A RELUCTANT STANDARD-BEARER FOR CHICAGO SCHOOL ANTITRUST

By Max Huffman[1]

I. CHICAGO SCHOOL ANTITRUST

Chicago School Antitrust is the name given to a set of ideas of antitrust law interpretation and enforcement that emerged from the 1960s and 1970s. Leading proponents are – or were – Robert Bork, Justice Scalia's colleague on the D.C. Circuit; and Richard Posner and Frank Easterbrook, both also Chicago Law School professors turned judges.[2] The Chicago School favors restraint in enforcement and a narrow focus on economic efficiency, which is argued to serve consumer interests through the operation of unrestrained economic markets.

II. JUSTICE SCALIA A CHICAGO SCHOOLER?

Justice Scalia was a law professor at Chicago, and then an Executive Branch appointee, when the primary ideas of Chicago School Antitrust were being tested and developed. He was a colleague to Judge Bork, who was one of the (if not *the*) leading voices in the Chicago School.[3] Some of Justice Scalia's most famous positions, including originalism, owe their genesis to earlier thinkers on the topic, notably including Judge Bork.[4]

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[1] Professor of Law, Indiana University Robert H. McKinney School of Law.
[2] Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 Antitrust L.J. 105 (2012).
[3] Robert Bork, The Antitrust Paradox: A Policy At War with Itself (1978).
[4] See Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension Between Originalism and Democracy*, 80 U. Chi. L. Rev. 243 (2013).

Justice Scalia was part of the intellectual ferment that gave rise to the deregulatory mindset in the 1970s and 1980s. He left the Jones Day law firm, moved to the UVA law faculty, and was involved in the intellectual conversations around ideas including textualist interpretive philosophy (statutes), originalist interpretation (constitutions), and free-market economic thought.

Originalism, for which Justice Scalia is known, and free-market ideology have something important in common. Both, as they are primarily espoused and sometimes applied, are theories of hands-off approaches to deciding issues. One is as a matter of constitutional adjudication. The other is as a matter of economic regulation. From this perspective, U.S. antitrust law can be analogized to constitutional originalism. Antitrust is not a field in which Congress or a Fourth Branch agency meddles to any great degree, in the way that (for example) airline regulation is. It is instead a body of law that is curated by the courts – and, over history, frequently by the Supreme Court, where Justice Scalia made his career. A judge with a professed inclination to be hands off in constitutional interpretation – an originalist – might also be inclined to be cautious in antitrust enforcement. And that is a philosophy that the Chicago School of antitrust interpretation represents better than does any other.

One might therefore expect a thinker engaged with originalist interpretive philosophy also to be engaged with Chicago School ideology. And, in fact, Robert Bork, both the strongest originalist of his generation and a leader in the Chicago School of antitrust, demonstrates that marriage well. Justice Scalia adopted the originalist philosophy from Judge Bork and advanced it from the pulpit of the Supreme Court. For the most part, he did not take the same leadership role in advancing the Chicago School tradition in antitrust.

III. WHY NOT?

Justice Scalia is well known for his leadership in the development of modern administrative law. Administrative law, the body of law that governs the regulatory state, is the sibling of antitrust. That is both because serious antitrust is largely administrative in nature and because regulation is frequently seen as the alternative to antitrust. But Justice Scalia has never been closely associated with Chicago School Antitrust and his tenure on the Court gives no reason to think that is an oversight. In 1986, the year he was appointed to the Supreme Court, Justice Scalia was invited to participate in a panel at the Antitrust Section Spring Meeting. His remarks, "The Role of the Judiciary in Deregulation," do not mention antitrust at all.[5] If Justice Scalia could properly be considered a Chicago Schooler, why did he not also advance the Chicago School's ideas on antitrust during his three decades on the Court?

[5] Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 Antitrust L.J. 191 ((1986).

One likely reason is that the Rehnquist Court – famously – rarely heard antitrust cases.[6] It was low on Chief Justice Rehnqhist's agenda. This does not answer the question entirely, however, because a certiorari grant only requires four votes.

A second reason is that Justice Scalia was overshadowed as an antitrust thinker by Justice Stevens, who had concentrated on antitrust in private practice, had taught the course at the Chicago Law School, and had served on both a Legislative Branch and an Executive Branch commission on antitrust, before being appointed to the Supreme Court.[7] Justice Breyer, a former Harvard Law School professor, an expert in administrative law, and an author of important antitrust opinions while a judge on the First Circuit, might later have been considered (and currently is considered) the Court's leading antitrust thinker.

