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## An Anti-Antitrust Activist?; Podium

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## *AN ANTI-ANTITRUST ACTIVIST?; Podium*

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### Body

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Podium

JUDGE ROBERT H. Bork's champions are marketing him for the U.S. Supreme Court as a strict constructionist who gives the utmost deference to congressional intent in his legal analysis. President Reagan described him as a fair-minded jurist who believes his role is to interpret the law, not make it. Judge Bork is touted as a believer in judicial restraint who will help end the process by which judges become non-elected legislatures through their failure to adhere accurately and narrowly to the legislative commands.

A careful examination of Judge Bork's writings demonstrates that this description is not accurate. The judge's interpretations of congressional intent in his original area of specialization demonstrate that he is a judicial activist for his ideological causes. Contrary to his protestations and those of his champions, Judge Bork interprets congressional will selectively to suit his own agenda; he does not defer to a Congress that had different goals. Not only does he consider his interpretation of original intent the only correct one; he denounces as unconstitutional any conclusions to the contrary.

Judge Bork, now a member of the U.S. Circuit Court of Appeals for the District of Columbia, made his early reputation as an antitrust scholar. He first attracted attention during the 1960s through several important articles, all brilliantly written, that argued there was too much antitrust enforcement. He expanded and synthesized his analysis into an enormously influential 1978 book, *The Antitrust Paradox*. Key to his arguments was his then-novel conclusion that the only legitimate goal of the antitrust laws was to enhance the efficiency of our economy. This conclusion was in many ways the foundation of his attack on antitrust. As Judge Bork correctly noted, Antitrust policy cannot be made rational until we are to give a firm answer to one question: What is the point of the law -- what are its goals? Everything else follows from the answer we give.<sup>1</sup>

THE VIEW OF the goals of the antitrust laws that prevailed almost universally until less than a generation ago was decidedly populist. Various social and political goals were deemed important to the antitrust laws' framers.<sup>2</sup> This view held center stage virtually until the advent of the Reagan administration.<sup>3</sup>

There is today a consensus, even among liberal scholars, that Warren court antitrust decisions, built upon a heavily social and political view of the goals of antitrust, were far too interventionist. In addition to overly strict substantive standards, the excesses included the practical problems that inevitably arose in the implementation of a relatively amorphous social/political orientation. These implementation problems helped make the antitrust world receptive to a more conservative alternative that promised superior implementation, clarity and predictability.

If a single scholarly work were to be given credit for providing the basis for the efficiency-oriented view of antitrust it surely would be the seminal 1966 article by then-Professor Bork,<sup>4</sup> the foundation for his 1978 masterwork. It also formed the basis for the conclusions of countless other conservative scholars.<sup>5</sup>

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***Judge Bork*** asserted that his analysis was a strict constructionist view of the legislative history of the Sherman Act. In a lengthy, heavily footnoted text, he developed the argument that the original framers of the Sherman Act had a single intent: to enhance economic efficiency. ***Judge Bork*** argued that [t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.<sup>6</sup>

***Judge Bork*** further asserted that there was not a scintilla of support in the act's legislative history for broad social, political and ethical mandates.<sup>7</sup> He explicitly denied that wealth transferred or extracted from consumers to firms with market power could have been a possible congressional concern: [I]t seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity, he wrote.<sup>8</sup>

***Judge Bork*** developed his argument through a detailed analysis of the 1890 legislative record. He pointed to dozens of statements that revealed an overriding congressional concern that the trusts would acquire monopoly (or market) power that would give them the ability to raise prices and restrict output artificially.<sup>9</sup> ***Judge Bork*** presents a convincing case that this concern preoccupied Congress during the debates. He then uses modern economic analysis to explain how monopoly power leading to higher prices for consumers can produce a form of economic inefficiency termed allocative inefficiency, which is a reduction of the total wealth of society. The explanation of why this happens is complex.<sup>10</sup>

***Judge Bork*** reasoned that because we now know the only harm to consumer welfare from higher prices is economic inefficiency, congressional displeasure with market power can be equated fairly with a concern for economic efficiency. ***Judge Bork*** then quotes far fewer, although still significant, remarks that manifest a congressional desire to preserve and enhance corporate productive efficiency.<sup>11</sup> On the basis of this evidence, he concludes that the antitrust laws embody only a concern for consumer welfare, a term of art he defines as the aggregate economic efficiency of our economy.<sup>12</sup>

The entire Chicago school quickly adopted ***Judge Bork***'s conclusion that economic efficiency should be the sole value weighed in antitrust analysis.<sup>13</sup> President Reagan's appointments to head the antitrust enforcement agencies naturally also adopted and implemented this standard.<sup>14</sup>

NOTICE THE subtle, yet crucial, change in terminology. ***Judge Bork*** uses consumer welfare as an Orwellian term of art that has little or nothing to do with the welfare of consumers. His desire to maximize consumer welfare (which he defined as economic efficiency) carries with it no concern about the wealth extracted from consumers by firms with market power as a result of the higher prices that arise from cartel or other prohibited behavior.

