Bork's Legacy

Robert H. Bork and the Yale School of Antitrust Analysis

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This remembrance was adapted from remarks presented by Professor Priest at a Memorial Service for Robert H. Bork on April 9, 2013, in Washington, DC.

Robert Bork was educated at the University of Chicago Law School and identified himself as an advocate of that approach to the analysis of economic behavior. In his extensive writings, Bob gave great credit to what he learned from a Chicago School giant, Aaron Director, at one point stating that his learning from Director constituted "a religious conversion."

But Bob Bork transcended the conversion and his work went substantially beyond the Chicago School antitrust analysis, and was original to him, developed at Yale, and not derived from Director or any of the other Chicago School participants. Bob took from Director that most vertical arrangements—vertical integration, tying and exclusive dealing agreements, and the like—could not enhance market power. Bob credited Director for these insights, perhaps excessively.

What Bob did, however, was to conceive how these concepts should be translated into law: the Yale approach. First, Bob accepted the per se prohibition of price fixing, established in an opinion by Justice Douglas—another Yale Law Professor—in *Socony-Vacuum Oil*. Different from the Chicago School, however, Bob took the point to challenge the rest of then-current antitrust law. Director did not support the per se prohibition of price fixing; he believed that antitrust law, in its entirety, was an infringement of the market, which he tried to debunk. But the per se prohibition of price fixing was widely accepted. Bob Bork took advantage of this point, and it was the basis of his great book, *The Antitrust Paradox*. According to Bob's argument, the per se prohibition of price fixing was defensible, but could only be accepted if the basic normative goal of the antitrust laws was to enhance consumer welfare.

Bob then argued that the efforts of the Supreme Court through the 1950s and 1960s to protect small business were irreconcilable with a policy of enhancing consumer welfare more broadly. Bob further extended the analysis by transforming it into a discussion of appropriate judicial decisionmaking. Bob argued that the consumer welfare standard was a "neutral principle," appropriate for judges in a majoritarian democracy. The conflicting standard of "aid the underdog; promote local or small business" was not. That standard, which motivated the Supreme Court in the 1950s and 1960s, allowed judges to implement their personal policy views in place of the decisions of the legislature, inconsistent with a majoritarian democracy.

Bob Bork's vision had an extraordinary effect. The Supreme Court radically changed its approach to antitrust law in the late 1970s. The major antitrust cases of the past forty years all derive from Bork. In *GTE-Sylvania*, the first and most influential doctrinally of the cases, Bob was cited four times. He was cited in *Professional Engineers*; *Jefferson Parish Hospital*; *NCAA*, *Aspen Skiing*; *Matsushita*.

Bob's work formed the heart of the analysis of the Court. In *Business Electronics*, Bob was cited seven times. He was cited in *Supreme Court Trial Lawyers'*; *Brooke Group*; *Leegin*, an incredible case, overturning the 1912 opinion in *Dr. Miles*, Bork cited four times; *Weyerhauser*. These citations will continue and expand. It is not in the slightest an exaggeration to state that Bob Bork was the architect of modern antitrust law.

Bob wrote an important article in 1968 claiming that the original intent of the Sherman Act was to enhance consumer welfare. The intellectual link between Bob's antitrust scholarship and his constitutional law scholarship has not been emphasized, though I think the two are closely aligned. In my view, Bob turned his method of analysis of antitrust law into a method of analysis of constitutional law, claiming that to derive neutral principles for the application of constitutional provisions one had to look back—as he had done for the Sherman Act—to the original intent of the Constitution's founders, and not rely on the subsequent, political, redistributionist views of judges, not subject to a majoritarian electorate.

It was a noble effort, but one that proved less successful than his work in antitrust (it has, though, spawned a field of constitutional originalists of the first order): perhaps because there are so many different issues that arise in the implementation of the Constitution—beyond consumer welfare under the Sherman Act; perhaps because the country has changed so much from 1789 to the present, compared to 1890 to the present; perhaps because the original intent of the Founders of the Constitution isn't as clear as the original intent of the Congress enacting the Sherman Act.

In a tribute by Bob of his close friend and Yale colleague, Alex Bickel written after Bickel's death, Bob quoted an aphorism of Holmes, as a form of measure of a life. Bickel had died prematurely, at age 49. Bob, summing up Bickel's life, noted that Bickel had written "history, journalism, courtroom argument, legislative drafting, appearances before congressional committees, public debates and speeches . . . political campaigning," as Bob had done and would continue to do. This quote states, as I interpret it, not only Bob's reflection on Bickel's life, but his ambitions for his own—his measure of his own life, which had many years to run. This tribute was delivered in 1979, several years after Watergate and the Saturday Night Massacre, but many years before the confirmation hearings in 1987.

Bob wrote, quoting Holmes, about Bickel, but I believe, also about how he evaluated his own life plan: " . . . life is action and passion, it is required of a man that he share the passion and action of his time at peril of being judged not to have lived."

Bob Bork lived a life of "action and passion"; he shared the "passion and action of his time" in the fullest sense, that met the standard that he defined for Alex Bickel and that he set for himself. He was a great man and had, and will continue to have, an extraordinary influence on American law. ***Y***

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Robert Bork portrait painted by Peter Egeli