A third reason might be that antitrust is a decidedly poor exemplar for Justice Scalia's textualist interpretive philosophy. Textualism in the antitrust arena produces perverse results. Early antitrust cases, relying on text more than they did the purposes of the law, sometimes seemed to hold that *any* commercial contracts might present antitrust problems because they "restrained trade", in however limited a manner.[8] No serious thinker makes a practice of applying textualist interpretive philosophy to antitrust law.[9]

IV. JUSTICE SCALIA'S ANTITRUST RECORD

Justice Scalia was not silent on antitrust, however. He wrote nine opinions in total during his tenure on the Court. These are:

(1) *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 176 (2004) (Scalia, J., concurring);
(2) *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004);
(3) *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 800 (1993) (Scalia, J., dissenting in part);
(4) *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 640 (1992) (Scalia, J., concurring);
(5) *Eastman Kodak Co. v. Image Technical Servs.*, Inc., 504 U.S. 451, 486 (1992) (Scalia, J., dissenting);
(6) *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 333 (1991) (Scalia, J., dissenting); and
(7) *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991);
(8) *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 576 (1990) (Scalia, J., concurring); and
(9) *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

Of the nine, three opinions – one in dissent, one in the majority, and one in concurrence – show Justice Scalia's efforts to advance his theories and, in one case, has outsize influence.

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[6] See Herbert Hovenkamp, The Antitrust Enterprise 6 (2005).
[7] See Mark R. Patterson, *Justice Stevens and Market Relationships in Antitrust*, 74 Fordham L. Rev. 1809 (2006).
[8] See, e.g. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 328 (1897).
[9] In a 2013 article, Professor Lande did apply textualist analysis to the antitrust laws, but not in the manner of arguing for that approach. See Robert Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 Fordham L. Rev. 2349, 2362, 2365-83 (2013).

Even if he was a reluctant Chicago Schooler, Justice Scalia did have an influence on the modern treatment of claims relating to conduct by dominant firms, an area of substantial interest to proponents of Chicago School Antitrust.

Section 2 of the Sherman Act outlaws conduct by which a dominant firm monopolizes or threatens to monopolize an industry. Section 2 has always presented a serious intellectual challenge for anybody thinking hard about its prohibition. The problem is that monopolizing – trying to become a monopoly – is, in borderline cases, indistinguishable from being an effective competitor. The only reason firms engage in innovation (whether related to product or process), charge competitive prices, or provide excellent customer service, is precisely to achieve some semblance of monopoly power, which may or may not rise to the level of "monopolizing."

The Supreme Court rendered some important opinions on dominant firm conduct during Justice Scalia's tenure. These cases came at a crux time in the development of antitrust law. In the early 1990s it was not clear whether the Chicago School theories, announced in the '60s and '70s and serving as the basis for Reagan-era antitrust enforcement, would have lasting effect – or whether they would be relegated to historical footnote. In retrospect, Justice Scalia's limited contributions seem to have tipped the scale in favor of the Chicago School's lasting impact.

V. *KODAK V. IMAGE TECH.* DISSENT

In *Eastman Kodak v. Image Tech. Servs.*, Justice Blackmum wrote for the majority that a firm – Kodak – with monopoly power caused by consumers' being locked in to their purchases could be liable for forcing those consumers to purchase its repair services and thereby keeping other repair centers out of the market. The core of the *Eastman Kodak* holding was the theory of monopoly power based on consumers' being locked in to a relationship with a durable goods manufacturer. Copiers of the sort that were at issue in the case were huge purchases and, once made, consumers lived with their machines for decades. The Court reached this conclusion despite the fact that Kodak was in vigorous competition for consumers who had not yet committed to a purchase.[10]

Kodak was a monopolist even though it had a small share of the primary market. It was a monopolist because once somebody bought a photocopier, he or she was locked into a decades-long relationship with Kodak, which could then proceed to provide parts and services at a cost and quality structure that ignored the competition for the initial purchase decision. Because of the Court's acceptance of challenges to the Chicago School based on information economics and practical realities, many see *Kodak* as the leading exemplar of "Post-Chicago School Antitrust."[11] I have argued that *Eastman Kodak* represents an application of behavioral antitrust principles.[12]

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[10] *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 465-79 (1992).
[11] See, e.g. Robert Lande, *Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in a Post-*Kodak *World*, 62 Antitrust L.J. 193 (1993).
[12] Huffman, *Marrying Neo-Chicago*, 78 Antitrust L.J. at 135-144.

Justice Scalia dissented in *Eastman Kodak*, advancing the traditional Chicago School Antitrust approach of skepticism to theories of harm from dominant firm conduct.[13] Referring to "the sledgehammer of [Sherman Act] § 2," Scalia argued that the majority opinion "makes no economic sense" and "threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good." "[A] rational consumer" could not be locked in to a relationship with a manufacturer permitting that manufacturer to extract monopoly rents through a product tie. That consumer would know in advance that, once the purchase was made, Kodak would have the kind of bargaining power after the purchase that comes from the long-term ownership of an enterprise copier. That consumer would therefore have the up-front ability to bargain over terms for service and replacement parts because of the competition in the market for the initial purchase. "We have never premised the application of antitrust doctrine on the lowest common denominator of consumer."

