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### Robert Bork, The Antitrust Paradox: A Policy at War with Itself

Paul H. Brietzke

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## BOOK REVIEW

*The Antitrust Paradox: A Policy at War with Itself*, by Robert H. Bork. New York: Basic Books, 1978. Pp. 425, \$18.00.

Except when responding to advertisements and sale promotions, the people are stupid; their indolent and fickle representatives in Congress are no better; the courts are unable to recognize the narrow limitations on their competence or to resist the temptations to power provided by the antitrust statutes; FTC and Antitrust Division bureaucrats are guilty of an untrammelled pursuit of the pet theories of the moment at the expense of consumer welfare; private attorneys are frustrated by a fragmentation of issues in complex antitrust litigation; and legal academics, members of an "intellectual class" seeking to augment its power and prestige at the expense of the "business class," bear a major share of the blame for the decadence of contemporary antitrust law.<sup>1</sup> Strong stuff, and Professor Bork seeks to rescue the beleaguered and bewildered by deploying insights he has gleaned from neoclassical microeconomics, as it is understood by the Chicago School. The book is uneven, bearing the stamp of having been written and revised over a period of ten years. The content of crucial premises shifts subtly (and sometimes not so subtly) in the course of exposition. While it is not designed as a hornbook and cannot be used as such, given the number of axes being ground, many of Bork's case commentaries are original and interesting. In sum, however, they fail to meet the burden of proof through logical argumentation incurred by anyone who attacks most of the important Supreme Court decisions in a particular area.

In outline, Bork contends that "the only legitimate goal of antitrust is the maximization of consumer welfare."<sup>2</sup> This concept "provides a common denominator by which gains in destruction of monopoly power can be estimated against loss in efficiency, and economic theory provides the means of assessing the probable sizes of the gains and losses."<sup>3</sup> Most judges and lawyers ignore this mode

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1. R. BORK, *THE ANTITRUST PARADOX* 16, 49, 84, 86, 318, 410, 413, 416, 423-24 (1978) [hereinafter cited as R. BORK].

2. *Id.* at 7.

3. *Id.* at 79.

of analysis, giving rise to the Antitrust Paradox: "great popularity and vigorous enforcement coupled with internal contradiction and intellectual decadence."<sup>4</sup> At one stage, Bork minimizes the seriousness of the problem, which "flows from a small number of intellectual errors that can be corrected."<sup>5</sup> We soon learn, however, that the problem is not so simple; the dark forces of "an anticapitalist and authoritarian ethos"<sup>6</sup> are at work. He finds that:

the trends observable in antitrust . . . are four: (1) a movement away from political processes toward political choice by courts; (2) a movement away from the ideal of free markets toward the ideal of regulated markets; (3) a tendency to be concerned with group welfare rather than general welfare; and (4) a movement away from the ideal of liberty and reward according to merit toward an ideal of equality of outcome and reward according to status.<sup>7</sup>

This progress of the idea and Ideal in history is very Germanic and sounds vaguely Hegelian. The outcome is certainly not Hegel's progressive realization of freedom, however. Antitrust is:

a microcosm in which larger movements of our society are reflected. . . . [B]attles fought and won or lost in [the antitrust arena] . . . are likely to affect the outcome of parallel struggles in others.

. . . .

The struggle between economic freedom and regulation also reflects and reacts upon the tension in our society between the ideals of liberty and equality.<sup>8</sup>

Bork goes far beyond his apparent sphere of competence in these conclusions, where inarticulate political and philosophical premises are legion. His "economic freedom" clearly means much more than an absence of regulation: the fact is that "Congress . . . continues to transform us into a highly regulated welfare state."<sup>9</sup> This kind of comment would send a Harold Laski or a Richard Titmuss reeling in his grave, and Bork's ignorance of the precepts of social democracy is evident. In particular, he fails to take into account notions of

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4. *Id.* at 408.

5. *Id.* at 409.

6. *Id.* at 419.

7. *Id.* at 418-19.

8. *Id.* at 10.

9. *Id.* at 412. See note 31, *infra*.

liberty and equality other than his own. You will thus love the book if Bork's prejudices confirm your own. If they don't, you—like this reviewer—will undoubtedly remain unmoved by a rather slipshod analysis.

Professor Bork ignores the fact that the economy of the United States operates under far fewer regulations than the economies of most industrialized states. Since the economic performance of several of these states has far outstripped ours in terms of growth, Bork's concept of efficiency and the general welfare (the mere presence or absence of various types of regulations) cannot be the decisive variable governing economic performance. It is a truism that business regulations—including antitrust laws in the U.S.—accurately reflect the degree of trust a government reposes in the nation's corporations. The economic performance of American corporations in recent years offers slender justification for expanding upon an already abundant trust;<sup>10</sup> certainly the political performance of our corporations, particularly that of multinationals in the international arena, argues for a more extensive regulation. Given that Professor Bork was one of Nixon's Solicitors General (on this topic I shall say no more), he should, at least by now, be aware of the political abuses which stem from the exercise of a concentrated and undifferentiated mass of wealth and power by managers of large corporations. Bork does discuss a "predation through governmental processes"—sham litigation, sharp lobbying practices, influencing local zoning board decisions, etc.<sup>11</sup>—but he ignores the corruption and diffuse corporate influence over high-level governmental decisions (the so-called clout) that make genuinely participatory democracy at home impossible and constitute an interference in our foreign relations and in the internal affairs of other states.