***Judge Bork*** thus defines consumers to include monopolists and cartels. Antitrust based on ***Judge Bork***'s definition of consumer welfare makes no distinction between real consumers -- the purchasers of goods and services -- and the firms with market power that raise prices and thereby extract wealth from purchasers. Higher prices to consumers are fine with ***Judge Bork*** as long as the monopolist or the cartel produces efficiently.

***Judge Bork*** correctly noted that the Sherman Act's legislative history is replete with concern over the higher prices consumers face as a result of monopoly pricing. But he is mistaken in his belief that Congress understood this concern to mean a desire to avoid economic inefficiency. None of the quotations presented by ***Judge Bork*** suggests Congress was even aware that monopoly prices lead to economic inefficiency. Even leading economists of the day had only a tenuous understanding of this concept<sup>15</sup> and, as conservative Nobel laureate George J. Stigler reminds us, no economist had any significant effect on the Sherman Act's passage.<sup>16</sup> Not surprisingly, ***Judge Bork***'s hundreds of citations to the 1890 debates fail to contain evidence that even a single member of Congress knew monopoly pricing is inefficient. Put simply, Congress did not condemn the trusts for their lack of efficiency.

Congress was, however, well aware that higher prices from monopoly power transfer wealth from consumers to firms with market power. Indeed, the debates strongly suggest that Congress condemned the trusts and monopolies for exactly this reason. For example, Senator Sherman termed monopolistic overcharges extortion which makes the people poor, and extorted wealth.<sup>17</sup> Congressman Coke referred to the overcharges as robbery.<sup>18</sup> Representative Heard declared that the trusts, without rendering the slightest equivalent, have stolen untold millions from the people.<sup>19</sup> Congressman Wilson complained that one particular trust robs the farmer on the one hand and the consumer on the other.<sup>20</sup> Representative Fithian

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declared that the trusts were impoverishing the people through robbery.<sup>21</sup> Senator Hoar declared that monopolistic pricing was a transaction the direct purpose of which is to extort from the community...wealth which ought to be generally diffused over the whole community.<sup>22</sup> Senator George complained: They aggregate to themselves great enormous wealth by extortion which makes the people poor.<sup>23</sup>

These value-laden condemnations of the wealth-extraction effects of monopoly pricing show a much broader concern than with mere economic efficiency. A fair reading of the Sherman Act's legislative history reveals that it is in large part a consumer protection statute. Congress' primary reason for passing the antitrust laws was to prevent consumers from paying more than the competitive level for their goods and services. **Judge Bork** tried to make the stockholders of monopolies and cartels into honorary consumers; but the consumers that Congress wanted to protect comprised only purchasers of goods and services.

DESPITE THE common sense that truly underlay congressional intent, it is not difficult to understand how **Judge Bork**'s story gained such widespread acceptance.

Perhaps the most important reason was his clever but deceptive selection of his key term, consumer welfare, as the lodestar of antitrust.<sup>24</sup> Few people realize how counterintuitively he defined the term. He succeeded in promoting his interpretation because the subject is extremely complex; other than economists and some antitrust lawyers, few understand that monopoly prices lead to both allocative inefficiency and a transfer of wealth from consumers to the monopolist. As **Judge Bork** translated legislative intent into triangles and rectangles and then back to the appealing term consumer welfare, few discovered what he had really done. Even the Supreme Court appears to have been confused.<sup>25</sup>

In addition, **Judge Bork**'s argument that only an efficiency approach to antitrust is clear and predictable for businesses also has won many converts. Even many who strongly suspect that Congress may have intended the antitrust laws to encompass more than economic efficiency have to admit that the social-and-political school of antitrust was extremely difficult to administer.<sup>26</sup> **Judge Bork** recently has taken his assertion of superior administrability much further; he has argued that courts cannot include values other than economic efficiency in antitrust analysis without engaging in a task that is so unconfinedly legislative as to be unconstitutional.<sup>27</sup>

But **Judge Bork**'s approach is, at best, no easier to administer and no more clear or predictable than a price to consumers (or wealth-transfer) approach. Under both, the required quantities -- a prediction of market power and efficiencies -- are identical.<sup>28</sup>

Consider two differences that would arise if a new set of federal antitrust enforcers attempted to use an unconstitutional antitrust law to prevent consumers from being forced to pay monopoly prices.<sup>29</sup> Both would lead to significantly more aggressive antitrust enforcement. The major change from the existing approach to merger enforcement would be the undramatic lowering of the Department of Justice Merger Guidelines' numerical threshold levels.<sup>30</sup> Since the wealth-transfer approach would factor in not only the inefficiencies resulting from higher prices but also the extraction of wealth from consumers, the anti-merger rules that would emerge would be tougher.

