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An Introduction to Bork (1966)

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The Sherman Antitrust Act of 1890, the cornerstone of the U.S. antitrust regime, broadly prohibits contacts, combinations, and conspiracies in “restraint of trade” and makes it unlawful “to monopolize” any line of commerce.¹ The open-textured nature of the Act—not unlike a general principle of common law—vests the judiciary with considerable responsibility for interpretation, the discharge of which requires it to choose among competing values. In this important article,² then-Professor Robert H. Bork examined the legislative history of the Sherman Act in search of the U.S. Congress’s intent in passing it and, therefore, the policies the judiciary should follow when deciding cases under the Act. Bork was candid about the “difficulties inherent in the very concept” of legislative intent and cautioned against viewing his work “as an attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act.”³ Nevertheless, he thought the undertaking justified by the need to counter the judiciary’s repeated invocation of values that were unrelated to the debate that had informed congressional enactment of the Sherman

1 See 15 U.S.C. §§ 1 and 2.

2 The article was originally published in the *Journal of Law & Economics*. See R.H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) reprinted in this issue as 2(1) COMPETITION POL’Y INT’L 233-278 (2006). Hereinafter, where the Bork article is cited, the first set of page citations refer to pages in Bork’s original article and the second set in parentheses refer to pages in the reprint.

3 Bork, *supra* note 2, at 7 n.1 (at 233 n.1). Bork’s caveat is an important one. After all, “[i]t is the law that governs, not the intent of the lawgiver.” A. SCALIA, A MATTER OF INTERPRETATION 17 (1997).

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Act and, lacking any legitimate economic rationale, were likely to produce real economic harm.

For example, the Supreme Court of the United States in *Fashion Originators' Guild of America v. FTC* counted protection of “the freedom of action of [Guild] members [not] to reveal to the Guild the intimate details of their individual affairs” among the policies underlying the Sherman Act.⁴ Indeed, no lesser light than Judge Learned Hand had asserted that the Congress intended the Sherman Act to achieve certain socio-political aims, such as minimizing the “helplessness of the individual”⁵ and ensuring the “organization of industry in small units.”⁶ Obviously such policies are highly malleable. They can be invoked (or not) to justify almost any result in any situation. Indeed, as Bork pointed out, Judge Hand went so far as to state that in enacting the Sherman Act, the Congress had “delegated to the courts the duty of fixing the standard in each case.”⁷

Bork's examination of the text and structure of the Sherman Act against the background of preliminary proposals and draft legislation, statements by senators and representatives, and contemporaneous understandings of constitutional and common law led him to conclude: “The legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare.”⁸ By “consumer welfare” Bork meant “the maximization of wealth or consumer want satisfaction,”⁹ known today as allocative efficiency, a concept he thought the framers of the Sherman Act clearly grasped even though they did not “speak of consumer welfare with the precision of a modern economist.”¹⁰ Bork also explained that maximization of consumer welfare is the common denominator underlying the central prohibitions of the Act, that is, the condemnation of cartel agreements, monopolistic mergers, and predatory business tactics.¹¹ He explained that legislators used the term “monopolize” to refer only to those three prohibited activities, as opposed to a “monop-

4 312 U.S. 457, 465 (1941).

5 *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945).

6 *Id.* at 429.

7 *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

8 Bork, *supra* note 2, at 10 (at 236).

9 *Id.* at 1 (at 234).

10 *Id.* at 10 (at 236).

11 *Id.* at 11-12, 21-26 (at 237-39, 248-53).

oly,” which might arise from superior efficiency.¹² According to Bork, “Only a consumer-welfare value which, in cases of conflict, sweeps all other values before it can account for Congress’ willingness to permit efficiency-based monopoly.”¹³

When Bork’s article was first published in 1966, his thesis was novel. By 1977, it had become the conventional wisdom of the federal courts. That year the U.S. Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹⁴ repudiated the position it had taken only ten years before in *United States v. Arnold, Schwinn & Co.* In the earlier case, the Court had held that a non-price vertical restraint imposed by a manufacturer on a distributor after “title, dominion, or risk” had passed was a per se violation of the Sherman Act,¹⁵ that is, regardless of its actual—and possibly efficient—economic effect.

