Copyright © 2015 Ave Maria Law Review

TRIBUTE TO ROBERT H. BORK

Lino A. Graglia[†]

Robert Bork was a giant in American law, arguably the most influential and significant jurisprudential figure in the last half of the twentieth century. The two most important areas of law in terms of national social policy are undoubtedly constitutional law and antitrust, and Bork was in some ways the central figure in each.

After graduating from the University of Chicago Law School in 1953, a period of service in the U.S. Marine Corps, and a highly successful stint in private practice, Bork began his teaching career at Yale Law School in 1962 as a professor of antitrust law. Under the influence of the "Chicago School" of economics, which strongly favors free markets and is skeptical of government economic regulation, Bork undertook to simplify and make sense of antitrust law by arguing that it should be put on a purely economic basis.

Antitrust law is to the American economic system what constitutional law is to the American political system: a matter of fundamental importance. From its beginning with the Sherman Antitrust Act in 1890, there was uncertainty and dispute as to its purpose. Was it to serve political and social ends in addition to or instead of economic ends, and more basically, was its purpose to protect free market competition or, on the contrary, protect small businesses from the rigors of competition? In his 1978 book, *The Antitrust Paradox: A Policy at War with Itself*,[1] Bork argued that antitrust law made sense and was socially beneficial only if seen as simply an anti-monopoly, purely economic measure; the sole purpose of which was to protect free market competition in the interest of serving consumer welfare.

The book was so clearly and powerfully reasoned and well written as to be nearly irrefutable. Bork was able to show conclusively that many business practices such as vertical integration, resale price maintenance, tying arrangements, and exclusive dealing, formerly condemned as anti-competitive were often, if not always, actually pro-competitive. The book

† A.W. Walker Centennial Chair in Law, University of Texas School of Law; B.S. City College of New York 1952; LL.B Columbia University 1954. Author of DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

1. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

soon came to be seen as authoritative by courts including the United States Supreme Court. Together with similar and complementary work by Professor and then Judge Richard Posner and the general growth of the "law and economics" movement, the result was an enormous shrinkage in the scope and coverage of antitrust law and the removal of legal impediments to the efficient functioning of free markets. It would be difficult to find another work of scholarship that has had so thorough and so beneficial an impact on American law and society.

In constitutional law, Bork argued, for example in *The Tempting of America*,[2] for a reduction in the scope of the law and, specifically, of the policy-making role of the Supreme Court in the American system of government. Bork's work in constitutional law did not, unfortunately, have the impact of his work on antitrust. The scope of constitutional law continues to expand with the Court becoming, if anything, more, not less, interventionist. Bork's work served, however, to make him to a large extent the central figure in ongoing scholarly debate on the role of constitutional law and the Court. The making or declaring of constitutional law is said to depend on one's method of constitutional interpretation, and there are supposedly many methods or theories of interpretation. In reality, however, there are only two: the view that the Constitution means what it was intended and understood to mean by those who wrote and adopted it, and the view that its meaning can be derived from other sources. The first view is called "originalism" and the second "the living Constitution." Bork was the most prominent and effective proponent of originalism, arguing that if the Constitution does not mean what it originally meant, it can be made to mean whatever judges would like it to mean.

Much of contemporary constitutional law scholarship is devoted to attempting to refute this proposition by arguing that divorcing the Constitution from its original meaning does not leave judges free to enact their policy preferences because they will still be restrained by, for example, tradition, morality, or principles of justice. The reality is so clearly otherwise as to make plain that the real objection to originalism simply is that it would severely limit the policy-making role of judges, particularly the Supreme Court, which has, since the time of the Warren Court, principally served to further liberal ends. The result of originalism would be to leave policy-making on issues like abortion, prayer in schools, capital punishment, and the

2. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

restriction of pornography in the hands of the American people—the nightmare of the liberal academic elite.

Judge Bork's argument for originalism has not prevailed, but it remains the obstacle proponents of the living Constitution must try to overcome. That it cannot be overcome is shown by the fact that it is the position taken by all Supreme Court nominees during their Senate confirmation hearings. They all must and do insist on their belief that the role of judges is to follow, not make, the law and to apply, not rewrite the Constitution. When President Reagan nominated Bork for the position of Supreme Court Justice, the Senate had before it, at the confirmation hearing, a nominee who not only said but actually held and would have followed that belief. Apparently fearful that the result would be to allow them to make the law without Supreme Court supervision, the senators in the Democratic-controlled Senate rejected him. The result was a tragic loss for the Court and the Country.