

## THE ABIDING INFLUENCE OF *THE ANTITRUST PARADOX*

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It is an honor to be invited to write about Judge Robert H. Bork's contributions to antitrust law. It is also a pleasure to join in paying tribute to Judge Bork's work. When I joined the faculty at Yale, Judge Bork was a colleague, though I did not get to know him then. But when Judge Bork left Yale, I inherited his antitrust course. At Yale Law School at least (and only so far as the classroom), I am Judge Bork's successor.

Despite all of the horrible things that Judge Bork continues to say about the Yale Law School (he has recently added the Yale Club to the list), he remains an important and dominant presence there today. Intellectually, I would like to think that my antitrust class closely resembles the course that he taught or would be teaching if he had stayed. But Judge Bork has a continuing presence in a different sense. Antitrust remains a popular course, drawing 60 to 80 students per year, which is a very large class by Yale Law School standards. Indeed, the Law School possesses only two or three classrooms that can accommodate that number. In the room in which I typically teach the class, on the back wall directly facing the instructor, and looking over the shoulders of every student, is a large portrait of Judge Bork. It is an excellent portrait, though perhaps emphasizing Judge Bork's sternness and seriousness more than his wonderful sense of humor. The presence of the portrait, however, has two effects on the class. First, it keeps the instructor on track. If I were even to entertain the suggestion that something in an antitrust opinion, say, of Justice William O. Douglas, made any sense, a quick glance at the portrait would immediately disabuse me of the thought. The second effect is

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on the students. Many students, at least at the beginning of the course, will present arguments based on concepts of the existence of barriers to entry, of the ability of a firm with market power to leverage that power from one market to another, or of harms related to foreclosure. To deal with arguments of this nature, all the instructor needs to do is to ask students making such contentions to look over their shoulders at Judge Bork's portrait. What, in any other light, is a serious portrait becomes a scowling portrait, and has a wonderful effect on performance and understanding in the class. Judge Bork's influence on the understanding of antitrust law will be sustained at Yale Law School for many generations into the future.

This brief Essay seeks to place Judge Bork's important book, *The Antitrust Paradox*,<sup>1</sup> into the context of the Chicago School's contribution to the modern direction of antitrust law. Virtually all would agree that the Supreme Court, in its change of direction of antitrust law beginning in the late 1970s, drew principally from Judge Bork's book both for guidance and support of its new consumer welfare basis for antitrust doctrine.<sup>2</sup> Many outside the Chicago School, however, and some within, have regarded Judge Bork's contribution in the book as chiefly derivative of ideas of Aaron Director that had been developed by Director's students and research associates, such as Lester Telser, John McGee, Judge Bork, and others.<sup>3</sup> Judge Bork has not dissented from the point: in *The Antitrust Paradox*, he generously attributes his learning from Director and from the associates that Director brought to Chicago.<sup>4</sup> But Judge Bork's contribution to the success of the Chicago approach should not be understated.

To view Judge Bork's work as derivative seriously undervalues his contribution to the development of modern antitrust

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

2. See, e.g., Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439 (2008); Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where it has Been, Where it is Now, Where it Will be in its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 248 (1999).

3. See, e.g., Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1129 (1997); Spencer W. Waller, *Antitrust: New Economy, New Regime: Second Annual Symposium of the American Antitrust Institute: The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 300-01 (2001).

4. BORK, *supra* note 1, at ix-xi.

law. To be sure, Aaron Director had many important and seminal ideas, in particular with respect to the economic effects of vertical practices.<sup>5</sup> Without question, *The Antitrust Paradox* builds on those ideas. As I shall explain, however, the book extends far beyond those basic ideas by translating them persuasively for members of a Court neither trained in nor sympathetic to economic analysis and, furthermore, by convincing the Court that consumer welfare is the only coherent standard on which to base modern antitrust law.<sup>6</sup>

