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Robert Bork said there was an antitrust paradox.¹ Was there a Robert Bork Paradox?

Bork was not a legal formalist. He was not a textualist, and he was an originalist only in a quite limited sense. He was also not himself a paradox. Bork's thinking was systematic and consistent. He believed that principled judging consisted in the identification of values external to the judge and the derivation from those values, which might be quite abstract, of more specific doctrines that would implement them. That process could be creative and would require many judgments, but it must not rest on the judge's own values if it was to be neutral and principled, as to be legitimate it had to be.

Bork was also a leading figure in American law, and here there is a paradox. The thinkers who are most closely identified as his followers are noteworthy for being legal formalists and textualists. They generally do not follow Bork by thinking of law as consisting fundamentally of basic values from which specific conclusions can be deduced or derived.

This Essay will describe the basic structure of Bork's thinking, briefly discuss its intellectual origins and affinities, and then pose and address the paradox that his followers differ from him on seemingly basic issues.

In *Neutral Principles and Some First Amendment Problems*,² Bork proposed a free speech doctrine that, he acknowledged, was far from the Supreme Court's: only political speech should be protected, and even such speech should not be protected if it advocates violent overthrow of the government or

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This essay deals with the substance of Judge Bork's thought, and not with the Judge as an individual. By being about ideas, it is an instance of the principle that imitation is the sincerest form of flattery. As to Robert Bork himself, having already likened him to Socrates, Newton, and Gauss in this *Journal*, see John Harrison, *On The Hypotheses That Lie At the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL'Y 473 (2008), I could only repeat myself.

1. ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

2. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

the violation of any law.³ He did not rest that proposal on any strong claim about the text. After observing that the First Amendment need not be an absolute because "'freedom of speech' may very well be a term referring to a defined or assumed scope of liberty," Bork quickly turned from text to history.⁴ He then just as immediately turned away from history, after a single paragraph setting out the claim that "the framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."⁵ Having dealt with text and history in just over a page, he concluded, "We are, then, forced to construct our own theory of the constitutional protection of speech."⁶

Bork's theory was derived from two propositions. First, the Constitution contemplates a representative democracy, and second, judges must be principled.⁷ The second postulate was the burden of the first part of the article, in which Bork found inherent in the Constitution a requirement that judges be neutral in the derivation, definition, and application of the principles they employ.⁸ Judicial neutrality, he found, was established not in the concept of the judicial power or the history of the Constitution, but in its "Madisonian" structure. A Madisonian system avoids either minority or majority tyranny by giving substantial power to the majority while preserving basic rights for the minority.⁹ In such a system, the judges are simply imposing their own values, and engaging in judicial tyranny, unless they can derive their conclusions from the Constitution's values and not simply their own.¹⁰

He was as unconcerned with text or history in deducing a value of free speech as in deducing the requirement of princi-

3. *Id.* at 20 ("I am led by the logic of the requirement that judges be principled to the following suggestions. Constitutional protection should be accorded only to speech that is explicitly political . . . Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law.").

4. *Id.* at 21–22.

5. *Id.* at 22.

6. *Id.*

7. *Id.* at 22–23.

8. *Id.* at 7.

9. *Id.* at 2–3.

10. *Id.* at 3 (noting that the "Court's power is legitimate only if it has, and can demonstrate in reasoned opinions, that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse yet if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.").

pled judicial decisionmaking. What mattered was that the Constitution creates “a representative government, a form of government that would be impossible without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.”¹¹ That constitutional value provided judges with a principle by which to distinguish political speech from all other forms of conduct, and hence to say that it is constitutionally protected without having to rest that judgment simply on their own beliefs.¹²

