

BOOK REVIEW

THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF. By Robert H. Bork. Basic Books, Inc., 1978. Pp. xi, 462. Price \$18.00.

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A number of conservative commentators have received critical acclaim in recent years for the elegance of their argument and the incisiveness of their thought. William Safire's award winning column for the New York Times,¹ James Kilpatrick's newspaper articles and commentaries on CBS Reports, and of course William Buckley's various writings and television reports² are characteristic of this burgeoning conservative eloquence. Another name that should be added to this list of conservative stylists is that of Robert Bork, Solicitor General under Presidents Nixon and Ford and the author of a striking new book on government policy, *The Antitrust Paradox: A Policy at War With Itself*. Bork's new book is also likely to share another characteristic with the writings of Safire, Buckley, and the others: it will anger many readers because of its seeming disregard for facts and factors outside the rigid parameters of his theory.

Antitrust policy has always been a particularly fertile field for debate between liberals and conservatives.³ At the grass roots level, the former view it as a means of protecting the consumer, halting the concentration of economic power, and curbing predatory business

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¹ Mr. Safire won a Pulitzer Prize for commentary in 1978.

² In addition to editing the *National Review* and producing his television program "Firing Line," Mr. Buckley is the author of various books ranging from *God and Man at Yale* (1951), to *American Conservative Thought in the Twentieth Century* (1970), to *Saving the Queen* (1976).

³ For an excellent recent example of this ongoing dialogue, see *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977). See also Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972); Brodley, *Massive Industrial Size, Classical Economics, and the Search for Humanistic Value*, 24 STAN. L. REV. 1155 (1972); Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964).

practices;⁴ the latter see it as an unnecessary hindrance to efficient industrialization and business management.⁵ Bork's effort is clearly on behalf of the latter position and is quite systematic in attempting to poke gaping holes in the fabric of liberal thought. Despite the popularity of antitrust as a topic of economic discussion, Bork's initial criticism of the area is that it is an "unknown policy":⁶ a policy of restraint on business certainly, but one based on little critical understanding of actual practices or business problems. What is the policy trying to achieve? Who is it trying to help or to hold back? How broad is its impact? What are its limits? Finally, what are its real economic consequences?

For Bork the only supportable justification for antitrust policy is aid to the consumer, the purchaser of goods and services.⁷ All other criteria or rationales, such as aid to small business and concerns about concentration, he rejects as being unsupported by legislative history, by sound economics, by society's needs, or by the words of the actual antitrust laws themselves. Antitrust policy as currently formulated ignores the role that business efficiency plays in creating consumer welfare⁸ and thus skews the effects of the law and leaves us with inapposite economic results. Bork sees his book as an attempt to "supply the theory necessary to guide antitrust reform."⁹

I

Bork's approach to antitrust is an almost obsessively systematic one.¹⁰ The process is one at least ostensibly of logical progression from point to point, general to specific, problem to solution. After

⁴ See, e.g., SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973); Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 YALE L.J. 974 (1977); Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439 (1974).

⁵ See, e.g., R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); *THE COMPETITIVE ECONOMY: SELECTED READINGS* (Y. Brozen, ed. 1975); Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164 (Goldschmid, Mann & Weston, eds. 1974).

⁶ R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 3 (1978) [hereinafter cited as BORK].

⁷ *Id.* 7.

⁸ *Id.* 4, 7.

⁹ *Id.* 8.

¹⁰ In addition to his ostensible adherence to principles of logic in constructing his argument, Bork also seems to have a fondness for the military method of instruction: "tell them what you're going to tell them, tell them, tell them what you've told them."

laying out what he views as the misleading historical foundations¹¹ of antitrust from the enactment of the Sherman Act¹² in 1890, through the occasional bright spots and disasters of *United States v. Addyston Pipe & Steel Co.*,¹³ *Standard Oil Co. v. United States*¹⁴ and *Chicago Board of Trade v. United States*,¹⁵ to the enactment of the Clayton¹⁶ and Federal Trade Commission Acts,¹⁷ he attempts to show how these and later developments added harmful gloss to the purely pro-consumer base of antitrust. This unfortunate gloss amounts, he argues, to the proposition that "efficiency should sometimes be curbed because of the social and political health supposedly engendered by the preservation of a sturdy, independent yeomanry in the business world."¹⁸ Bork finds the effectuation of this policy, as well as its less exotically phrased variants, beyond the competence of courts.¹⁹