That portion of Chicago School thought that addresses industrial organization derives from a single basic principle: Markets in the real world are generally highly competitive, constrained only by real costs of operation. It follows from this proposition that markets operate at a position very near to that which might be called “efficient” —efficient given the costs that firms must face. It further follows from the proposition, again given the presumption of general competitiveness, that actions taken in the market by a single firm generally represent a means for advancing the interests of the firm by providing value to consumers. Put conversely, if a firm’s practices did not provide value to consumers, the firm would fail in the competitive battle. Thus, there is a presumption in Chicago School analysis that individual firm practices generally benefit competition and consumers, rather than the reverse. This is the basis that led the Chicago School to be critical of, if not scathing toward, the expansion of antitrust law condemning industrial practices from the earliest years—such as *Standard Oil*<sup>7</sup>—and most especially in the years following the second New Deal.<sup>8</sup>

The basic assumption of high levels of competition, and of the necessity of a single firm to provide value to consumers in all of its practices, formed the foundation of the many seminal ideas concerning vertical practices that are associated with the work of Aaron Director and his associates, including Judge

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5. See, e.g., Sam Peltzman, *Aaron Director’s Influence on Antitrust Policy*, 48 J. LAW & ECON. 313 (2005).

6. See BORK, *supra* note 1, at 81–89.

7. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

8. The Chicago School approach to these issues is discussed in George L. Priest, *The rise of law and economics: a memoir of the early years*, in *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS* 350 (Francesco Parisi & Charles K. Rowley eds., 2005).

Bork. Thus, Director intuited that a firm can only exploit market power to the extent of that power, and can only gain a single monopoly profit. Similarly, a firm generally will be unable to leverage market power possessed in one market into another competitive market. Further, foreclosure of competition in a market represents market success, not anticompetitive victory. These ideas are the foundation of Director's work.<sup>9</sup> These ideas are also a foundation of *The Antitrust Paradox*, but the book extends the analysis of antitrust law substantially beyond ideas relating to vertical practices.

*The Antitrust Paradox* changed the direction of antitrust law by systematically applying economic analysis to the legal issues that face courts in antitrust litigation. Although the book analyzes economics issues, it is at heart—and this accounts for its success in the courts—a legal book. Its brilliance comes from its translation of counterintuitive economic analysis into legal analysis persuasive to the courts.

First, the book made economic analysis—difficult even for many economists to understand—intelligible and persuasive to judges possessing no economic background. The repeated citations to the book by the diverse Justices of the U.S. Supreme Court in the many post-*GTE Sylvania*<sup>10</sup> cases are illustrative.<sup>11</sup>

Second, the book expanded Chicago School economic analysis to horizontal practices. Aaron Director had little to say about horizontal practices. Judge Bork's antitrust work, as exemplified in *The Antitrust Paradox*, builds on the centrality of the prohibition of horizontal restraints—cartel agreements—to the understanding of appropriate antitrust prohibitions. Judge Bork's seminal emphasis on the significance of *Addyston Pipe*<sup>12</sup> as a formulative antitrust decision is an example.<sup>13</sup> It was Judge Bork, not Director or any other Director associate, who focused on the centrality of *Addyston Pipe*, a case involving the horizontal allocation of markets among competitors.

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9. See, e.g., Peltzman, *supra* note 5.

10. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

11. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602–05, 608–09 (1985); *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984).

12. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

13. See BORK, *supra* note 1, at 26–30.

Third, both in the *Legislative Intent and the Policy of the Sherman Act*<sup>14</sup> and in *The Antitrust Paradox*, Judge Bork distilled the economic learning of the Chicago School into a single, workable standard for antitrust analysis: the consumer welfare standard.<sup>15</sup> Neither Director nor his associates discussed “consumer welfare” as a standard. The maximization of consumer welfare, of course, is implicit in their work. Judge Bork made the standard explicit and, as I shall explain below, convincing to the courts.