Justice Scalia advanced the Chicago School position that antitrust should be based on economic theories of economically rational consumers and economically rational purchase decisions. Justice Scalia's dissent reflects the deep Chicago School suspicion with Section 2 doctrine specifically (Bork and Easterbrook had argued that instances of harm to be remedied by Section 2 will be rare) and with restraints on commercial activity by large manufacturers generally.

Justice Scalia's *Kodak* dissent was a harbinger. *Kodak* was one of the last plaintiff-side victories leading to a 17-year drought, lasting until 2010 in *NFL v. American Needle*, before another plaintiff finally won an antitrust case in the Supreme Court.[14] Notably, that drought included important holdings restricting the application of Section 2, including *Pacific Bell Telephone Co. v. Linkline Communications* (2009), *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.* (2007), and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* (2004).

VI. *VERIZON V. TRINKO*

In 2004 Justice Scalia had his chance to advance the narrowing interpretation of Section 2 in a majority opinion. *Verizon v. Trinko* involved a claim that Verizon, as a monopoly provider of local telephone service in its particular geographic area, had violated Section 2 by failing adequately to interconnect with regional upstart AT&T – causing harm to plaintiff Trinko due to the consequent faulty telephone service.[15] As a pure antitrust case *Verizon v. Trinko* suffers some confounding factors due to the presence of a comprehensive federal scheme for regulating telephone service and requirements for interconnection.[16] The case might readily have been decided on the basis of a simple argument that the Telecommunications Act preempted application of the Sherman Act to the conduct in question.

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[13] *Kodak*, 504 U.S. at 486.
[14] *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010).
[15] *Verizon Comm'n Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).
[16] Telecommunications Act of 1996, Pub. L. 104-104.

Justice Scalia nonetheless managed to include a substantial section of the opinion that has been interpreted since as narrowing the application of Section 2.[17] "The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." Justice Scalia argued that Verizon was uniquely efficient in its ability to serve its customers and "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law… Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing…"

In terms of its actual holding, *Verizon v. Trinko* should be understood to be a narrow opinion. The Telecommunications Act of 1996 does not create a new category of conduct that, combined with monopoly power or the dangerous probability of achieving it, will present a Section 2 violation. In terms of its practical importance, *Verizon v. Trinko* goes much further. The Court expressly recognized the importance of monopoly as a goal for a firm in a free market economy. *Verizon v. Trinko* places a closing bookend to a period of history that began in 1945 with Judge Hand's opinion in *Alcoa.* Judge Hand had held that even monopoly achieved through superior competitiveness could present a Section 2 problem.[18] In *Verizon v. Trinko*, Justice Scalia advanced a cause that Judge Bork had championed in *The Antitrust Paradox*,[19] emphatically holding to the contrary.

VII. *EMPAGRAN* CONCURRENCE

Also in 2004, the Supreme Court interpreted the impenetrable language of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). The interpretive question had bedeviled the lower courts for more than two decades and spawned a number of scholarly discussions. There was a deep and irreconcilable split in the U.S. courts of appeals. The FTAIA problem presented in *Empagran* had echoes of the core interpretive problem in antitrust generally. The FTAIA, like the Sherman Act itself, was enacted in 1982 after years of common law development, and was meant to capture the parts of that common law that Congress approved.[20]

Justice Breyer's opinion engaged in a careful statutory interpretive exercise drawing on all available evidence of Congress's intent in 1982, including drawing on the pre-statutory common law in a manner not dissimilar from Judge Taft's 1898 opinion in *United States v. Addyston Pipe & Steel Co.* The Court concluded that the FTAIA did not allow recovery for foreign injury caused by foreign conduct.

To one member of the Court, however, the interpretive question was simple. Justice Scalia wrote a four-line concurrence:

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[17] *Trinko*, 540 U.S. at 407-11.
[18] See *Unites States v. Aluminum Co. of America*, 148 F.2d 416, 430-31 (1945).
[19] Robert Bork, The Antitrust Paradox: A Policy At War with Itself (1978).
[20] See Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Houston L. Rev. 285, 289-304 (2007).

> I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

Empagran thus provided Justice Scalia his primary opportunity to apply his textualist approach to statutory interpretation in an antitrust case.[21]

VIII. IN SUM

Justice Scalia was not a prominent antitrust jurist. It would be impossible, however, in light of his long tenure on the Court and his engagement with the core intellectual philosophies that underlie much of modern antitrust, for him not to have had an impact on the body of law. And in *Kodak* (dissenting), *Empagran* (concurring), and *Trinko* (for the majority), he did.

[21] Scalia's *Texaco Inc. v. Hasbrouck* concurrence can also be read as showing textualist interpretation, in that case applied to the Robinson-Patman Act. See 496 U.S. at 576-81.