One reason *Neutral Principles* gave rise to so much controversy when Bork was nominated to the Supreme Court is that it addressed not only the First Amendment, but a wide range of controversial topics in constitutional law. On many of those topics, Bork directed withering criticism at the Supreme Court. He criticized *Griswold v. Connecticut*¹³ and *Reynolds v. Sims*,¹⁴ the substantive results of which turned out to have substantial popular support.¹⁵ On the most fraught issue of all, though, he was entirely orthodox as to the outcome: *Brown v. Board of Education*¹⁶ was right. *Brown* was right, and the scholar from whom Bork had borrowed part of his title, Herbert Wechsler,¹⁷ was wrong, because *Brown* could be derived by neutral principles.¹⁸ It could be derived, not by careful reading of the text or long inquiry into the history, but from some basic facts and “purely juridical” considerations.¹⁹ The basic fact was that the Equal Protection Clause was somehow about racial equality between blacks and whites.²⁰ The purely juridical principle was that the courts are not permitted to choose one version of equality over another, because judges may not choose one gratification over another without a legal warrant, and the legal materials did not indicate any particular conception of equality. Hence, the courts had to use a general principle of equality, one that required both physical equality, which by itself would permit separate-but-equal schools, and also psychological equality,

11. *Id.* at 23.

12. *Id.* at 26.

13. 381 U.S. 479 (1965).

14. 377 U.S. 533 (1964).

15. Bork, *supra* note 1, at 7–19.

16. 437 U.S. 483 (1954).

17. See Herbert Wechsler, *Toward Natural Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

18. Bork, *supra* note 1, at 12–15.

19. *Id.* at 15.

20. *Id.* at 14.

which would forbid them and lead to *Brown*.²¹ The requirement of judicial neutrality, combined with the “impulse” of equality, banned segregated schools. Basic values plus judicial neutrality equals rigorous and principled constitutional decisionmaking.

When he wrote *Neutral Principles*, Bork was a typical law professor in that he had two fields: his own, and constitutional law. His own was antitrust law. The structure of his thinking about constitutional law is virtually identical to that of his thinking about the Sherman Act. In Bork’s view, that act’s basic impulse, combined with the requirement that judges be neutral, yielded a quite general and abstract value that courts could and should implement through elaboration, that was at once creative and principled. From the various values that might be found in the Sherman Act, Bork selected one and only one: maximizing consumer welfare.²² That sole value should guide the courts, he argued, because implementing the others would require that judges make non-neutral choices, preferring some distributional claims over others.²³ Although the value was fixed and the reasoning was to be rigorous, the actual doctrinal results would change over time as the economy changed and judges learned more about economics.²⁴

According to Bork, the Sherman Act was a directive to put into practice Chicago-style neoclassical welfare economics, at least until some better form of economics came along. Bork realized that his interpretation required a distinctive understanding of the concept of restraint of trade, a term used in English and American common law in a way that had no particular connection with consumer welfare. Bork’s derivation of that concept would horrify many textualists today:

It is clear from the debates that ‘the common law’ relevant to the Sherman Act is an artificial construct, made up for the occasion out of a careful selection of recent decisions from a variety of jurisdictions plus a liberal admixture of the senators’ own policy prescriptions. It is to this ‘common law,’ holding sway nowhere but in the debates of the Fifty-first

21. *Id.* at 14–15.

22 Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 *YALE L. J.* 775, 781 (1965).

23. *Id.* at 838–39.

24. “Courts charged by Congress with the maximization of consumer welfare are free to revise, not only prior judge-made rules, but, it would seem, rules contemplated by Congress.” Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J. L. & ECON.* 7, 48 (1966).

Congress, that one must look to understand the Sherman Act.²⁵

Today's intentionalists should not conclude, however, that Bork meant to endorse inquiry into subjective intention in any simple or ordinary sense. In his view, legislative intent was itself a construct that had to be used with care.²⁶ Its function was to give judges the basic value from which to reason. With that value in place, the antitrust judge's "responsibility is nothing less than the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process."²⁷

Bork is perhaps best known today as one of the founders of contemporary constitutional originalism. Originalism is itself a large-scale principle, but for Bork it rested on the more basic requirement of judicial neutrality. Only adherence to the original understanding, he argued, can make the Constitution "law that binds judges."²⁸ The requirement that judges be bound by law was the foundation of Bork's originalism, as demonstrated by his claim that if decision according to the original understanding were impossible, the only alternative would be to abandon judicial review altogether. Without the original understanding to guide judges, "the choice would be either rule by judges according to their own desires, or rule by the people according to theirs."²⁹ For Bork, that was no choice at all, for reasons on which his commitment to the original understanding was founded.