This kind of authoritarianism is probably more of a clear and present danger than the one Bork worries about, but his narrow approach to the subject matter makes the neglect of corporate political abuses inevitable: "It is only the fact that the simple ideas of economics are powerful and entirely adequate to this field that

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10. The law's approach has changed, but the basic policy bias has not. The field is still open to private forms of ingenuity. There has been no sustained policy of fragmenting markets through law, and law did little to hinder the initial growth of large concentrations of economic power where overt collusion was absent. J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 230, 264 (1977). See *id.* at 80. Private business can prosper under rules and institutions which differ considerably, "at least from a juridical point of view . . ." L. FRIEDMAN, *THE LEGAL SYSTEM* 208 (1975).

11. R. BORK, *supra* note 1, at 347-64.

makes it conceivable for the law to frame and implement useful policy."<sup>12</sup> He adds that:

The need of the law generally is for the systematic development of normative models of judicial behavior, models which, while they cannot attain, will at least distantly approach the rigor of the descriptive models of basic economic theory. Until we have such models, criticism of the courts for having the wrong goals will generally be empty, the mere assertion of a different set of personal preferences.<sup>13</sup>

This proves a self-defeating position for, as the basis for Bork's "models" is not developed in any rigorous fashion, we are left with his personal preferences. Once again, the viewpoint adopted is extremely Germanic, a 1920's call for a "science" of law and economics to "discipline" the exercise of a judicial "free choice." It is also manifestly inconsistent with evaluations of economics offered by Bork himself. Clearly, economics contains more than the "simple ideas" that would serve to simplify antitrust laws. Bork correctly finds that economics is unable to quantify or to measure directly the components of cost curves and efficiency or the effects of restrictions on output—cardinal concerns in antitrust analysis. Models only predict "the tendencies of business behavior" and leave out too many factors which are relevant to formulating concrete policy prescriptions. Oligopoly theory, essential to an understanding of concentrated industries, is "little more than a guess," "less an intellectual construct than a frame of mind, a mood, a dogma that is ripe for thoroughgoing reform."<sup>14</sup>

How, then, is economics to serve as the judicial model for a new legal science? The main flaw in Bork's reasoning here is his adoption of two false dichotomies. The first is: "To abandon economic theory is to abandon the possibility of a rational antitrust law."<sup>15</sup> Surely the questions are when and why a problematic economics *must* be abandoned to secure legal and administrative rationality and other social and political goals. Secondly, the relevant

12. *Id.* at 90.

13. *Id.* at 72.

14. *Id.* at 92, 96, 117, 191, 392. Joan Robinson adds that economists often treat circular statements as though they had a factual content and dress up imprecise ideas in the language of infinitesimal calculus. J. ROBINSON, FREEDOM AND NECESSITY 119-20 (1970).

15. R. BORK, *supra* note 1, at 117.

policy choice is not, as Bork suggests, between the polar opposites of price systems and central regulation, but between various combinations of them. While it is undoubtedly true that judges and lawyers have paid too little attention to economic analysis (particularly in the earliest of antitrust cases, many of which are nevertheless preferred by Bork), a judicial reluctance to give weight to the economists' "instant explanations for all occasions" proffered by parties to an antitrust suit is also understandable. There is no *a priori* reason why economic explanations should be preferred to legal ones,<sup>16</sup> especially as lawyers dominate antitrust policymaking and many economists abjure action in favor of an austere theoretical elegance. While law cannot thus be drowned in economics as Bork would wish, a greater measure of cooperation between disciplines would undoubtedly increase the rationality of antitrust policies. The barriers to cooperation are more formidable than Bork would have us believe, however. For example, Thurmond Arnold notes that: "Social sin in the economic sciences consists of imposing rules to

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16. See R. UNGER, *LAW IN MODERN SOCIETY* 11 (1976):

Rationalist social science [including both economics and analytical positivism in law] aspires to become a system of propositions whose interdependencies are governed by precise logical notions of entailment, consistency and contradiction.

The whole body of thought, save for the perplexing but inevitable introduction of empirical assumptions, disclaims any pretense to describe what actually happens in social life. It moves at the level of the hypothetical: its conclusions are descriptively true only to the extent its premises hold. By tightening or relaxing the strictness of the premises, by making them more or less complex and therefore more or less faithful to the social reality we want to apprehend, we are able to control the balance between simplicity of explanation and descriptive fidelity.

A number of observations flow from these assertions. Since neither of the competing positivisms of law and economics addresses itself wholly to the province of antitrust administration—really a form of social reality—they are inadequate to the task of policy formulation and implementation. Law is, if anything, more realistic in this regard because it is more often formulated in response to real life situations. Its realism should not be exaggerated, however; for example, Bork's attempt to predict the economic effect of antitrust laws on the basis of appellate cases is like basing botany solely on an examination of cut flowers purchased from the florist. If law and economics are inadequate to the task, there is no reason to ignore insights from such disciplines as psychology (*e.g.*, the motivations of businessmen), sociology and political science. As Unger suggests, however, the manipulation of premises in rationalist social science must also amount to manipulation of results, once chains of causation are assumed. For this reason, the most significant missing link in contemporary antitrust analysis is the philosopher's value inquiry. For example, whose interests are and are not embodied in the law and analyses of it, and why? Absent such studies, judges are justified in treating economists as though they are saying "I prefer" rather than "I know," and in giving weight to their own preferences.

sort out complicated situations. Social sin in the legal sciences consists in failing to work out logically a complicated set of rules."<sup>17</sup>