More dramatically, consider a merger that produced an efficient monopolist that would raise prices significantly. **Judge Bork** would ask only whether the merger produced more efficiencies than inefficiencies. If so, he would approve the merger despite the fact that all of the efficiency savings from the merger would accrue to the monopolist while consumers would have to pay significantly higher prices for fewer goods.<sup>31</sup> By contrast, an unconstitutional merger policy truly based upon congressional intent would block such mergers.

A wealth transfer or price to consumer approach to merger enforcement would ask a different question: Is the merger likely to lead to significantly higher prices for consumers? If the answer is yes the merger would be blocked, with full knowledge that so doing would prevent the formation of an efficient monopoly. This is because Congress cared more about protecting consumers from monopoly extortion than obtaining the benefits of allowing efficient monopolies.

DOES IT REALLY matter that **Judge Bork** was so wrong about congressional intent? That he read so many pages of the legislative record and did not find any of the evidence contrary to his preferred views? That he equated the welfare of

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purchasers with the welfare of cartels? That he defined consumer welfare in a way that permits consumers to pay higher prices to monopolists, and stated that views challenging his own are unconstitutional?

It does, for two reasons. The less important is that his incorrect views of the congressional intent behind the antitrust laws leads to many incorrect antitrust policy conclusions and judicial decisions.<sup>32</sup>

More important, *Judge Bork*'s antitrust record portends that as a Supreme Court justice he is unlikely to be a true strict constructionist. Moderates and liberals may have little to fear from a true strict constructionist since such a justice would impartially implement Congress' original intent. *Judge Bork*, however, saves his narrow view of a *judge*'s role for instances when this posture is consistent with his preferred ends. In other cases, he finds a way to reach the result demanded by his ideology and denounces contrary conclusions as unconstitutional.

One can usefully debate the extent to which a Supreme Court justice should be a strict constructionist. However, both sides in the confirmation battle should know whether a candidate's record is consistent with strict constructionism or with judicial activism. *Judge Bork*'s antitrust record indicates he is likely to be a judicial activist for his conservative agenda, and not a consistent strict constructionist.

1. R. *Bork*, *The Antitrust Paradox* (1978), at 50.
2. See e.g., Blake & Jones, *In Defense of Antitrust*, 65 *Colum. L. Rev.* 377, 377-82 (1965).
3. See e.g., Michael Pertschuk, chairman, Federal Trade Commission, Remarks before the Eleventh New England Antitrust Conference. Boston, Mass., 10 (Nov. 18, 1977).
4. R. *Bork*, *Legislative Intent and the Policy of the Sherman Act*, 9 *J. L. & Econ.* 7 (1966).
5. For example. R. Posner, *Antitrust Law: An Economic Perspective* (1978), at 23, merely cites *Judge Bork* for the argument that Congress intended that only economic efficiency play a role in antitrust. For other examples see R. *Lande*, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*. 34 *Hastings L.J.* 65 (1982), at 67-69. Much of the analysis in this Podium piece was taken from this work.
6. *Bork*, supra note 1, at 91.
7. *Bork*, supra note 4, at 10.
8. *Bork*, supra note 1, at 111.
9. *Bork*, supra note 4, passim. For example, Senator Sherman asked that Congress protect the public from trusts that restrain commerce, turn it from its natural course, increase the price of articles, and therefore diminish the amount of commerce. 21 *Cong. Rec.* 2462 (1890). Senator Sherman also complained that when a trust embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced. *Id.* at 2457.
10. To raise prices, a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This foregone production of goods worth more than their cost is pure social loss and constitutes the allocative inefficiency of monopoly. For example, suppose that widgets cost \$2 in a competitive market (their cost of production plus a normal profit). Suppose a monopolist would sell them for \$2. A potential purchaser who would have been willing to pay up to \$1.50 will not purchase at the \$2 level. Since a competitive market would have sold him widgets for less than they were worth to him, the monopolist's reduced production has decreased the consumer's satisfaction without producing any countervailing benefits for anyone. This pure loss is termed allocative inefficiency. For an extended discussion and formal proof that monopoly pricing creates allocative inefficiency, see E. Mansfield, *Microeconomics: Theory and Applications* (4th ed. 1982), at 277-92.
11. *Bork*, supra note 4, at 26-31.