As a judge, Bork believed that his job was to turn quite abstract values into determinate but possibly mutable doctrines through principled decisionmaking. On the question of mutability, he clashed with then-Judge Scalia in *Ollman v. Evans*,³⁰ a defamation case that the D.C. Circuit decided en banc. Bork argued that the existing common law privilege for statements of opinion was inadequate to implement the First Amend-

25. *Id.* at 37.

26. That construct had to be treated gingerly because of its "inherent artificiality." *Id.* at 47. Its artificiality arose because "the attribution of any intent to a legislature involves a number of problems and assumptions." *Id.* at 7 n.2. Bork thus rejected any "attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act, but merely as an attempt to construct the thing call[ed] 'legislative intent' using conventional methods of collecting and reconciling the evidence provided by the Congressional Record." *Id.*

27. *Id.* at 48.

28. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 160 (1990).

29. *Id.*

30. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

ment's values, and should be replaced with a judicial inquiry into the totality of the circumstances designed to ensure adequate protection for free expression.³¹ His conclusion reflected, not a detailed inquiry into text or history, but the basic values as they applied to changing circumstances.³²

Although Judge Bork found history of little use in *Ollman*, he conducted a more substantial historical inquiry in another influential opinion, his concurrence in *Tel-Oren v. Libyan Arab Republic*.³³ That case involved Section 1350 of Title 28 of the United States Code, a descendant of a provision in Section 9 of the Judiciary Act of 1789. Bork's historical inquiry was explicitly guided and bounded by a principle about judicial decisionmaking that he derived from the constitutional structure. He began with a presumption against finding causes of action for parties like the plaintiffs in that case.³⁴ That presumption came from a structural principle governing the judicial role: Courts should not make policy choices that might interfere with American foreign policy.³⁵ Neither the specific presumption nor the general principle appears explicitly in the text of any of the sources Bork relied on, including of course the Constitution. He found it, not in any particular words, but in the entire structure.

Bork's view that scholars and judges could rigorously deduce powerful conclusions from a few general and basic principles in part reflected his time at the University of Chicago. In studying law and economics with Aaron Director, Bork, as he described it, "underwent what can only be called a religious

31. *Id.* at 997 (Bork, J., concurring).

32. "We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of these clauses." *Id.* at 996. Bork defended "evolving constitutional doctrine" against then-Judge Scalia's objections. *Id.* at 995. Judge Scalia, in dissent, said that Bork was not engaged in the "application of existing principles to new phenomena . . . but rather *alteration* of preexisting principles in their application to preexisting phenomena on the basis of judicial perception of changed social circumstances." *Id.* at 1038 n. 2 (Scalia, J., dissenting).

33. 726 F.2d 774 (D.C. Cir. 1984).

34. The presumption arose from Bork's requirement that any cause of action for a plaintiff like *tel-Oren* be explicit and not implied. *See id.* at 801 (Bork, J., concurring) (stating, "For reasons I will develop, it is essential that there be an explicit cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

35. *Id.* at 801-02. Bork derived his presumption from general principles of separation of powers and analogies to related doctrines like the act of state and political question doctrines. He did not argue that any existing doctrine required his conclusion. *Id.*

conversion.”³⁶ The economic approach represented “an enormously rigorous and logical way” of analyzing problems.³⁷ Bork was proud of his position in the Chicago tradition. His turn to constitutional law, however, took place in New Haven, and that part of his work bears some of the hallmarks of the Yale Law School. His claim that free speech protections can be derived from structural features of the Constitution, for example, echoes that of Charles Black.³⁸ Indeed, the affinities between Black and Bork as structural thinkers are such that this Essay might well be titled, *Structure and Relationship in the Legal Thought of Robert Bork*.

