

REVIEW

The Antitrust Paradox: A Policy at War with Itself. ROBERT H. BORK. Basic Books, Inc., New York, 1978. Pp. xi, 462. \$15.00

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As antitrust specialists would expect, Robert Bork's book *The Antitrust Paradox*¹ is an important contribution to the antitrust dialogue. It draws on his scholarly contributions to antitrust law and economics over the past decade and extends his approach to the study of antitrust issues to new areas. As with Bork's earlier work, this book will doubtlessly generate controversy.

The book is organized in three parts. Part One is theoretical, setting out the legislative background and the basic consumer welfare model. Part Two, which deals with applications, is the core of the book. Bork successively applies the consumer welfare model and related economic reasoning to mergers (horizontal, vertical, and conglomerate), vertical market restrictions (including price fixing, exclusive dealing, and territorial restraints), and predatory behavior (including the setting of prices, distribution practices, and litigation). Part Three is a summation in which Bork offers views on how the law ought to be enforced and remarks on incentives that encourage enforcement agencies to extend, or attempt to extend, the reach of the law in ways that, viewed with detachment, are often unwarranted. Along the way, Bork discusses and criticizes other approaches to the study of antitrust, paying particular attention to the barriers-to-entry approach.

In addition to the book's formal structure, Bork's analysis operates on various conceptual levels, and three types of issues can be distinguished: the statement of the goals of antitrust, the way in which antitrust problems are formulated, and the analysis of the details of specific problems.² Bork's position on the first of these issues is that while there are many worthy social goals, there are also many public policy instruments. Goal achievement is commonly promoted by matching instruments to goals in a discriminating

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¹ R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) [hereinafter cited without cross-reference as BORK].

² It is easy and often good fun to quibble with details. Given Bork's argumentative style, it is difficult to suppress this temptation with respect to the book under review. My intent, however, is to forgo this and focus on the central issues..

way. Bork insists that efficiency is not only an important social goal, but that it is the only goal antitrust is well-suited to promote.³ To burden antitrust with other goals confuses the enforcement process and is counterproductive; the protection of competitors rather than competition easily results.⁴

It is easy to agree that antitrust ought not dissipate its energies in the pursuit of other social goals to which it is only obscurely connected, especially if this impairs the quality of its enforcement relative to the goal of efficiency. But this does not imply that other social goals should be suppressed altogether.⁵ Bork omits the possibility that, although across-the-board attention to other social goals is unwarranted, specific exceptions to this general policy should be admitted. Thus, if other social goals operate intensively in particular circumstances, and if these can be clearly distinguished and easily recognized, antitrust might be used to promote these goals in a discriminating manner.

It is important, however, that these other goals be described with care and the circumstances in which they are held to apply be limited. Too often, other goals are vaguely stated and invoked uncritically, with the result that such goals are not meaningfully promoted by proposals that purport to have beneficial effects of a non-efficiency kind. Protectionism, which is not a valued social outcome, often results. Furthermore, no one claims that efficiency is unimportant. Plainly, then, if efficiency is valued and if efficiency sacrifices are implied by taking one course of action rather than another, failure to recognize and assess efficiency ramifications is undesirable. Bork's analysis thus remains applicable whether nonefficiency goals are assigned a zero weight or if, Bork's arguments to the contrary notwithstanding, nonefficiency values are admitted and tradeoffs—between, say, dispersed economic power and efficiency—are contemplated.

It is Bork's second level of analysis—formulation of antitrust problems—that is the core of his book. Bork's contributions to antitrust law and economics, in the book under review and elsewhere, rely heavily on standard price theory, feature careful reasoning in which the analysis is run to completion, and tend to neglect strategic factors. He takes the position, which I believe to be correct, that antitrust must be more informed by economic analysis if the past mistakes of antitrust enforcement—as illustrated, for example,

³ BORK 79, 81.

⁴ *Id.* at 81-88.

⁵ *See, e.g.,* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 10-13 (1977).

by *United States v. Arnold, Schwinn & Co.*,⁶ and recently rectified by *Continental T.V., Inc. v. GTE Sylvania Inc.*⁷—are to be avoided. Although Bork's use of static economic analysis might be disputed, this is not because his economic reasoning is of a fragmentary kind. To the contrary, having once formulated the analysis in static economic terms, he relentlessly presses the argument to completion. His treatment of predatory pricing is illustrative, where his systematic application of the static model discloses that pricing efforts to destroy rivals lack rationality.⁸ This is a very strong result.

I would caution, however, that static analysis is appropriate only if strategic considerations can be presumed to be absent—where by “strategic” I refer to efforts by established firms to take up or maintain advance positions (for example, through “strategic” investment) or to respond contingently to rivalry in ways designed to discipline existing rivals and/or discourage potential competition (which is the more general formulation of the predatory pricing issue). Inasmuch as special structural preconditions, of an incipient or actual dominant firm kind, usually need to be satisfied before firms have an incentive to behave strategically, Bork's nonstrategic approach applies without qualification to *most business behavior*. It discloses that, except as these structural preconditions are satisfied, reckless claims of “unfair business practices”—predatory behavior, vertical restraints, other exclusionary activities—are typically protectionist.⁹ This is a significant achievement.