His analysis suggests that there are two basic theories underlying antitrust law: first, that "[c]ompetitors may agree to remove the rivalry existing between themselves and thereby injure the competitive process," and second, that "[c]ompetitors may inflict injury on their rivals and thereby injure the competitive process."²⁰ Both of these theories, he notes, contain an "important core of truth,"²¹ but they have been overextended by courts and legislatures to cover economic conduct that in fact is pro-consumer in nature. Bork argues that the law has failed to take account of the fact that the practices complained of are also sometimes beneficial. The law has really only focused on preserving allocative

¹¹ Bork argues that the early history of antitrust, from 1890 to 1914, contained the seeds of every major theory prevalent in antitrust today and that the mistakes in perception of both law and economics made then have clouded our vision even until today. Bork maintains that "the intellectual history we rely upon is false." BORK, *supra* note 6, at 15-16.

¹² Ch. 647, 26 Stat. 209 (1890) (current version codified at 15 U.S.C. §§ 1-2 (1976)).

¹³ 85 F. 271 (6th Cir. 1898).

¹⁴ 221 U.S. 1 (1911).

¹⁵ 246 U.S. 231 (1918).

¹⁶ Pub. L. No. 212, 38 Stat. 730 (1914) (current version codified at 15 U.S.C. §§ 12-27 (1976)).

¹⁷ Pub. L. No. 203, 38 Stat. 717 (1914) (current version codified at 15 U.S.C. §§ 41-77 (1976)).

¹⁸ BORK, *supra* note 6, at 54.

¹⁹ Among the advantages of adhering exclusively to consumer welfare as an antitrust goal, Bork lists (1) maintenance of the integrity of the legislative process, (2) establishment of fair warning procedures for businessmen and (3) emphasis on real economic distinctions. *Id.* 81-88.

²⁰ *Id.* 134.

²¹ *Id.*

efficiency²² and has denigrated productive efficiency.²³ As a consequence, if courts had been consistent in their application of the accepted theories, he thinks that "not only would competition be outlawed, but a modern (or almost any) economic system would be impossible."²⁴ As a final, summary point on theory, Bork suggests that the law as presently structured "perceives threats to competition where none exists."²⁵ The result is that realistic and indeed valuable business practices are being destroyed without reason.

II

Once Bork has laid out the problem with antitrust theory, he methodically proceeds to detail the necessary practical reforms in current policy. He proposes basic changes in almost every area of antitrust practice.

In the area of monopoly and oligopoly, Bork maintains that current attempts to dissolve firms such as IBM and AT&T, which reached their present size through internal growth, would inflict a serious economic loss on the consuming public. Any monopolistic restrictions on output by such firms, while extremely unlikely in any case, will be met by market entry of firms of equal or greater efficiency, if such firms exist.²⁶ Therefore, breaking up oligopolistic firms, as proposed by the Neal Task Force²⁷ and by Carl Kayesen and Donald Turner,²⁸ would be largely harmful in its impact because it would sacrifice efficiency. The same argument leads Bork to conclude that both *United States v. Aluminum Co. of America*²⁹

²² By "allocative efficiency," Bork refers to "the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their output most." *Id.* 91.

²³ This term refers to "the effective use of resources by particular firms." *Id.*

²⁴ *Id.* 135. Bork maintains that "[v]igorous and consistent enforcement of present antitrust doctrines would be a national disaster." *Id.* At this point one could question whether Bork has abandoned his efforts at logical consistency: he criticizes current antitrust policy both for being too narrow in its focus and for deviating from that focus. A more complete critique of Bork's arguments appears in the text accompanying notes 41-49.

²⁵ BORK, *supra* note 6, at 160.

²⁶ *Id.* 178.

²⁷ WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, REPORT I (reprinted in ANTITRUST & TRADE REG. REP. (BNA), Supp. to no. 415, May 26, 1969).

²⁸ C. KAYSEN & D. TURNER, ANTITRUST POLICY 44-141 (1959). Ralph Nader has also made this argument concerning General Motors. See *Testimony on Planning, Regulation and Competition in the Automobile Industry*, 114 CONG. REC. 21707-13 (1968).