The defects inherent in Bork's economic logic become more evident when we take a closer look at his seemingly monolithic antitrust goal of maximizing consumer welfare. According to Bork, this is the sole aim embodied in the Sherman Act. Seeking to free us from "a falsely imagined past,"<sup>18</sup> he ignores the difficulties inherent in reducing congressional intent in the antitrust area to so simple a proposition.<sup>19</sup> The Supreme Court has occasionally utilized an approach similar to Bork's, finding Congress' major goal to have been the maintenance of competition.<sup>20</sup> The Justices' arguments are more persuasive than Bork's, however, and his neglect of the maintenance of competition gives rise to a badly distorted perspective.<sup>21</sup> For example, he suggests that competition "may be read as . . . a term of art . . . designating any state of affairs in which consumer welfare cannot be increased . . . through judicial decree."<sup>22</sup> This is an unduly narrow and legalistic fusion of two complex concepts, particularly in light of the high levels of incompetence Bork finds reflected in judicial decrees.

Other definitions are piled on top of these rather indigestible bits of information. Consumer welfare is found to be wholly synonymous with efficiency and "is merely another term for the

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17. Arnold, *The Symbols of Government*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 836, 837 (M. & F. Cohen eds. 1951). See M. MASSEL, COMPETITION AND MONOPOLY 164-94 (1964).

18. R. BORK, *supra* note 1, at 15, 35. Bork's rendition is, presumably, a truly "imagined past."

19. See, e.g., H. THORELLI, THE FEDERAL ANTITRUST POLICY 180-85, 226-69 (1955); Letwin, *Congress and the Sherman Antitrust Law*, 23 U. CHI. L. REV. 221 (1956). There is nothing in the record which unequivocally contradicts Bork's position, nor is there much support for his tenuous analysis.

20. E.g., *United States v. Philadelphia National Bank*, 374 U.S. 321, 338 (1963); *Northern Pac. R.R. v. United States*, 356 U.S. 1, 4 (1958); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

21. See, e.g., note 24, *infra*.

22. R. BORK, *supra* note 1, at 61. This contention only makes sense if it is treated as a gross oversimplification of the economics theory of workable competition, particularly Jesse Markham's ideas. See F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 36-38 (1970). While Bork examines several definitions, he adopts the one quoted in the text as his favorite. It is then broadened through an unsatisfactory attempt at a layman's definition: "When we talk of the desirability of competition we ordinarily have in mind such things as low prices, innovation, choice among differing products—all things we think of as being good for consumers." R. BORK, *supra* note 1, at 61.

wealth of the nation.”<sup>23</sup> Efficiency is then defined in a fairly conventional fashion but applied in some fairly suspect ways, while Bork’s concept of wealth remains decidedly murky. This is not surprising: most contemporary economists avoid using the notion of wealth because of its emotive imprecision. These facile equations—presumably, some of Bork’s “simple ideas of economics”—give rise to numerous contradictions throughout the book.<sup>24</sup>

Maximizing consumer welfare is, of course, a goal commonly assigned to competitive price systems by economists. Congress and the courts are, however, charged by the Constitution and processes of judicial review with maintaining and advancing a broader goal—the general welfare. Differences between these types of welfare are significant. For example, a contemporary microeconomics text asserts that, while individuals can determine their own preferences and canons of happiness, society cannot: “[T]he terms ‘public’ and ‘society’ are a bit too broad and vague to have much scientific meaning in rational discourse.”<sup>25</sup> Constitutional law and politics are based on totally different sets of premises, and an economic atomism could never form the basis for political inaction in the area of antitrust or elsewhere.<sup>26</sup> While neoclassical microeconomics is unable to distinguish between types of consumers and consumption, Congress has proved abundantly capable of doing so. The whole is greater than the sum of those parts explored through the economics of industrial organization—individuals, firms and industries—and the paucity of sensible policy prescriptions offered by those economists and philosophers who attempt to link the

23. *Id.* at 7. See also *id.* at 90.

24. *E.g.*, “The integration of economic activities, which is indispensable to productive efficiency, always involves the implicit elimination of . . . competition. We . . . should encourage it . . . because the integration creates wealth for the community.” *Id.* at 28; see *id.* at 98 and the text accompanying notes 66-67, *infra*. Even if efficiency and wealth are synonymous with consumer welfare, how can they justify the elimination of another synonym, competition? Bork also argues that there should be a time limit within which a merger can be challenged because of “the question of equity, of settled expectation.” *Id.* at 223. What does this “equity” have to do with his universal goal of consumer welfare? While he is probably making a valid point, Bork should not plead the equities while execrating others for introducing their equitable notions into what should, in his view, be a “pure” antitrust analysis. See also the text accompanying notes 29-32, *infra*.

25. R. MILLER, *INTERMEDIATE MICROECONOMICS* 6 (1978).

26. If the individual’s interest is posited as sovereign, taking adequate account of group, public and state interests becomes impossible, as does the technique of social engineering (for want of a better term). Roscoe Pound’s confused thinking dominates American legal thought on this topic, rendering it incapable of a reasoned response to Bork’s arguments which would command a consensus.



micro and macro spheres continues to make the exercise of a political judgment inevitable. Historically and contrary to Bork, there existed a "pattern of middle-class values . . . implemented by law . . . assigned high priority to . . . providing a firm economic base for erecting noneconomic goals,"<sup>27</sup> which thereby enhanced the quality of life for *some* individuals. Antitrust policies and the welfare of individual consumers can be segregated from other aspects of general welfare for purposes of analytical convenience only; they should not be elevated to the status of ends-in-themselves, as Bork, some businessmen and employees of the FTC and Antitrust Division attempt to do.

