Robert Bork: Intellectual Leader of the Legal Right

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There were two important movements in conservative and libertarian legal thought in the latter part of the twentieth century. One was law and economics. The other was originalism. Judge Robert Bork was unique in being at the intellectual center of both of them. In law and economics, he applied economic analysis in book-length form to antitrust law, showing how the simple insights of price theory could generate a fully coherent body of legal doctrine.[1] In constitutional theory, he made a crucial first step toward originalism by arguing that neutral principles must be derived neutrally and thus from the text of the Constitution.[2] As a result of these distinct enterprises, he was the most important legal scholar on the right in the last fifty years.

These contributions were of substantially different kinds. In antitrust, he mapped an entire field. In constitutional law, he discovered or rediscovered a methodology but left it to others to reticulate and refine his insight. While some have suggested that his claim to being a great scholar rests only on his contribution to antitrust,[3] this assessment is mistaken. The pathfinder can be as great as even the most expert surveyor.[4] Both are crucial to the progress of any discipline.

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1 See, for example, Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 116–33 (Basic Books 1978).

2 See, for example, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 7–8 (1971).

3 See, for example, Akhil Reed Amar, *Remembering Bork: He Was My Teacher 30 Years Ago. I've Spent My Career Proving Him Wrong.*, Slate (Dec 20, 2012), online at http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/robert_bork_s_death_learning_from_him_and_proving_him_wrong.html (visited Oct 17, 2013).

4 My friend and coauthor Professor Michael Rappaport similarly identifies him as a pathbreaker. See Mike Rappaport, *Judge Robert Bork: Pathbreaker*, Liberty Law Blog (Library of Law and Liberty Dec 23, 2012), online at http://www.libertylawsite.org/2012/12/23/judge-robert-bork-pathbreaker (visited Oct 24, 2013).

Because his career of public controversy centered on constitutional law, Bork's obituaries did not much emphasize his law and economics work. The *New York Times* devoted only a paragraph to his antitrust contributions, ending it dismissively with the comment that "[s]tudents called a course he taught on the topic at Yale 'protrust.'"[5] But Bork was the most important figure in antitrust law in his time. His book, *The Antitrust Paradox*,[6] was an enormous milestone not only in antitrust but in law and economics generally.

To be sure, Bork was not the originator of the law-and-economics analysis of antitrust law. That analysis had begun in a course at the University of Chicago, where the economist Aaron Director argued with law professor Edward Levi. Although Director led only every fifth class, he persuaded Bork the student of the virtues of his approach not only in antitrust, but in social policy more generally. Director, recalled Bork, "destroyed my dreams of socialism with price theory."[7]

But Bork took these economic ideas and married them to a lawyer's gimlet eye for dissecting case law to produce a book that offered a devastating critique of decades of Supreme Court decisions. He discussed all the important areas of antitrust—monopoly, mergers, horizontal agreements, and vertical agreements. In each area he explained in clear language how simple economic analysis could transform antitrust law, improving the welfare of consumers.

He had a descriptive flair that could capture the attention even of the lawyer unschooled in the dismal science. In *Fortner Enterprises, Inc v United States Steel Corp*,[8] the real estate developer Fortner had a dispute with United States Steel Company, which had loaned Fortner money to buy land on the condition that Fortner purchase and erect upon the land prefabricated houses built by United States Steel.[9] Fortner sued, alleging that United States Steel had illegally tied its loans to the sale of its houses.[10] But, as Bork later pointed out, this claim was backwards, since United States Steel was trying to sell

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5 Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, NY Times A1 (Dec 20, 2012).

6 Bork, *The Antitrust Paradox* (cited in note 1).

7 Douglas Martin, *Aaron Director, Economist, Dies at 102*, NY Times B10 (Sept 16, 2004).

8 394 US 495 (1969).

9 Id at 496–97.

10 Id.

houses and offering very good terms to achieve this goal.[11] But the Supreme Court nevertheless said that United States Steel had "a unique economic ability to provide 100% financing at cheap rates," entitling Fortner to a jury trial on whether the houses were illegally tied to financing.[12] Bork summed up: "The effective holding of the case is that Fortner was getting credit terms more favorable than he could get elsewhere and was entitled to prove it in order to recover triple damages."[13] A sentence of quotable ridicule is worth a page of economic models in transforming the law.

And change the antitrust law he did, so much so that now it very largely resembles the recommendations and analysis Bork sets out in *The Antitrust Paradox*. To take just a few examples: After his criticism of *United States v Topco Associates*,[14] the Court now considers productive efficiencies even in the context of horizontal agreements among competitors.[15] After his evisceration of many merger cases brought by the government, the Justice Department and FTC revised guidelines attempting to assess the costs and benefits of mergers in a more economically sophisticated fashion.[16] And finally, in *Leegin Creative Leather Products, Inc v PSKS, Inc*,[17] the Court, citing Bork multiple times,[18] ended its per se prohibition on retail price maintenance, a doctrine that had stood for almost a hundred years.[19] Manufacturers are now permitted to strike price agreements with distributors, allowing them to find a structure of distribution for delivering their product with the lowest possible cost. In the absence of market power, the manufacturer in this respect is now rightly regarded as the customer's BFF.