²⁹ 148 F.2d 416 (2d Cir. 1945).

and *United States v. United Shoe Machinery Corp.*³⁰ were wrongly decided, in that the courts found bigness alone to be illegal regardless of other business factors.³¹

The equally confused state of current merger policy, he argues, is also worthy of substantial reform. The nadir in this area, according to Bork, is the Supreme Court's opinion in *Brown Shoe Co. v. United States*.³² Although this case has received considerable attention and criticism elsewhere,³³ nowhere has it been dissected so ruthlessly. In addition to bad economic results, the case produced bad theory: it "employed the theory of exclusionary practices to outlaw vertical integration that promised lower prices; the theory of incipency to foresee danger in a presumably desirable trend that had barely started; and the theory of 'social purpose' to justify the fact that the decision prevented the realization of efficiencies by a merger which, realistically viewed, did not even remotely threaten competition."³⁴

In Bork's view, the only mergers of any kind that should properly be limited by law are extremely large horizontal mergers in which the result is that there are three or fewer firms in a particular market.³⁵ Attacks on vertical mergers he finds especially pernicious because such mergers are in substance a way of creating efficiency and not of harming competition.³⁶

One current antitrust policy in which Bork finds some value is the per se limitation on competitors agreeing to limit competition, as in price fixing and market division cases.³⁷ He thinks, how-

³⁰ 110 F. Supp. 295 (D. Mass. 1953).

³¹ BORK, *supra* note 6, at 165-72.

³² 370 U.S. 294 (1962). Warren's opinion concluded that the acquisition by Brown, a shoe manufacturer, of a shoe retailer violated the Sherman and Clayton Acts even when the market shares involved were around 5 percent. Bork demurs when deciding whether this is the worst antitrust opinion ever written, but he does say it has "considerable claim to the title." BORK, *supra* note 6, at 210.

³³ See, e.g., E. KINTNER, *PRIMER ON THE LAW OF MERGERS* 204-10, 256-58 (1973); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 100-05 (1976); Adams, *Market Structure and Corporate Power: The Horizontal Dominance Hypothesis Reconsidered*, 74 COLUM. L. REV. 1276 (1974); Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 370-73 (1965); Peterman, *The Federal Trade Commission v. Brown Shoe Co.*, 18 J.L. & ECON. 361 (1975).

³⁴ BORK, *supra* note 6, at 216.

³⁵ *Id.* 221-22.

³⁶ *Id.* 225-45.

³⁷ Bork has praise for *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) and *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), among the early cases, and *United States v. Trenton Potteries*, 273 U.S. 392 (1927) and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) among the more recent cases.

ever, that these rules should be recast to cover instances where the restraint involved is "naked"—that is, only when the agreement [between rivals] is not ancillary to cooperative productive activity engaged in by the agreeing parties."³⁸ To make the proper distinctions in this area Bork has worked out a rather complicated test to determine possible harm to the consumer: first, if the integration involved is essential to the activity to be carried on, such integration "and the restraints that make it efficient should be completely lawful"; second, when such integration may be useful but is not essential, then the enterprise and its "ancillary restraints" should be lawful only if (a) the parties are cooperating through contract in an economic activity other than the elimination of rivalry, (b) the collective market share is not too great, and (c) the parties have not shown a "primary purpose or intent to restrict output."³⁹

Finally, Bork spends a number of chapters on antitrust policy with regard to exclusive dealing, tying arrangements, resale price maintenance, requirements contracts, barriers to entry, group boycotts and individual refusals to deal. He argues that the theories of automatic exclusion and incipency upon which the Clayton, Robinson-Patman and Federal Trade Commission Acts are based should not be applied in these areas. Instead, exclusionary or foreclosing practices should only be prohibited when deliberate predation can be proved.⁴⁰

In addition to the specific criticisms that he makes of these various aspects of antitrust law, Bork also has some rather pointed things to say about the ideological framework surrounding present policy. He feels quite deeply that an egalitarian ethic (based on principles of economic leveling) has suffused not only current antitrust thinking but the institutions that interpret and implement the law as well. The problem may have become a social and ideological one:

To study antitrust at length, to wonder at the manifold errors of economics and logic displayed, to see that the errors move the law always in one direction, is to begin to suspect that a process much deeper than mere mistaken reasoning is at work. It seems as though the intellectual terrain is regarded as important not in and for itself but

³⁸ BORK, *supra* note 6, at 263.