In *GTE Sylvania Inc.*,¹⁶ a retailer of televisions claimed a manufacturer’s limitation on the locations at which the retailer could sell its televisions was a per se violation of the Sherman Act. The U.S. Court of Appeals for the Ninth Circuit, after rehearing the case en banc, had recognized that—as the Supreme Court later put it—the condemnation of “Schwinn [was] clearly broad enough to apply” to the facts of the case.¹⁷ Nonetheless, the Ninth Circuit concluded *Schwinn* was not controlling, applied the rule of reason, and endorsed the manufacturer’s position that such arrangements “may in some instances promote, rather than impede, competition” and, in turn, allocative efficiency.¹⁸ More to the present point, the Ninth Circuit expressly adopted Bork’s thesis and rejected the multiplicity of “values” that the Supreme Court for decades had been reading into the Sherman Act:

“Since the legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare, we decline blindly to condemn a business practice as illegal per se because it imposes a partial, though perhaps reason-

12 *Id.* at 12, 26-31 (at 238-39, 254-59).

13 *Id.* at 12 (at 238).

14 433 U.S. 36 (1977).

15 388 U.S. 365, 379 (1967).

16 433 U.S. 36 (1977).

17 *Id.* at 46.

18 *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 1000 (9th Cir. 1976) (en banc).

able, limitation on intrabrand competition, when there is a significant possibility that its overall effect is to promote competition between brands.”¹⁹

Two dissenters remained of the view that the legislative history of the Sherman Act “reflect[s] a concern not only with the consumer interest in price, quality, and quantity of goods and services, but also with society’s interest in the protection of the independent businessman, for reasons of social and political as well as economic policy.”²⁰

The Supreme Court affirmed the Ninth Circuit, holding that “[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive,”²¹ and stating, “[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.”²² In emphasizing allocative efficiency over other values, the Supreme Court implicitly endorsed Bork’s thesis. Indeed, in his concurring opinion, Justice White attributed to the Court the view that the Sherman Act is “directed solely to economic efficiency,” citing Bork’s article as the source of that position.²³

The significance of the Court’s new, Borkian position should not be underestimated. As Professor Timothy Muris has said, “the opinion was a ringing endorsement of the economic approach to antitrust law.”²⁴

Two years later, in *Reiter v. Sonotone Corp.*,²⁵ the Supreme Court considered a class action brought under the Clayton Antitrust Act of 1914 by plaintiffs who had purchased hearing aids from a manufacturer they alleged had fixed prices with its rivals and its retailers. Relying this time expressly on Bork’s appraisal of the legislative history of the Sherman Act as the “predecessor” of the Clayton Act, the Court concluded the latter Act, in providing a remedy to anyone

19 *Id.* at 1003 (footnote omitted). See *id.* at n.39 (“A study of the legislative history of the Sherman Act ‘establish[es] conclusively that the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies’”) (quoting Bork, *supra* note 2, at 11 (at 237)).

20 GTE Sylvania Inc., 537 F.2d at 1019 (Browning, J., joined by Wright, J., dissenting).

21 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977).

22 *Id.* at 54.

23 *Id.* at 69 (White, J., concurring) (citing Bork, *supra* note 2, at 7 (at 233)).

24 T.J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 900 (2001).

25 442 U.S. 329 (1979).

injured in his “business or property,” covered “pecuniary injuries suffered by those who purchase goods and services at retail for personal use.”²⁶ Quoting Bork’s 1978 book, *The Antitrust Paradox*, in which a version of his article appears as a chapter, the Court declared that the legislative history “suggest[s] that Congress designed the Sherman Act as a ‘consumer welfare prescription.’”²⁷

In *NCAA v. Board of Regents of University of Okalahoma*,²⁸ the Court had further occasion to embrace the consumer welfare thesis when it determined the National Collegiate Athletic Association’s limitation on the number of televised intercollegiate football games and its fixed-price, exclusive agreements with certain broadcasters violated the Sherman Act. Although the Court noted the arrangement adversely affected competitors’ “freedom to compete,” it ultimately based its decision squarely on allocative efficiency:

“Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This . . . point is perhaps the most significant, since Congress designed the Sherman Act as a consumer welfare prescription. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”²⁹

Thus, by the mid-1980s, Bork’s thesis had undeniably changed the Supreme Court’s most fundamental understanding of the Sherman Act.