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11 See Bork, *The Antitrust Paradox* at 368–69 (cited in note 1).

12 *Fortner Enterprises*, 394 US at 505–06.

13 Bork, *The Antitrust Paradox* at 369 (cited in note 1).

14 405 US 596 (1972).

15 See, for example, *Broadcast Music, Inc v Columbia Broadcasting System, Inc*, 441 US 1, 19–21 (1979).

16 The key change came in the 1984 guidelines. See generally US Department of Justice, *1984 Merger Guidelines* (1984), online at http://www.justice.gov/atr/hmerger/11249.htm (visited Oct 26, 2013). The guidelines have since been revised, but they are largely continuous with the 1984 guidelines. See generally US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (Aug 19, 2010), online at http://ftc.gov/os/2010/08/100819hmg.pdf (visited Oct 26, 2013).

17 551 US 877 (2007).

18 See id at 889, 897.

19 While the per se rule on vertical agreements had been weakened, the rule against price maintenance announced in *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373 (1911), had held sway since 1911.

Disagreement on particular antitrust cases, of course, continues, but the disagreements take place in the legal landscape that was in large measure created by *The Antitrust Paradox*. I would analogize Judge Bork here to the most successful kind of statesman—one who, like Margaret Thatcher, transforms the opposition by creating new terms of debate.

Bork is, of course, even more famous for originalism. Here he did not provide a comprehensive reordering of his field, but he nevertheless created a historic inflection point for constitutional interpretation in a single famous article, *Neutral Principles and Some First Amendment Problems*.[20] He did so by offering a new solution to some of the principal old problems that scholars were confronting at the time. High on that list of such issues were the countermajoritarian difficulty and "neutral principles."[21] The countermajoritarian difficulty is raised when the unelected Supreme Court invalidates legislation that is enacted by a contemporary majority.[22] Deciding cases according to neutral principles is what constrains the judge from rendering judgments based on his or her own preferences.[23]

For Bork, the solution to these problems was interconnected. While he agreed that most decisions were left to popular majorities, he acknowledged that minority rights were to be protected as well. But neither the minority nor majority could be entrusted with determining the appropriate boundaries of the other's rights, because each has an incentive to set them in its own interest.[24] Thus, only something extrinsic to their will—the text of the Constitution—could generate the proper guideposts. Similarly, neutral principles by themselves are not sufficient to constrain judicial discretion, because judges would still have discretion to decide which principles to follow. The neutral principles had to be neutrally derived, and that also pointed to deriving the principles from the text of the Constitution.[25]

Bork's excursion as a scholarly pioneer in this field was brief and necessarily left many issues unanswered. Indeed, while it is clear that he was speaking of the historical understanding of the

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20 Bork, 47 Ind L J 1 (cited in note 2).

21 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 19 (1959).

22 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (Bobbs-Merrill 1962).

23 See Bork, 47 Ind L J at 7–8 (cited in note 2).

24 See id at 3.

25 See id at 7.

constitutional text, he never even used the term "originalism" in this famous article. Even subsequently, he did not provide substantial scholarship on important questions of methodology—like whether originalism is best understood through original intent or original public meaning—or describe in substantial detail the proper relation between originalism and precedent. Many others have provided justifications for originalism that may prove more compelling than his and less connected to the peculiar constitutional problems that dominated his day.[26]

But further articulation and disagreement are the fruits of scholarly success, not evidence of inadequacy. Bork opened up a new world, or at least rediscovered an old one. Those who came afterwards naturally created new maps, filling in important details of the terrain and not infrequently disagreeing with the boundaries he drew. But the scholarship attendant on any idea is necessarily fractal in nature. Making a better map always leaves room for better maps to come.

A measure of the importance of his contribution is to consider conservatism in constitutional law before and after his salient contribution. Before Bork, the quintessential conservative was Justice John Marshall Harlan II.[27] His views on constitutional law certainly differed from those of his colleagues on the Warren Court, but his jurisprudence was not founded on wholly different principles. For instance, in *Griswold v Connecticut*,[28] he concurred in the invalidation of the Connecticut law,[29] joining in substantive due process and embracing an expansive role for the Court in overturning legislation without explaining how this

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[26] The justifications offered for following the original meaning are now quite varied. Professor Randy Barnett argues that original meaning is likely to lead to just results as defined in the classical liberal tradition. See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 100–09 (Princeton 2004). Professor Keith Whittington argues that originalism is justified by an appeal to the sovereignty of the people in creating the Constitution. See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 152–59 (Kansas 1999). Michael Rappaport and I argue that originalism is justified because strict supermajoritarian rules embodied in the making and amending of our Constitution are likely to lead to good results and more likely to do so than other methods of constitution making. See John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* 1–3 (Harvard 2013).