One reason why antitrust policies ought to emphasize general welfare rather than the welfare of individual consumers, as perceived by Bork, is that we are consumers of much more than physical products purchased in the marketplace. We also consume dirty air and water, mental pollution through advertisements, inadequate schools, Pintos with a hidden death wish, long commutes from sterile suburbs to decaying city centers, and corporate contributions to domestic and foreign political intrigues. Most neoclassical microeconomists would define these kinds of misfortunes as "externalities" which can then be ignored or factored out of the discussion. The analytical frame they offer, however, is too narrow for purposes of formulating public policy as it only accounts for those demands amenable to commercialization through the marketplace. For example, Bork (and the Chicago School) necessarily view politics and bureaucratic activities as inherently inefficient when they are analyzed in the same way as market activity, as means to private ends. Non-Marxists have begun to take up the notion of commodity fetishism to describe the intellectual bankruptcy of this approach, and Congress and the courts have, until recently at least, displayed an increasing willingness to view consumption in its social context.<sup>28</sup>

Bork's evaluation of the role of markets is ambiguous in the extreme. Paying a great deal of lip service to the free market system, he also advocates mergers, vertical integrations and other means by which market decisions are displaced by the *ukases* of large corporations. This is done in the expectation of (often suspect or remote) gains in efficiency, even though markets are weakened or narrowed in the process.<sup>29</sup> He seems to take a continuing market

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27. J. HURST, *supra* note 10, at 272.

28. See F. HIRSCH, *SOCIAL LIMITS TO GROWTH* 58, 86 n.5., 91, 146 (1977).

29. See R. BORK, *supra* note 1, at 67, 108, 111, 226.

vitality for granted while applying contemporary economic analyses to a simpler and less alloyed *laissez faire* than is found in the United States today.<sup>30</sup> Inevitably, the maintenance of competition gets neglected in the course of his exposition. His legal arguments harken back to when the earliest antitrust cases were decided, prior to the accretion of a concentrated corporate power. He seeks to return us to a preregulatory Arcadia which bears little resemblance to the realities chronicled by Frank Norris and Upton Sinclair and which ignores the withering of Adam Smith's Invisible Hand which has occurred in the interim.<sup>31</sup>

The justifications Bork offers for his heavy emphasis on productive efficiency are that "it necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or service offered," and that the Supreme Court's failure to take adequate account of productive efficiency "has skewed legal doctrine disastrously."<sup>32</sup> This is all well and good, save that the Supreme Court almost invariably favors efficiency when faced squarely with a choice between it and a competing policy.<sup>33</sup> Further, Bork's concept of efficiency relies heavily on the suspect assumption of almost limitless economies of scale. While the Chicago School typically regards available scale economies as negligible beyond very small scales, Bork, in his only significant departure from their postulates, adopts the assumption of the British School that large scale economies exist, especially within large multiplant firms. This theoretical, almost theological, dispute cannot be resolved until problems inherent in calculating long run average cost curves are overcome; few practical generalizations can be made at this stage.<sup>34</sup> The

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30. *E.g.*, *id* at 394: "Price discrimination is, on balance, probably better for consumers than any rule enforcing nondiscrimination, and . . . law cannot satisfactorily deal with the phenomenon in any event." While this assertion is supported by some interesting arguments, and while the law is far from satisfactory in this area, the extent of consumer benefit must surely depend on the particular discriminator's market power and the purposes for which it is exercised. *See id* at 415; note 31, *infra*. For Bork's Economic Darwinism, see text accompanying note 59, *infra*.

31. *Id* at 425. "The regime of capitalism brings with it not merely unexampled economic performance and a social and cultural atmosphere that stresses the worth of the individual but, because of the bourgeois class it creates, trains, and raises to power, the possibility of stable, liberal, and democratic government."

32. *Id* at 7.

33. P. AREEDA & D. TURNER, 1 ANTITRUST LAW 9 (1978). From this perspective, the real dispute concerns whether courts regularly destroy efficiencies without realizing it; it is clearly not the conscious process Bork makes it out to be.

34. *See* D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 30-41 (1951); J. KOCH, INDUSTRIAL ORGANIZATION AND PRICES 101 (1974).

effect of his assumption is to make Bork an advocate for the biggest of business enterprises. In comparison, the Supreme Court seems to convey a "small is beautiful" message, a message which in some respects coincides nicely with nascent appreciations of the physical and social limits to growth and the humanistic aspects of economic development.<sup>35</sup>

Bork opens the door to these kinds of policy considerations, for he admits that "[e]fficiency is at bottom a value concept, not a description of mechanical or engineering operation [*sic*]."<sup>36</sup> He then adopts Frank Knight's efficiency definition of a ratio "between useful output and total output or input."<sup>37</sup> The usefulness of any output remains open to discursive justification and, consequently, so does efficiency. For example, Bork's assertion that outputs which are not readily susceptible to commercialization should be excluded from antitrust analyses is not persuasive. Must we, as Bork suggests, accept a monopoly where gains in terms of the economist's productive efficiencies outweigh losses of allocative efficiencies,<sup>38</sup> or are we entitled to ask *Quo warranto*?<sup>39</sup> Consider an example of how Bork's notions of efficiency foster muddled commentaries:

If no manufacturer used exclusive dealing contracts, and if a local retail monopolist decided unilaterally to carry only Standard's [dressmaking] patterns because the loss in variety was more than made up in the cost saving, we would recognize that the decision was in the consumer [*sic*] interest. We do not want a variety that costs more than it is worth.<sup>40</sup>

How can we calculate what "it is worth," taking into account Bork's

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35. See CLUB OF ROME, *THE LIMITS TO GROWTH* (1974); F. HIRSCH, *supra* note 28; G. MYRDAL, *ASIAN DRAMA* (1968); E. SCHUMACHER, *SMALL IS BEAUTIFUL* (1974). While these books have had a major impact on Continental thinking, they have scarcely made a dent in the provincialism of American economists. Judges have been *slightly* more progressive in this area. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (per Warren, C.J.); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (per Hand, J.). As might be expected, Bork is extremely critical of these decisions.

