See Hemphill & Wu, *supra* note 55, at 1235–48 (proposing legal theories to address harm from parallel exclusionary conduct).

¹³³ See *supra* text accompanying notes 47–58.

¹³⁴ See *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc) (per curiam) (setting forth a “balancing approach” to evaluate allegedly exclusionary conduct).

¹³⁵ See *United States v. Dentsply Int'l Inc.*, 399 F.3d 181, 197 (3d Cir. 2005) (upholding district court determination that Dentsply's “alleged justification was pretextual and did not excuse its exclusionary practices.”); see also *McWane* Commission Opinion, *supra* note 97, at 30–32 (rejecting as not cognizable justification that exclusive dealing was necessary to (i) maintain sufficient volume to operate domestic foundry and (ii) prevent customers from “cherry-picking” high-volume products from rivals and persuade them to support McWane's full line of products); cf. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (in case involving horizontal agreements, court rejected proffered justification that exclusionary rules were necessary to promote “network cohesion”). In *Microsoft*, the court found that several of Microsoft's licensing restrictions on trading partners lacked any cognizable procompetitive justification. *Microsoft*, 253 F.3d at 62–64. But it also found that Microsoft's interest in preventing a “substantial alteration” to its copyrighted work outweighed any marginal competitive harm from restricting computer manufacturers from modifying Windows' start-up screens, and that the plaintiffs had failed to rebut Microsoft's proffered justification for causing Windows to override the user's choice of default browser in certain circumstances. *Id.* at 63, 67. Of course, in some of the cases that were not adjudicated, the defendant would have argued that allegedly exclusionary conduct was justified by important efficiencies. See, e.g., Answer of Respondent Intel Corp. at 4–5, Intel Corp., FTC File No. 0610247 (Dec. 31, 2009), available at www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter (explaining procompetitive justifications for conduct FTC challenged).

oligopoly market structure could be a plausible strategy. But the DOJ's *American Express*¹³⁶ case involves allegations of exclusion by oligopolists.

Bork argued that antitrust should not be concerned about barriers to entry from capital requirements, established dealer networks, or conditions that suppliers impose on their customers.¹³⁷ Further, he relied on ease of entry at the distribution level as one basis for his laissez-faire approach to exclusive dealing.¹³⁸ The agencies, however, have focused heavily on barriers to entry—especially those that the defendant's exclusionary conduct has itself created—when bringing unilateral exclusion cases.¹³⁹

In addition, Bork applied an almost irrebuttable presumption that—save for the most extreme cases of exclusion by a dominant firm, as in *Lorain Journal*—exclusive dealing is motivated by an objective to obtain efficiencies rather than to exclude rivals. The agencies, however, closely scrutinize claims that exclusive dealing is necessary to achieve efficiencies,¹⁴⁰ and—where there are cognizable efficiencies—will weigh them against any anticompetitive effects.¹⁴¹

Finally, Herbert Hovenkamp observes that in the 35 years since *The Antitrust Paradox* came out, the terrain for antitrust disputes has shifted from “product differentiation, distribution, and dealers in physical goods” to “intellectual property rights, technology and innovation, information systems, and networks.”¹⁴² Moreover, in the unilateral exclusion realm, we are seeing the courts and agencies struggle with areas of doctrinal controversy about which Bork had little specific to say in *The Antitrust Paradox*. These include practices such as loyalty discounts,¹⁴³ bundling,¹⁴⁴ and allegedly exclusionary pricing in industries like pharmaceuticals with very high fixed and very low

¹³⁶ See Complaint, *United States v. Am. Express Co.*, No. 10-cv-04496 (E.D.N.Y. Oct. 4, 2010), available at www.justice.gov/atr/cases/americanexpress.html. In addition, although the DOJ did not bring its case against Visa U.S.A. under an exclusive dealing theory, it alleged that semi-exclusivity rules imposed by two oligopolist credit card networks prevented rival networks from gaining access to banks to issue their credit cards. *Visa U.S.A.*, 344 F.3d at 240–41.

¹³⁷ BORK, *supra* note 1, at 310–11.

¹³⁸ See *id.* at 306, 308–09.

¹³⁹ See, e.g., *Dentsply*, 399 F.3d at 194–96 (analyzing dealer network and exclusive dealing requirements as barriers to entry); *McWane* Commission Opinion, *supra* note 97, at 17 (observing that “exclusive dealing policy raised a barrier to entry.”).

¹⁴⁰ *McWane* Commission Opinion, *supra* note 97, at 30–32.

¹⁴¹ See *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam) (rule of reason analysis applies to exclusive dealing claim).

¹⁴² Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, *supra* this issue, 79 ANTITRUST L.J. 401, 419 (2014).

¹⁴³ E.g., *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

¹⁴⁴ E.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

variable costs.¹⁴⁵ Although these changes have not yet led to any great divide between Bork's vision and agency unilateral exclusion enforcement, that may not remain the case.

IV. CONCLUSION

Robert Bork led a controversial public life. His tremendous contributions to antitrust scholarship are no exception. Thousands of pages have been devoted to debating whether his prescriptions for antitrust enforcement were good or bad. But especially when his embrace of *Lorain Journal* is taken into account, modern agency enforcement against unilateral exclusion seems to reflect greater convergence on principles that Bork could endorse than one might expect based on the conceptual debate. In this particular province of his vast realm of influence, Bork may have been as much of a uniter as a divider.

¹⁴⁵ *E.g.*, *Meijer, Inc. v. Abbott Labs.*, 544 F. Supp. 2d 995 (N.D. Cal. 2008). As discussed *supra* at note 104, however, in his White Paper on behalf of Netscape in *Microsoft*, Bork cited extremely low variable costs for Microsoft's software as a basis for deviating from his general skepticism towards challenges to predatory pricing.