Although there are clear connections between Bork’s thoughts and those of his intellectual antecedents and contemporaries, his successors present a paradox. Bork’s conception of law as consisting of basic values is anti-formalist; it treats legal norms as transparent to their purposes. It is anti-textualist; the specific words of enactments matter hardly at all. And history’s relevance to it is quite limited.

Today, though, Bork’s most important followers in American constitutional law and theory are generally text-formalists of one kind or another who rely extensively on history. If Bork has any one intellectual heir it is Judge Frank Easterbrook—a dominant figure in law and economics, a leading figure in constitutional law and theory, a judge on the Court of Appeals for the Seventh Circuit, a University of Chicago graduate, and former Assistant to Solicitor General Bork. Easterbrook is probably the most important textualist on or off the bench.³⁹ Two of Bork’s former law clerks, John Manning and Steven Calabresi, are among the most important scholars of the Constitution’s text and history.⁴⁰ All three are formalists in that all

36. Edmund W. Kitch, ed., *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J. L. & ECON. 163, 183 (1983) (comment in discussion by Bork).

37. *Id.* at 201.

38. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39 (1969) (freedom of speech on questions of national politics can be derived from the federal structure of the Union).

39. See, e.g., Caleb Nelson, *What Is Textualism?* 91 VA. L. REV. 347, 347 (2005) (identifying Easterbrook as a leading textualist).

40. Professor Manning has defended textualism as a methodology, see, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1(2001), has elaborated it, see, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003), and has applied it to important issues, see, e.g., John F. Manning, *The Eleventh Amendment and the Interpretation of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004). Professor Calabresi has developed an account of the original understanding of the Fourteenth Amendment’s text as it applies to sex discrimination, Steven G. Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011), and interpretations of the Constitution’s structural provi-

three distinguish sharply between the content of legal norms and their purposes or the values they reflect.

Reading those scholars, and others of their contemporaries who might be thought of as Borkian originalists, one might think that they were followers, not of Robert Bork, but of Bork's own constitutional law teacher, William Winslow Crosskey. The first two volumes of Crosskey's great work, *Politics and the Constitution In the History of the United States*, have as their epigraph Justice Holmes' formulation of objective textual interpretation: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."⁴¹ But unlike scholars like Easterbrook, Manning, and Calabresi, Bork was in no sense a Crosskeyite. His methodology was fundamentally different from his teacher's, and my impression is that in Bork's view Crosskey was, to put it gently, highly eccentric.

The paradox is that Bork's closest and most prominent followers are not Borkians in fundamental ways. The resolution of the paradox, insofar as there is one, is to be sought in the common impulse, as it were, behind Bork and his followers. That impulse is the conviction that law is objective. In particular, it is the convention that law is distinct from the normative views of those who implement it. The interpreter's task is to find out what the law is, not to discover that it is the best that it can be.

Formalists find objectivity in rules as opposed to the reasons for having them, and textualists find it in the meaning of words rather than speakers. Robert Bork found it elsewhere, in values and purposes that were posited by and for—but not made by or for—judges. Those values and purposes, he thought, gave the law its content and provided its justification. Quite possibly he thought that inquiry into formal rules, and close readings of texts, were often nothing but a game, a distraction from the real point of law. I would say that law is fundamentally about rules. For that reason, as another of Bork's colleagues from Yale in the 1970s said, if law is not a game, it is not not a game either.⁴²

sions based on close readings of the text, see, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

41. WILLIAM WINSLOW CROSSKEY, I POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES ii (1953).

42. Arthur Allen Leff, *Law and*, 87 YALE L. J. 989, 1005 (1978).