36. R. Bork, *supra* note 1, at 105.

37. *Id.*

38. *Id.* at 98.

39. Kaysen, *The Corporation*, in *THE CORPORATION IN MODERN SOCIETY* 85, 97 (E. Mason ed. 1970).

40. R. Bork, *supra* note 1, at 307, discussing *Standard Fashion v. Magrane-Houston Co.*, 258 U.S. 346 (1922).

assertion at other junctures that freedom of choice is a significant component of consumer welfare, the only permissible antitrust goal?

Bork's views on advertising and sales promotions illustrate his attitudes towards consumer choice and welfare and the usefulness of a particular output. Criticisms of advertising, he argues, are "based on invincible ignorance of the functions it serves" and "on an unadmitted bluenosism." "Much of human happiness depends on the fleeting fantasies and comforting attitudes with which we bolster our morale in the face of the 'objective' truth of our lives and prospects. Only a modern Puritan can object to these evanescent satisfactions which advertisers provide us."<sup>41</sup> This abrupt descent from the high perch of scientific objectivity has a snobbish air about it; "we" clearly refers to "them," not "us." The possibility that this Yale law professor bolsters his morale through advertising is negated by a disdainful view of consumers who "forget" and "are relatively inattentive" and able to "retain only a few points"<sup>42</sup>—qualities presumably inconsistent with being a Yale law professor and which may be the effect rather than the cause of advertising techniques. Bork's point in introducing all of this is to advance the view, held by many economists, that a "composite product" results from the addition of advertising and sales promotions to the physical object. This composite is deemed more useful than the naked object because consumers "willingly" pay more for it. As a result, and in order to avoid injuries to retailers arising from the "free ride," we should deprive consumers of a choice already truncated by advertising and legalize all resale price maintenance agreements.<sup>43</sup>

Bork's view of the purpose and effect of advertising is difficult to sustain, except among disingenuous businessmen. To the extent it succeeds, advertising converts consumer sovereignty into a textbook fiction, reduces the discipline exercised by the market over major advertisers and has other pernicious consequences. Dahl and Lindbloom argue that "[a]dvertising often misinforms, confuses judgment, and debases taste; in all this, it obstructs rationality."<sup>44</sup> Fred Hirsch adds that, through advertising, "self-interest becomes the social norm, even duty. [This tendency conflicts with] traditional morality, with its stress on duty and social obligation . . ."<sup>45</sup> These

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41. R. BORK, *supra* note 1, at 313, 317-18.

42. *Id.* at 318.

43. *Id.* at 274, 295-97, 373.

44. R. DAHL & C. LINDBLOOM, *POLITICS, ECONOMICS AND WELFARE* 415 (1976).

45. F. HIRSCH, *supra* note 28, at 82-83.

harms far outweigh the benefits enumerated by Bork for, as Frank Knight (whose views Bork seems to respect) argues, true individual satisfaction is based on "the refinement and elevation of the plane of desire, the cultivation of taste."<sup>46</sup> Antitrust policies, and those of the FTC in particular, have a crucial role to play in an elevation of the usefulness of national output—at least in this bluenosed Puritan's opinion.

Forced to choose, the reader would probably conclude that Bork's law is better than his economics. The choice is a narrow one, however. His eccentric policy preferences permeate both spheres and the excessive reductionism found in Bork's legal analyses is heavily buttressed by *reductio ad absurdum* arguments. Maintaining, for example, that courts are unable to distinguish predation from "normal" competitive processes while applying what he mistakenly terms the "legal fiction" that certain business practices are automatically exclusionary, he states that "courts would have to regulate amounts paid for films, admission prices, interior comfort and decor, and so forth, to ensure absolute equality between theaters in the same town."<sup>47</sup> Courts are by no means perfect but judges are certainly more intelligent than that, and none of the numerous cases about film distribution and exhibition go anywhere near as far as Bork suggests. We are then told that the:

auto dealer who refuses to sell only the chassis or the grocer who declines to subdivide a can of pears are engaged in tying. The law . . . attempts to avoid this ridiculous conclusion by distinguishing between packages that are inherently one product and those that are inherently more than one. But . . . [there] is no way to state the 'inherent' scope of a product.<sup>48</sup>

This issue does occasionally cause difficulty, but judicial common sense by and large resolves it satisfactorily and more sensibly than Bork, who would legalize all tying arrangements.<sup>49</sup> In a third example, Bork echoes the hoariest chestnut in antitrust law, Justice Peckham's concern that the formation of a corporation or partner-

46. *Id.* at 61.