Although Bork recognizes that the static model captures only a fraction of reality and that an appreciation for competition as a process is often essential,¹⁰ he nevertheless eschews dealing with strategic issues in strategic terms. Where actual or prospective dominance exists, however, antitrust is poorly served by exclusive reliance on static price theory. Rather, allowance needs to be made in these circumstances for intertemporal incentives and effects.¹¹ “Evolutionary process analysis” is frequently illuminating and sometimes essential when dominant firm conditions come under scrutiny as well.¹²

⁶ 388 U.S. 365 (1967).

⁷ 433 U.S. 36 (1977).

⁸ BORK 144-54.

⁹ *Id.* at 145-59, 291-98, 299-309.

¹⁰ *Id.* at 92.

¹¹ These issues are discussed in Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979).

¹² See Nelson & Winter, *Forces Generating and Limiting Competition Under Schumpeterian Competition*, 9 BELL J. ECON. 524 (1978).

The arguments against Bork's antitrust model are not limited to the static/strategic distinction. Other objections are that Bork gives insufficient attention to "second best" considerations and that he defines entry barriers out of existence. Although there is something to be said for both of these objections, they are not as weighty as many critics believe; with qualifications, Bork's main argument survives both of them.

To claim, as some do,¹³ that the second best literature¹⁴ demonstrates that Bork's partial equilibrium analysis is worthless is to misread seriously the real ramifications of this literature. Admittedly, the strict preconditions of the simple partial equilibrium model are never satisfied. But as Bork points out,¹⁵ this is merely an existence argument; quantitative substantiality is not implied. The message, rather, is that where interaction effects with other sectors in which distortions exist are known to be strong, the simple partial equilibrium framework ought to be extended to make express provision for such interactions. Neither the efficiency criterion nor the partial equilibrium orientation is placed in jeopardy on this account.

Bork's treatment of what are conventionally termed entry barriers¹⁶ is somewhat more problematic. Bork emphasizes that merit outcomes, not structure *per se*, are what matter:¹⁷ the distinction between remediable and irreparable entry impediments is important in this regard. Little useful public policy purpose is served, and a considerable risk of public policy mischief results, when conditions of an irreparable kind are brought under fire. Mistaken treatment of economies of scale illustrate what is at stake. Thus, suppose that economies of scale exist and that the market is of sufficient size to support the larger of two technologies. Since superior outcomes will be attributable to the less efficient technology only under very unusual conditions,¹⁸ net social benefits ought presumably to be attrib-

¹³ See, e.g., Sullivan, Book Review, 75 COLUM. L. REV. 1214, 1219-21 (1975).

¹⁴ See, e.g., Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

¹⁵ BORK 113-14.

¹⁶ In Chapter Sixteen Bork discusses several "claimed entry barriers[:] physical product differentiation, advertising and promotion, capital requirements, and vertical arrangements such as dealerships, leases, and deferred rebates." *Id.* at 311.

¹⁷ The question for antitrust is whether there exist artificial entry barriers. These must be barriers that are not forms of superior efficiency and which yet prevent the forces of the market—entry or the growth of smaller firms already within the industry—from operating to erode market positions not based on efficiency.

Id.

¹⁸ Bork discusses the tradeoffs between efficiency and market power in Chapters Five and Six.

uted to these scale economy conditions. To describe such economies as "barriers to entry," however, does not invite this conclusion; to the contrary, mistaken welfare judgments are encouraged. Many of the enthusiasts of entry-barrier analysis have been reluctant to concede such hazards.

But to demonstrate that conventional entry-barrier arguments sweep too broadly does not establish that this entire tradition should be rejected. The possibilities that *remediable* impediments to entry might arise and that such circumstances are identifiable ought to be considered. Consistent with his neglect of strategic factors, Bork seems unwilling to entertain such possibilities. This unwillingness is due chiefly to his implicit assumption that labor and capital markets operate frictionlessly, so that every market outcome is presumptively a merit outcome¹⁹ and further discussion is pointless. Once transaction costs are admitted, however, the assumption of frictionlessness no longer applies, the possibility of introducing strategic impediments to entry arises, and the main argument needs to be qualified. To be sure, the exceptions may not be numerous and the difficulties of informed or efficacious intervention may be great. Such "defects" might be better tolerated, therefore, rather than made subject to public policy review and attempted rectification. But this is a separate argument. Neither Bork nor others of the anti-entry barrier persuasion have addressed the entry barrier issues on these grounds. Since the frictionlessness assumptions on which Bork implicitly relies are unacceptable to many students of antitrust, continuing dispute over the nature and importance of entry barriers is to be expected.

On the whole, Bork's use of economic reasoning is compelling; he makes a convincing case that economic analysis should play a more central role in antitrust policy formation and enforcement. The core issues with which antitrust must come to terms are the ones that Bork addresses in this book, and his tendency to define antitrust issues narrowly ensures that the dialogue will continue. Whether efficiency is the only legitimate antitrust goal is certain to be disputed by many thoughtful students of antitrust, and even within an efficiency framework, static economic analysis must sometimes give way to intertemporal and process analysis if dominant firm issues are to be addressed in relevant terms. Faced with issues such as these, antitrust can look forward to a lively future,

¹⁹ This assumes that consumers are not egregiously manipulated by selling efforts. Although there are exceptions, for most products this is a reasonable assumption.

in which Professor Bork and this book will doubtlessly play influential parts. *The Antitrust Paradox* is essential reading for antitrust scholars and practitioners alike.