[27] See Jeff Brown, *The Platonic Guardian and the Lawyer's Judge: Contrasting the Judicial Philosophies of Earl Warren and John M. Harlan*, 44 Houston L Rev 253, 282–83 (2007).

[28] 381 US 479 (1965).

[29] Id at 499–502 (Harlan concurring).

was justified by the text of the Constitution.[30] To be sure, he was far more cautious than the majority opinion in his analysis,[31] and suggested that the right to contraception does not extend outside marriage.[32] But this opinion cannot be considered originalist, in that it does not seek to locate its rules of decision in the most plausible reading of the text of the Constitution. As a result, it may be said that, before Bork, conservative thought lacked a clear method of interpretation. As such, it tended to fight at best a rearguard action against progressive legal thought, criticizing progressive decisions but retreating under the advance of the precedents that progressives created.

But originalism provided resources for an offensive strategy. For instance, it is not that there is unanimity on such questions of whether the Constitution includes the right to contraception, but there is very substantial agreement that any right to contraception must be encompassed within the original meaning of some portion of the Constitution's text. There is also an insistence that precedent, however powerful (and originalists do not yet agree on its weight in adjudication), does not have the generative and regenerative force of text. Thus, Bork began a root-and-branch rejection of living constitutionalism. Originalism was a methodology to stop the process of constitutional change outside the confines of the amendment process. That is a move of historic significance.

It is not possible to completely separate Bork the scholar from Bork the Supreme Court nominee whose confirmation the Senate blocked. But even if that story had an unhappy ending for the judge and for many others, it tells us something wonderful about great scholarship. His ideas could not be defeated by a Senate vote.

Antitrust law now goes by *his* book. While not yet triumphant, originalism is also on the march. In *District of Columbia v Heller*,[33] the Court extensively inquired into the historical meaning of the Second Amendment to hold that possessing a

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30 See Robin West, *Reconstructing Liberty*, 59 Tenn L Rev 441, 442–44 (1992).

31 See *Griswold*, 381 US at 499–500 (Harlan concurring).

32 See id at 500 (Harlan concurring), citing *Poe v Ullman*, 367 US 497, 553 (1961):

> It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

33 554 US 570 (2008).

handgun in the home was a constitutional right.[34] A measure of the increasing prevalence of originalism was Justice Stevens's dissent. He disagreed on the history, but accepted the originalist methodology.[35] Law is about reasons, and Bork very substantially contributed to the reasons that justices can give in their opinions.

Heller is by no means unique. In the recent case on the constitutionality of the Patient Protection and Affordable Care Act,[36] the five members of the Court who held that the Commerce Clause did not permit Congress to mandate the purchase of health insurance relied on a careful reading of the text in its historical context to conclude that the authority to regulate commerce could not be understood as the authority to bring commerce into being.[37] And not all of these decisions are politically conservative. For instance, in a series of decisions, the Court, led by Justice Antonin Scalia, has enforced the Confrontation Clause[38] of the Constitution to give criminal defendants broad rights to cross-examine witnesses.[39] Two justices on the Court, Scalia and Clarence Thomas, are self-proclaimed originalists.[40]

In the academy, originalism is also undergoing a revival. Originalism may be the most discussed idea in constitutional theory. And the discussion does not stop at the theoretical level. Many leading law reviews publish thoroughly researched historical analyses of specific provisions of the Constitution.[41] This then becomes a transmission belt for moving the law toward the original meaning of the Constitution. *Heller* is again a salient example: the path to the decision was paved by an enormous amount of scholarship from academics of both the left and right

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34 See id at 592–95, 598–626.

35 See id at 640 (Stevens dissenting).

36 Pub L No 111-148, 124 Stat 119 (2010).

37 See *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2585–91 (2012) (Roberts). See also id at 2643–44 (Scalia, Kennedy, Thomas, and Alito dissenting).

38 US Const Amend VI.

39 See, for example, *Crawford v Washington*, 541 US 36, 68 (2004).

40 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849, 862 (1989); Clarence Thomas, *How to Read the Constitution*, Wall Street Journal A19 (Oct 20, 2008).

41 See, for example, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782, 783–85 (1995); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547, 552–56 (1999); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U Chi L Rev 101, 104–05 (2001).

that argued that the original meaning of the amendment included an individual right to bear arms. Such scholarship and cases like *Crawford v Washington*[42] show that while originalism was initially embraced by the right as a principle of decision to resist living constitutionalism that tended to the left-liberalism, its power is such that it now enjoys a measure of cross-ideological appeal.

Thus, while Judge Bork never became Justice Bork, his ideas still move the world, including the justices actually on the Court. That's the essence of ideas. They can go around political barriers. They can be like a torrent of water that bears all before it. They can also seep more slowly into society, mixing with a substratum of ideas, like the rule of law already in the political soil, and forever changing it.

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[42] 541 US 36 (2004).