

NetChoice

The Antitrust Paradox, by Judge Robert Bork

Since the publication of Judge Robert Bork's seminal *Antitrust Paradox*, American antitrust law has coalesced around the goal of protecting consumers—called the consumer welfare standard. Thanks to the consumer welfare standard, the U.S. has seen unprecedented innovation across industries and become the world's leader in technological development. Today, because of Judge Bork's book and the development and embrace of the consumer welfare standard, American consumers enjoy more choice and better products at lower price points.



It wasn't always this way. In 1893, Congress passed the Sherman Act—the first antitrust statute ever enacted anywhere—to protect and promote competition in the economy. Despite the law's worthy purpose, the United States struggled to apply it coherently or objectively for decades, frequently devolving into politically motivated actions with little to no overt consideration of harm to consumers. Lacking economic theory and empirical evidence, antitrust enforcers relied on their gut instincts. That “I know it when I see it approach” left businesses, consumers, litigants, and even judges guessing.

Enter Judge Robert Bork. An economist and lawyer, Bork wrote the *Antitrust Paradox* in 1978 to bring clarity, predictability, and objectivity to antitrust law. Broken into three parts that trace the history of antitrust, key concepts in its application, and foundational court decisions, Bork's book prompted federal enforcers and judges to think clearly about the law's purpose and its enforcement. His most important insight—one that still retains broad, bipartisan support today—was that the United States' antitrust laws are meant to protect consumers and the benefits they receive from the competitive process.

Known as the consumer welfare standard, Bork's interpretation boils down to this: Competition law is meant to benefit consumers by encouraging businesses to cut prices, improve quality, and innovate. Bork not only used legislative history to show that this is the original purpose of antitrust law, but also provided rigorous analysis to show why it is a better approach from a policy perspective. He thus advocated for enforcers and judges to narrow their focus on effects. Put simply, when businesses engage in behavior that benefits consumers, it's likely legal. But when that behavior hurts consumers through higher prices, reduced quality, or stifled innovation, the laws might be triggered. Bork also stressed the use of economic learning and empirical evidence in determining when a business's actions help or hurt consumers.

Bork explains, both conceptually and empirically, that antitrust laws must serve as a targeted means to specific ends. While many social causes warrant government intervention, antitrust is not the proper tool for advancing those causes, he explained. For example, judges can't fairly, predictably, or objectively decide a merger's legality if, on the one hand, the law is meant to protect consumers from high prices, but on the other hand, the law also tries to protect outdated industries or smaller competitors. Rather than arbitrarily pick winners and losers based on conflicting goals, the consumer welfare standard focuses solely on whether the conduct at hand ultimately benefits consumers. This clear focus promotes the rule of law while spurring economic growth and innovation.

While Bork proves this point time and again in his book, history has proved to be the best testing ground. Now that Congress has keyed in on antitrust reform, the *Antitrust Paradox* and Bork's insights are more relevant than ever before. While some reform ideas are better than others, all would benefit from Bork's key point: America's antitrust laws are and should be focused exclusively on the protection of consumers.