Fourth, *The Antitrust Paradox* successfully attacked those aspects of the antitrust canon that were inconsistent with the consumer welfare standard and with Chicago School analysis. Thus, *The Antitrust Paradox*

- (1) exposed the lack of content of the concept of preventing competitive harms “in their incipiency,” which had been an important, but standardless, Clayton Act proposition;<sup>16</sup>
- (2) criticized virtually the entirety of FTC antitrust jurisprudence developed during the 1950s and 1960s based upon an asserted populist approach to antitrust law;<sup>17</sup>
- (3) criticized and deflated the value of protecting small business against large business—a principal hallmark of Supreme Court antitrust jurisprudence during the 1960s and 1970s (and championed by Justice Douglas)—on the grounds that the policy harmed consumers at large;<sup>18</sup>
- (4) exposed the fallacy of antitrust policy based on concerns about so-called “barriers to entry”;<sup>19</sup>
- (5) criticized the Court’s approach to merger analysis, in particular, in the now notorious, though then mainstream, *Brown Shoe*<sup>20</sup> and *Von’s Grocery*<sup>21</sup> decisions;<sup>22</sup> and

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14. Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

15. See BORK, *supra* note 1, at 81–89.

16. *Id.* at 303.

17. *Id.* at 198–216.

18. *Id.* at 205, 256–57.

19. *Id.* at 310–29.

20. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

21. *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

22. BORK, *supra* note 1, at 198–218.

(6) demonstrated the general irrelevance of the Robinson-Patman Act<sup>23</sup> amendments in attempting to control retail distribution practices.<sup>24</sup>

These are tremendous accomplishments for a single book, and, indeed, for a career of antitrust scholarship. At the time this Essay was first drafted, there was one area of antitrust law in which Judge Bork's contributions had been only partially successful: resale price maintenance. *The Antitrust Paradox* demonstrated, following Director, Telser, and others, that resale price maintenance was most likely to benefit consumers, not to harm them.<sup>25</sup> Although the Supreme Court had moved largely in the direction suggested by the book—in *Monsanto v. Spray-Rite*<sup>26</sup> and *State Oil v. Khan*,<sup>27</sup> for example—to dismantle the widespread prohibitions of resale price maintenance, a single precedent survived: *Dr. Miles*.<sup>28</sup> Judge Bork had criticized *Dr. Miles* extensively<sup>29</sup> but, at the time this Essay was presented to the Federalist Society's Conference,<sup>30</sup> it remained the single outstanding anti-Chicago School precedent surviving into the twenty-first century, something of the order of the baseball exemption,<sup>31</sup> which neither Judge Bork nor the Chicago School has ever bothered to criticize on grounds of relevance. Roughly one week after the conference, however, the Supreme Court reversed *Dr. Miles*, making the Bork revolution of antitrust law complete.<sup>32</sup>

There is a further and important feature of *The Antitrust Paradox* that has been neglected—especially among economic

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23. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936).

24. BORK, *supra* note 1, at 382–94. Following *The Antitrust Paradox*, the Robinson-Patman Act has shriveled as law. See, e.g., Robert J. Aalberts & L. Lynn Judd, *Slotting in the Retail Grocery Business: Does it Violate the Public Policy Goal of Protecting Businesses Against Price Discrimination?*, 40 DEPAUL L. REV. 397, 414–15 (1991); Harry Ballan, Note, *The Courts' Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634 (1992).

25. See, e.g., BORK, *supra* note 1, at 280–98.

26. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

27. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

28. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

29. See BORK, *supra* note 1, at 32–33, 298.

30. See *supra* note \*.

31. See *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

32. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

types like me—but needs to be emphasized. Because the book contained and distilled so many new and interesting economic ideas, many readers focused on the economic analysis of industrial practices, a consistent subject of the book.

But the book goes further. It discusses the institutional competence—and limitations—of courts in the context of antitrust litigation.<sup>33</sup> It also examines the virtue of law as law versus law as political decision making by judges.<sup>34</sup> Most importantly, the book explains why the consumer welfare standard for antitrust law provides a consistent, normatively defensible, and politically removed standard for decision by courts.<sup>35</sup> In this light, Judge Bork's contributions in *The Antitrust Paradox* are related to his work in *The Tempting of America*<sup>36</sup> and his other constitutional writings.<sup>37</sup> In addition to the book's economic analysis, its institutional analysis of the competence of courts substantially advanced its success and its persuasiveness with the courts. In the revolution of antitrust law associated with the Chicago School, I know of no references by the Supreme Court to Aaron Director, Lester Telser, or John McGee, all friends that Judge Bork acknowledges. The Supreme Court references Judge Bork.<sup>38</sup>