47. R. BORK, *supra* note 1, at 143. He criticizes this "prophylactic rule," neglecting a fortuitous *double entendre*: it may be annoying and inconvenient, but it had better be there if it is needed. *See id.*

48. R. BORK, *supra* note 1, at 379.

49. *Id.* at 365-66, 380-81. For an example of a more sensible judicial approach, *see Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

ship could be deemed a restraint of trade.<sup>50</sup> The appropriate response to this concern is to examine the market power possessed by the enterprise and the ways in which it is exercised, factors which are largely ignored by Bork<sup>51</sup> and Peckham. The reincorporation of Standard Oil of New Jersey in 1899 could, for example, be invalidated because the company exercised a substantial power in abusive ways, while Bork's grocer with his can of pears does not.

Summing up his arguments—some of which are more satisfying than those we have cited—Bork concludes that antitrust law ought to prohibit only: horizontal agreements which are not ancillary to some legitimate business purpose and which are especially prevalent in regulated industries; horizontal mergers resulting in fewer than three “significant” rivals; and deliberate predations designed to prevent or delay new entries into the market or to discipline existing rivals, as distinct from mere rigorous competition.<sup>52</sup> These simple conclusions flow from a simplistic view of the real world. Businessmen have evolved many types of anticompetitive behavior which have, in turn, spawned complex legal techniques for applying statutes which do not interpret themselves. These techniques are by no means coherent, but they represent what were, at least at the time, reasoned responses acquired at substantial expense.<sup>53</sup> Bork's desire to emasculate these techniques without replacing them would only cause anticompetitive behavior to flourish, which is contrary to the antitrust statutes. From Bork's viewpoint, however, these few simple rules of antitrust law would have the advantage of handicapping the courts that inevitably promulgate “utterly arbitrary” rules which are “unrelated to [Bork's] reality.”<sup>54</sup>

These arguments provide no viable alternative to the crecive nature of antitrust law, the outcome of growing judicial experience and accretions of corporate power and anticompetitive behavior. With apologies for an overextended metaphor, what judges do in the field of antitrust is similar to the process of selecting a pub for

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50. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 567-68 (1898). See R. BORK, *supra* note 1, at 23, 135.

51. See, e.g., note 30, *supra*.

52. R. BORK, *supra* note 1, at 405-07.

53. “Formal products of legal processes . . . add up to a formidable body of evidence of values held by some individuals and groups.” J. HURST, *supra* note 10, at 215. This evidence is solid because the law is not invoked lightly. Since the law's impact is only marginal, its effectiveness requires at least a substantial acceptance of it or an adroitness in litigation, bargaining and/or manipulating public complacence. *Id.* at 215-19.

54. R. BORK, *supra* note 1, at 410.

lunch that has been recommended to the English. The procedure to follow, while hungry, driving in an unfamiliar part of the country and bearing in mind that pubs close for the afternoon, is to scrutinize carefully the first pub you come to, correlating what you see with what you already know about the food, beer, clientele, etc. of other pubs. The luncheon pub to choose is then the very next one that looks better than the one first sighted. This is unlikely to be the best pub in the neighborhood, but at least you won't be forced to choose, at 2:00 p.m., between eating in a totally unsatisfactory pub or going hungry—unless, as is unlikely, the first pub you saw is the best. Such a process lacks even the precision of the economist's theory of the second best. It is, however, grounded in the experience of other pubs acquired at some expense and energy, and it provides an artificial but workable and hence useful truncation of the variables considered.<sup>55</sup> Personal preference clearly plays a significant role, but everybody knows an obviously bad pub when they see one and decisions will thus be roughly in keeping with "community standards." If lunch turns out to be disappointing, there's always tomorrow and at least you have learned something. Professor Bork would presumably have us starve in pursuit of an unattainable elegance, retrace our journey to some "ultimate" pub sighted at 10:00 a.m. (or recommended eighty years ago by Justice Peckham), or apply some aberrant efficiency criterion and eat in the functional equivalent of McDonald's. Clearly, his *Antitrust Paradox* is no *Good Pub Guide*.

Why did Bork write his book? He finds himself incensed by the fact that contemporary "[a]ntitrust is a subcategory of ideology": "by the time a once militant ideology triumphs and achieves embodiment in institutional forms, its adherents are likely long since to have left off debating first principles."<sup>56</sup> Ideology and institutions grind on, even though "public and political enthusiasm for the harassment of business is at an ebb . . . ."<sup>57</sup> Recognizing that an

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55. Problems and misunderstandings arise in the legal sphere only because judges—and thus lawyers—are compelled by the rules of the game to prove that an inevitably imperfect process approximates an ideal rationality. Naked judicial expedience lacks legitimacy, *see* note 72, *infra*, and is thus concealed and to some extent displaced in the antitrust area by the image of an administration of a coherent body of doctrine derived from brief statutes of almost unlimited pliability. Few academics would deny the explicitly political nature of this process which is a response to, in Hurst's words, the command of the "constitutional ideal." J. HURST, *supra* note 10, at 136. Bork repeatedly wrings his hands over the political role of the judiciary, however.

56. R. BORK, *supra* note 1, at 3. *See id.* at 423.

57. *Id.* at 4. "Harassment" may not be the correct word. An overall "ebb" may be difficult to discern and, given his view of the public's stupidity, Bork would

ideology can only be pushed aside by another ideology, Bork sets out to assemble his own<sup>58</sup> from surprising crude components. Consider his attempt to graft the Invisible Hand onto Oswald Spengler's stump:

The environment to which the business firm must adapt is defined, ultimately, by social wants and the social costs of meeting them. The firm that adapts to the environment better than its rivals tends to expand. [E]conomic natural selection has normative implications that physical natural selection does not have. At least there seems to me more reason for enthusiasm about the efficient firm than about . . . the rat and the cockroach . . . .