Academics began seriously to challenge Bork only after the Supreme Court had adopted his reading of the legislative history in *Reiter*. From the more than a dozen articles critical of the consumer welfare thesis, there emerge two distinct alternative theories of congressional intent. One, advanced by Professor Robert H. Lande, is that the Congress’s chief objective in the Sherman Act was the prevention of “wealth transfers” from consumers to business trusts, forerunners of the large corporations of today.³⁰ Though he agrees with Bork that some legisla-

26 *Id.* at 343.

27 *Id.* (quoting R.H. BORK, *ANTITRUST PARADOX* 66 (1978)).

28 468 U.S. 85 (1984).

29 *Id.* at 107-08 (footnotes, citations, and quotation marks omitted).

30 See R.H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Economic Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65 (1982).

tors were concerned with allocative efficiency, Lande maintains that a number of them believed large trusts were generally more efficient than small- and medium-sized businesses. Because the Sherman Act is an “anti-trust” measure, Lande concludes allocative efficiency could not have been the sole value underlying the statute. Instead, he argues the Act was intended to curb the market power of large producers in order to prevent their “extract[ing] wealth from consumers.”³¹

Professor Herbert Hovenkamp, although he believes Lande’s case is stronger than Bork’s,³² contends the primary purpose of the Sherman Act was the protection of small business, not of consumers. The legislative history of the Sherman Act and attendant political circumstances, he believes, “suggest that the interest groups that communicated their concerns to Congress most effectively were small producers.”³³ Hovenkamp concludes that the Congress acted neither solely on the basis of efficiency nor only in order to benefit consumers, but rather primarily to avert “various kinds of injury to competitors . . . flow[ing] mainly from the lower costs of more efficient rivals.”³⁴

The challenges to Bork’s thesis lodged by Lande and Hovenkamp are representative of the academy as a whole. One commentator goes so far as to claim that Bork’s interpretation “has been almost universally rejected by antitrust scholars.”³⁵ Yet the academy has failed to persuade the judiciary, and Bork’s consumer welfare thesis has become one of his many enduring contributions to U.S. antitrust law.

Regardless whether Bork’s assessment of the legislative history of the Sherman Act is correct, the Supreme Court’s endorsement of allocative efficiency as the fundamental value underlying the antitrust laws has had important consequences. First, as a matter of administrability, the consumer welfare thesis has substantially ameliorated the practical problem of having courts choose among multiple, incommensurable, and often conflicting values. Even one of Bork’s sharpest critics agrees. Professor Christopher Grandy, who concludes “the legislative history of the Sherman Act fails to support the consumer-welfare hypothesis,” nevertheless acknowledges that Bork’s thesis “provides a clear and cogent set

31 *Id.* at 93.

32 See H. Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 24 (1989).

33 *Id.*

34 P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW* ¶ 101, at 11 (2d ed. 2000).

35 P.J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 905 n.150 (2000).

of rules that courts can apply in antitrust cases, and no other view of antitrust accomplishes that task as well.”³⁶

Second, judicial adoption of Bork’s thesis has nearly put an end to the efforts of counsel and the propensity of lower courts to manipulate outcomes by invoking highly plastic, subjective values of the sort instanced by Judge Hand. Third, by applying a single standard rooted in economic analysis, court decisions have become less arbitrary and more predictable. No longer must businesses make decisions without knowing the standard by which their actions, if challenged by the courts, will later be judged. Finally, judicial endorsement of the consumer welfare thesis has no doubt lead to a more efficient allocation of scarce resources, thereby increasing the wealth of the nation. Had Bork not written the following article, these salutary developments might still be in the offing. ▼

36 C. Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993).