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12. ***Bork***, supra note 3, at 91.
13. R. Posner, supra note 5.
14. For example, the administration's first assistant attorney general for antitrust, William Baxter, was succinct and clear. The sole goal of antitrust is economic efficiency. Taylor, A Talk With Antitrust Chief William Baxter, *Walt St. J.*, Mar. 4, 1982, at 28, col. 3. This view also was embraced by James C. Miller III, Reagan's first chairman of the Federal Trade Commission. See the account of *In re Allied*, File No. 811-0191, in *FTC: WATCH*. Jan. 14, 1983, at 1-5.
15. Scherer. *The Posnerian Harvest: Separating Wheat from Chaff*, 86 *Yale L.J.* 974, 977 n.20 (1977).
16. Stigler, *The Economists and the Problem of Monopoly*, 72 *Am. Econ. Rev.* 1, at 3 (1982).
17. 21 *Cong. Rec.* 2461 (1890).
18. *Id.* at 2614.
19. *Id.* at 4101.
20. *Id.* at 4098.
21. *Id.* at 4103 (Representative Fithian was reading, with apparent approval, a letter from a constituent).
22. 21 *Cong. Rec.* 2728 (1890).
23. *Id.* at 1765. Senator George continued: Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States[they] have extorted their ill-gotten gains from the poor and then used the money thus obtained to complete the ruin of the people. *Id.* Senator George complained that consumers were being robbed. *Id.* at 3150. He also complained that the trusts were able to fleece and rob the people. *Id.*
24. ***Judge Bork*** did not invent the term, but chose it from the available options.
25. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), quoted ***Judge Bork*** for the conclusion that the 1890 debates suggest that Congress designed the Sherman Act as a consumer welfare prescription. As the court's subsequent discussion makes clear, however, it almost certainly did so without knowledge that, as ***Judge Bork*** defines it, the term means only economic efficiency, not the well-being of consumers. In fact, the court implied that the antitrust laws contain a strong preference for protecting consumers from monopoly extortion: It is the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system...Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her property. [The treble-damages remedy was passed] as a means of protecting consumers from overcharges resulting from price fixing. *Id.* at 339-43.
26. Consider the plight of an honest, aggressive business operating under a big is bad, small is good antitrust regime. What mergers can it lawfully undertake? What vertical restraints or pricing decisions can it implement? Most important, what are the rules under which we ***judge*** its conduct? An efficiency approach carried out through rules, such as clearly designed merger guidelines (but not the ad hoc, case-by-case analysis conducted within the Reagan administration) would indeed be more workable than a big is bad, small is good approach.
27. R. ***Bork***, *The Role of the Courts in Applying Economics*, 54 *Antitrust L.J.* 21, 24 (1985).
28. The price to consumers standard actually requires somewhat less information and is somewhat more workable. See, A. Fisher, F. Johnson & R. ***Lande***, *Mergers, Market Power and Property Rights: When Will Efficiencies Prevent Price Increases?* FTC Working Paper No. 130 (1985).

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29. For a more complete survey of these differences see Sims & *Lande*, The End of Antitrust -- or a New Beginning? 31 Antitrust Bull. 301 (1986).

30. Antitrust Division, U.S. Department of Justice, Merger Guidelines, 49 Fed Reg. 26,823 (June 29, 1984). *Judge Bork* believes that mergers should be evaluated solely in terms of their efficiency effects. He would evaluate mergers that gave rise to both allocative inefficiency (from higher prices) and productive efficiency gains (from, for example, economics of scale) by setting the guidelines' thresholds high enough to allow most productive efficiency gains and prevent most allocative inefficiency losses. R. *Bork*, supra note 1, at 221-22. The wealth-transfer effects of mergers are always large in comparison to the accompanying allocative inefficiency effects -- usually at least twice as large. Incorporation of Congress' intent to prevent these transfers would produce significantly lower merger guidelines than would *Judge Bork*'s economic efficiency approach. See, Fisher & *Lande*, Efficiency Considerations in Merger Enforcement, 71 Calif. L. Rev. 1580, 1644-50 (1983).

31. It is difficult to imagine a federal antitrust enforcement official honestly implementing *Judge Bork*'s approach. Imagine the reaction in Congress if the head of the Antitrust Division announced that he was not challenging a merger that would lead to significantly higher prices to consumers because the resulting monopolist would be efficient.

32. Since *Judge Bork*'s appointment to the D.C. Circuit, he has authored only a few antitrust opinions. Of these, only *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (1986) discussed Congress' original intent in passing the antitrust laws. *Judge Bork*'s opinion noted that the court termed the antitrust laws a consumer welfare prescription. *Id.* at 228. *Judge* Patricia M. Wald's concurring opinion went to the heart of *Judge Bork*'s disingenuousness: [E]ven if one thinks the court intended to exclude all other considerations, the phrase consumer welfare surely includes far more than simple economic efficiency. *Id.* at 231, n.3.

## Classification

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