. . . .

[W]henever the physical environment provides a niche capable of sustaining life, an organism will evolve or adapt to occupy the place. The same is true of economic organisms, hence the fantastic proliferation of forms of business organization, products, and services . . . .<sup>59</sup>

This is an argument so thoroughly discredited that it has not been advanced seriously for a long time. Unlike the rat and the cockroach, people have acquired a limited immunity from processes of natural selection through an ability to modify our physical and social environment. Large corporations, as human instrumentalities, share this capacity, to manipulate consumers, markets, sources of finance and government itself to insure survival. If shareholder revolts or takeover bids do not save it first, the death of a big corporation then becomes a political impossibility because of the adverse impact on employment, national security, etc.

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presumably disapprove of a more vigorous antitrust policy in response to additional public enthusiasm for it.

58. While he does not own up to the fact, Bork's arguments are ideological in at least four senses of that term: they represent a combination of interdependent facts and values; they reflect the desire of a particular elite to establish its intellectual, moral and political leadership (what Bork accuses "the intellectual class" of attempting); they are to have a guiding, supporting and restraining effect on political behavior, providing explanations and justifications of an image of the good life and a strategy for achieving it; and they can be used effectively to cloak shabby actions. See, e.g., note 31, *supra*.

59. R. BORK, *supra* note 1, at 118-19. For another example of crude argumentation, see *id.* at 78: "Just as protected speech lies next to that which may be outlawed, so does vigorous price competition adjoin that which goes too far and is predatory." This is a facile attempt to equate something which has acquired a limited statutory sanction with a "preferred" freedom under the Constitution.



The Economic Darwinism propounded by Bork encourages us to regard present states of affairs as natural, inevitable and even desirable. What we get is one grand Panglossian Ethic, an example of "the Chicago School technique of arguing that (at least in the economy) what is, is for the best."<sup>60</sup> For example, Bork cites the work of a Chicagoan, George Stigler, as authority for a "survivorship test": "*any size achieved by internal growth without predation is the most efficient size for that firm. [Thus,] the dissolution of any such firm will always create a loss.*"<sup>61</sup> Implicit is a host of empirically unproved assumptions about market structures, economies of scale, barriers to entry, the degree of managerial attachment to profit maximization, etc. While Bork's arguments veer uneasily between a *laissez faire* and anticompetitive but supposedly more efficient arrangements, they all have one thing in common: they attempt to reify the preferences of the managers of large corporations.<sup>62</sup> The apparent reason that the concept of consumer welfare is so muddled is that it is a code word, a stalking-horse for corporate welfare.

Notwithstanding Bork's assertions, the relationship between the large corporation and the state should be characterized as an ebb and flow of threats *and* benefits, with each administrative program or court case viewed by the players as a separate game with its own stakes, penalties and ploys.<sup>63</sup> Managers of large corporations benefit directly or indirectly from many, and perhaps most, of these programs and decisions, yet businessmen feel free to pick and choose among them and to seek to discard the onerous ones, particularly in the area of antitrust. Corporate attempts to maintain old privileges and acquire new ones are usually buttressed by parading the "natural rights" accruing to private property and by depicting business power as strictly controlled by a price system, of which entrepreneurs are mere passive agents.<sup>64</sup>

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60. Rosenbluth, *Comment*, 19 J.L. & ECON. 389, 390 (1976) (referring to Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 J.L. & ECON. 371 (1976)).

61. R. BORK, *supra* note 1, at 194 (emphasis in original).

62. *E.g.*, *id.* at 199. Bork argues that mergers permit "entrepreneurs" to liquidate their holdings for irreproachable reasons; "economic welfare" requires a good market for capital assets; and the rewards for "entrepreneurial endeavor" can be enhanced by increasing the value of capital assets. Capital asset value is, of course, a matter of definition in imperfect markets. While it remains unproved that enhanced values will call forth additional *entrepreneurial* endeavor, they would certainly represent a redistribution of income in favor of the asset holders.

63. See M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 1, 14, 49, 114 (1964).

64. R. DAHL & C. LINDBLOOM, *supra* note 44, at 482.

Bork augments this corporate ideology by reverting to discredited policies and pieties, by arguing for an Economic Darwinism and by warning us of the destruction of "wealth" that attends a vigorous application of antitrust policies while praising the creation of "wealth for the community" through economic integration.<sup>65</sup> Wittingly or not, Bork misuses the admittedly vague concept of wealth. He fails to note the change that has occurred in the United States "from an economic system of possessory property into an economic system of administered power."<sup>66</sup> For example, divestitures seldom destroy the wealth or abuse the property rights of natural persons (unless Bork's problematic attitude toward economies of scale is adopted); divestitures merely alter the organizational forms through which the state permits wealth to be controlled. More generally, the notion that the redistribution of wealth destroys it ignores the fact that what constitutes "wealth" is governed by how claims to it are distributed.<sup>67</sup> These claims are defined, in large measure, through privileges, as opposed to rights, granted or tolerated under law, privileges which are the chief bone of political contention and which can be withdrawn without objection under the Constitution. The corporation owes its privileges and its very existence to the state, and it is only the political power of corporate managers—and public fears of killing off geese that lay golden eggs—that prevent broader state interventions than the ones embodied in antitrust laws.<sup>68</sup>

Government has the power of command over all of property, subject to constitutional promises of compensation in some instances; there are no "natural rights." Government's failure to intervene thus constitutes an acceptance of the status quo and is

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65. R. BORK, *supra* note 1, at 28. See *id.* at 70:

Antitrust is wholly unable to serve values that must be implemented by requiring or inducing affirmative conduct which the self-interest or capabilities of private persons do not cause or permit them to undertake. [W]hen the antitrust laws are seen as keyed to the goal of wealth creation, it becomes apparent that their passive and prohibitory nature is a necessity.