³⁹ *Id.* 279.

⁴⁰ Not surprisingly one of the areas that Bork finds rife with possibilities for predatory activity is the area of misuse of governmental process through bribes, sham litigation and conspiracies. *Id.* 347-64.

as a field of action upon which the political order moves against the private order.⁴¹

Bork finds this underlying commitment to equality through government action, manifested by the bias in favor of antitrust, to be at least partially the result, not of sound economics or concepts of personal freedom, but of "intellectual class tastes."⁴² He notes in closing, however, that there is a "new distrust of statist solutions, a new willingness to reconsider old economic policies and pieties."⁴³ This is evidenced in part by recent cases and in part by the existence of a "not altogether insignificant" minority that might agree, "at least in its general outlines," with the argument of his book.⁴⁴ Obviously, to Bork, the outcome of the debate over the content of antitrust policy is "of more than legal interest."⁴⁵

III

What is one to make of Bork's arguments? The first response of most readers, regardless of whether it is positive or negative, is apt to be an emotional one. As with most adherents to the "Chicago school" of antitrust⁴⁶ (despite the fact that he now teaches at Yale), Bork's commitment to classical economics will excite some and agitate others.

One area of particular criticism is in his narrow definition of the goals of antitrust. Proponents of almost all political persuasions can agree that consumer welfare is an appropriate, even preeminent, goal of antitrust, but "consumer welfare" in what sense? For Bork it seems to be "consumer welfare" in the short-run; "consumer welfare" as determined by current prices. He seems to have no concern for, or indeed appreciation of, the effect that significantly reducing the number of competitors in an area can have. No weight at all is given to the value of preserving consumer choice, a value that the antitrust laws may, in part, have been intended to preserve.⁴⁷ His attack on the concept of incipency in monopoly and merger policy is quite forceful at first reading.⁴⁸ As an alternative,

⁴¹ *Id.* 423.

⁴² *Id.* 424.

⁴³ *Id.* 425.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Other prominent professors of this mold include George Stigler, Ward Bowman, Jr., Aaron Director, Richard Posner, Edward Levi, and Yale Brozen.

⁴⁷ Blake & Jones, *In Defense of Antitrust*, 65 *COLUM. L. REV.* 377, 384 (1965).

⁴⁸ BORK, *supra* note 6, at 47-49 & 205-06.

however, he would allow the unrestricted elimination of firms from the market so long as at least four remain.⁴⁹ Even this permissible level of concentration is a begrudging "tactical concession to current oligopoly phobia"⁵⁰ since Bork is convinced that markets of far greater concentration are efficient. But Bork, himself, admits that the evidence is inconclusive as to whether firms in such an oligopolistic market can restrict output and control prices even without explicit price-fixing or other predatory acts.⁵¹ If he is wrong in his guess that such price control "probably" does not exist, then his concession may not be nearly enough to protect "consumer welfare."

Another serious shortcoming of the book is that in constructing his economic models, Bork excludes from his system several factors that, on a day-to-day basis, have a persistent impact on business practice. He deals with "barriers to entry" by denying their existence⁵² and by excluding them from the hypotheticals he uses to make his arguments. Similarly, he excludes the irrational fears and greedy conduct of businessmen that persuade them to leave or to enter a market, the effects of faulty production on business planning, the incomplete knowledge that consumers have of the products and services that they buy, and the delay between firm action and reaction in certain predatory practices.⁵³ In this way, Bork ignores the actual business facts that he so rigorously promises to consider.⁵⁴ This points out both the initial appeal and the shortcoming of logical arguments based on the theoretical premises and examples of classical economics: they sound unimpeachable precisely because they assume away the troublesome points in the analysis.⁵⁵

In the area of antitrust enforcement, Bork surprisingly does not discuss the substantive effects that extended and costly antitrust trials have on the law itself. While he does raise questions about

⁴⁹ *Id.* 221-22.

⁵⁰ *Id.* 221.

⁵¹ *Id.* 179-81.

⁵² *Id.* 310-29.