Finally, although somewhat less directly related to *The Antitrust Paradox*, I wish to discuss Judge Bork's unsuccessful nomination to the Supreme Court. Here, I gained an honor denied to my distinguished classmates on this panel, who both were sitting judges at the time. I was not a sitting judge, and thus had the opportunity to testify in favor of Judge Bork's confirmation to the Supreme Court.<sup>39</sup> In the twenty years since those hearings, the controversy remains. It is important to address this historical episode, because many readers were not even born at

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33. BORK, *supra* note 1, at 82–83, 86–89.

34. *See id.* at 419–20.

35. *Id.* at 405.

36. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

37. *See, e.g.,* Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 *ANTITRUST L.J.* 21 (1985).

38. *See supra* note 11.

39. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 2411–90* (testimony of witness panel 12, including testimony of the Author).

the time; those in primary or later schools may have incomplete recollections.

I had expected to testify about the importance of *The Antitrust Paradox*. By the time of my appearance, the principal focus of the hearings was not Judge Bork's twenty-year contribution to antitrust law, but a talk that Judge Bork had given at the University of Indiana Law School that was later published in the *Indiana Law Journal*.<sup>40</sup>

The focus on the *Indiana Law Journal* piece, however, was a pretext for a political undercutting of Judge Bork's nomination. The Senate Judiciary Committee asked me not a single question with respect to *The Antitrust Paradox*. Though I have not examined the entire record for this purpose, I am quite certain that the Committee devoted little time to Judge Bork's most important scholarly contribution. Why? Because it was untouchable, surely by the members of the Judiciary Committee and their staffs. By 1987, the time of the hearings on Judge Bork's confirmation, the Supreme Court was on the verge of changing its approach to antitrust law in the direction recommended by Judge Bork. There was no gain to the Committee from an emphasis on the person whose ideas would prove seminal and would dominate Supreme Court antitrust jurisprudence into the future.

The Committee's focus on the *Indiana Law Journal* piece, in contrast, was pretextual. Judge Bork's nomination to the Court foundered not because of Judge Bork, but because of the President. Judge Bork's nomination to the Court followed very shortly after the revelation of President Reagan's involvement in the Iran-Contra affair.<sup>41</sup> The Senate could not effectively reduce the power of the Commander in Chief with respect to dealings with Iran or with Nicaragua (the leftist government of which was opposed by the Contras). Instead, the opposition to the President's foreign policy concentrated on presidential appointments: in this instance, on Judge Bork's appointment to the Supreme Court. President Reagan, not Judge Bork, lost Judge Bork's nomination to the Supreme Court.

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40. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

41. The Iran-Contra affair first became known to the public in November and December of 1986. Judge Bork was nominated in 1987.



I stated at the time and I still believe that the failure of Judge Bork's nomination to the Supreme Court was a loss for the country. Putting aside other areas of law, it was not a terrible loss in terms of antitrust law. The Supreme Court has continued in its antitrust jurisprudence to follow the direction of *The Antitrust Paradox*. It has sometimes misinterpreted Judge Bork's direction.<sup>42</sup> And there are many cases that might have been decided more coherently if Judge Bork had authored the opinions. But the great and sustained influence of *The Antitrust Paradox* cannot be denied, and its originality within the Chicago School tradition remains preeminent.

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42. See George L. Priest & Jonathan Lewinsohn, *Aspen Skiing: Product Differentiation and Thwarting Free Riding as Monopolization*, in ANTITRUST STORIES 229 (Eleanor M. Fox & Daniel A. Crane eds., 2007).



*Federalist Society Conference on the Contributions  
of Judge Robert H. Bork*

**II.**

**JUDICIAL PHILOSOPHY AND ORIGINALISM**  
*The Tempting of America: The Political  
Seduction of the Law*

*ESSAYISTS*

KURT T. LASH  
JOHN HARRISON  
SAIKRISHNA B. PRAKASH