The connection between "wealth creation" and Bork's sole legitimate antitrust goal—maximizing consumer welfare—is unclear, however. Where the distribution of wealth is more unequal than the distribution of consumers' incomes, wealth may predominantly fall to large companies with a high marginal propensity to retain earnings. Consumers may thus see little more of this wealth than a public squalor.

66. C. DEHOUGHTON, *THE COMPANY* 132 (1970).

67. F. HIRSCH, *supra* note 28, at 66 n.19.

68. See Latham, *The Body Politic of the Corporation*, in *THE CORPORATION IN MODERN SOCIETY* 218, 223 (E. Mason ed. 1970); L. FRIEDMAN, *supra* note 10, at 180-81.

regarded as such by the public. It is government (and the President in particular) which ultimately bears the blame for poor economic performance. Government, therefore, must do something and be seen doing something when economic issues are inevitably and rapidly transferred to the political arena. One of the more popular things to do is to exert control over big business, or at least to appear to do so. Bork, like many other antitrust scholars, ascribes this tendency to a Jeffersonian populism at large in a populace woefully ignorant of the benefits of capitalism and dedicated to "the preservation of a sturdy, independent yeomanry in the business world."<sup>69</sup> This is altogether too simple an explanation for several reasons. Public ignorance is in the eye of the beholder. An unemployed person, for example, acquires a profound understanding of the economy which is foreclosed to a tenured professor. Secondly, Bork's argument makes populists of most middle-class Americans and it makes Jeffersonian populism roughly coexistent with the dominant thread of twentieth century liberalism, which runs through Woodrow Wilson's New Freedom, the New Deal and even the Great Society.<sup>70</sup> Thirdly, Bork ignores the fact that at least a modicum of small business opportunities is viewed by politicians in industrialized countries other than the United States as an essential precondition of political stability. While economists may doubt the wisdom of these policies, the political will to carry them out—really the desire to remain in office—cannot be gainsaid, particularly as economists have provided no convincing alternatives.<sup>71</sup> Finally, the recoupling of the economy to the political system in the twentieth century and throughout the industrialized world, for reasons unrelated to a Jeffersonian populism, has markedly increased the need for the legitimation of economic activity.<sup>72</sup> The breakdown of the ideology of *laissez faire* and the segregation of corporate ownership and control have already eliminated the sources of legitimacy on which Bork seeks to trade.<sup>73</sup>

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69. R. Bork, *supra* note 1, at 54. See *id.* at 413.

70. R. DAHL & C. LINDBLOOM, *supra* note 44, at 480, 481.

71. M. MASSEL, *supra* note 17, at 124, puts it thus: "The pressures within our society make themselves felt so effectively that policy development cannot rest exclusively on a technical basis." In other words, these "pressures" win out, notwithstanding the attempts of Bork and others to "foreclose" the issue.

72. J. HABERMAS, LEGITIMATION CRISIS 36, 87 (1976). The reasons for these crises are extremely complex. See *e.g.*, *id.*, *passim*; R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY (1959). Legitimacy may be defined as "faith or trust in structures or procedures" which are endowed with the prestige of "exemplariness and obligatoriness." L. FRIEDMAN, *supra* note 10, at 112.

73. See, *e.g.*, note 31, *supra*.

It is a misfortune of American big business that it has never taken the trouble to legitimate the great power acquired in the twentieth century. Assertions of a corporate social responsibility are too little and too late. While some draw comfort from this new ideology, "benevolence cannot . . . be a satisfactory justification for despotism."<sup>74</sup> There is a stubbornly persistent demand in all areas of American politics that organized power be defined and evaluated by persons and institutions other than the immediate power holders. Corporate accountability thus is required in addition to efficiency. The legitimacy of antitrust laws runs deeper than the business ethos, which is not to say that these laws are not applied mistakenly, irrationally or abusively in some instances.<sup>75</sup> Antitrust cannot be viewed as Bork would wish, as "a massive introduction of public force into an area of private activity."<sup>76</sup> What is public and what is private is itself defined under the antitrust laws, among others. Those who accept the substantial benefits conferred by the "private" corporation laws can be compelled to accept the detriments imposed through "public" corporation laws. Bork would require precious little from corporations in the way of a *quid pro quo* for the general welfare, and his slipshod arguments should thus command little attention outside the business community.

Paul H. Brietzke\*

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74. Brewster, *The Corporation and Economic Federalism*, in *THE CORPORATION IN MODERN SOCIETY* 72, 73 (E. Mason ed. 1970). See A. BERLE, JR., *ECONOMIC POWER AND THE FREE SOCIETY* 16 (1958); J. HURST *supra* note 10, at 242-45. Hurst argues that the regulation of labor relations, product safety, advertising and finance show that the public is unprepared to accept corporate management as self-legitimizing.

75. See R. DAHL & C. LINDBLOOM, *supra* note 44, at 480; J. HURST, *supra* note 10, at 45, 68-69, 209.

76. R. BORK, *supra* note 1, at 417.

\*Associate Professor of Law, Valparaiso University.