⁵³ In discussing the "illogic" of price cutting, for example, Bork ignores the inflated prices a monopolist or oligopolist may be able to charge after substantial competition is eliminated or severely reduced. *Id.* 149.

⁵⁴ *Id.* 3-11.

⁵⁵ I hope my criticisms of Bork amount to something more than suggesting merely "that if we would only stop thinking so much about the problem and throw the book at the bastards our monopoly problem would be solved." Posner, *Nader on Anti-trust: The Closed Enterprise System*, *NEW REPUBLIC*, June 26, 1971, at 11, 13-14 (criticizing *THE CLOSED ENTERPRISE SYSTEM* (M. Green, B. Moore & B. Wasserstein eds. 1972)).

the proper role of courts in antitrust litigation,⁵⁶ he does not touch on the many procedural problems (such as delay, judicial control, use of juries, abuse of discovery techniques) being considered by the National Commission for the Review of Antitrust Laws and Procedures.⁵⁷ One can only speculate as to such a conspicuous absence. It may be that Bork believed his theoretical message too important for him to be sidetracked by such obvious realities or he may believe that the realities are a direct result of the misdirections of antitrust law that he condemns. In any case, the omission is regrettable since the strain that antitrust litigation has placed on both public and private bodies must have implications for future antitrust policy.

Bork also neglects problems in the area of international antitrust such as extraterritorial application, boycott regulations, and treble damage actions by foreign governments.⁵⁸

Despite these criticisms Bork's book is not without merit. It deserves to be read because it demonstrates the importance of business efficiency and of proper cooperation among competitors that government prosecutors have ignored too often in the past. In particular, he properly denigrates the conception that bigness, even when obtained through efficiency, is "bad" in some sense or should be a violation of the antitrust laws.⁵⁹

Some of the helpful points he makes, especially regarding the importance of economics in antitrust analysis, have already been implemented by the Antitrust Division of the Justice Department and by the Federal Trade Commission by means of tremendous increases in the number and authority of economists within the two agencies.

As a final comment, it needs to be said that Bork and his Chicago school brethren have a definite contribution to make in their

⁵⁶ Generally, Bork's point is that courts have assumed too much of the legislative role. BORK, *supra* note 6, at 72-89.

⁵⁷ For a concise summary of the work of the National Commission, see DAILY REP. EXEC. (BNA), July 13, 1978, at A-1 to A-8.

⁵⁸ For a discussion of current concerns in this area, see the interview with Assistant Attorney General Shenefield in DAILY REP. EXEC. (BNA), Aug. 3, 1978, at C-1 to C-8. See also Davidow, *Recent Developments in International Antitrust*, 10 AKRON L. REV. 603 (1977); Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT. L. 645 (1977); Jones, *Extraterritoriality in U.S. Antitrust: An International "Hot Potato"*, 11 INT. LAWYER 415 (1977).

⁵⁹ Bork makes specific references in this regard to the recent government suits to break up IBM and AT&T and the legislative proposals to dismember General Motors and the oil companies. BORK, *supra* note 6, at 163.

traditional role as rather ascerbic critics of current policies. Bork's book has value because it forces consideration of economic and business factors that might not be given sufficient weight. His arguments do not, however, lead to the conclusion that the elimination of most antitrust prosecutions is more likely to help the consumer, or to produce a better society, than the current practice. Following all of Bork's prescriptions for policy would be even more myopic than rejecting all of his complaints.⁶⁰

⁶⁰ As I have indicated elsewhere with regard to the Chicago school, the rigidity of Bork's approach produces ineffective "policy-making proposals because it uses economic analysis as a means of deciding public policy to the exclusion of other considerations." Silkenat, Book Review (THE COMPETITIVE ECONOMY (Y. Brozen ed. 1975)) 22 ANTITRUST BULL. 241, 243 (1977).



JUDGE LOUIS H. POLLAK

The editors of the University of Pennsylvania Law Review take pleasure in dedicating this issue to the Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania. The entire law school community will miss his gentle presence as dean, especially those who have been fortunate enough to have been his students. The qualities that made Dean Pollak's tenure at this law school memorable will continue to serve him well as a federal judge. We extend our sincere wishes to him for many fulfilling years on the federal bench.

