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Scalia and Antitrust

BY KEITH N. HYLTON

ASK ALMOST ANYONE IN MASSACHUSETTS, or in any other predominantly liberal American state, what they think about Justice Antonin Scalia, and you are bound to hear comments, not a few of them derisory, about original intent as an approach to constitutional law. This was true long before his death on February 13, 2016, and is still true today. The theory of originalism, the notion that the Constitution should be interpreted in accordance with the intent of its framers, had become so closely associated with Scalia that the man had become the living embodiment of the theory.

But just as Scalia's constitutional law decisions were guided by a consistent theoretical framework, so were his antitrust decisions. They are not many, but they are exceptional in quality, and some of them are likely to have an outsized impact on antitrust law as time passes. Moreover, the same functional basis that led Scalia to embrace originalism influenced at least one important aspect of his thinking on antitrust.

Three broad strands appear in Scalia's opinions involving the Sherman Act.[1] The first is familiar Chicago School economics, which consists of a set of propositions about the workings of competitive markets, often suggested as a default framework for analysis by antitrust courts. Perhaps chief among these propositions is the view that markets tend toward economically efficient arrangements. This position is in contrast to the view, perhaps best expressed by Learned Hand in *United States v. Alcoa*,[2] that the judge should actively determine his own framework of analysis consistent with the goals of the statute. Under Learned Hand's view, which dominated antitrust from 1945 to the 1970s, economic efficiency was merely one of many considerations a judge should have in mind when rendering a decision under the Sherman Act, and certainly not a serious constraint on the judge's conception of the market ideal.

The second strand in Scalia's perspective treats the Sherman Act as both empowering and limiting judges. The novel feature of this claim is that the statute *constrains* judges because it does not give them the power to act as "super regulators"—entities able to intervene in virtually any decision a business makes in the course of competition—a status that the Sherman Act, in its bold simplicity, appears to bestow on them.

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The third strand is spun from Scalia's theory of constitutional interpretation. The Sherman Act has to fit within a constitutional framework, which puts limits on the power of judges to interfere with inherently political activity or with purely intrastate business conduct beyond the reach of Congress's power to regulate commerce.

These three strands appear in different combinations or admixtures in Scalia's antitrust opinions, together shaping a view of the Sherman Act that is both complex and subject to change over time. It is more than just the view of an originalist constitutional lawyer because it combines a keen and sophisticated interest in economic analysis. And it is more than just the view of a lawyer trained in Chicago School economics because it incorporates a theory of statutory and constitutional constraints.

Before saying anything about Scalia's vision of the constraints imposed on judges in antitrust cases, it is important to pause and consider the reason why a constrained view of judicial authority might be useful. The Sherman Act is a surprisingly short and sparse statute, the sort that could not possibly be produced by today's Congress. The statute is little more than an invitation to federal courts to develop a common law of competition, with the first paragraph (Sherman Act Section 1) prohibiting contracts, combinations, or conspiracies in restraint of trade, and the second (Sherman Act Section 2) prohibiting monopolization and attempted monopolization. But the statute's sparse language belies its nearly unlimited potential reach.

As the Court acknowledged in its first Section 1 case, *United States v. Trans-Missouri Freight Association*,[3] a prohibition on contracts in restraint of trade could be understood as a prohibition on *all* contracts, since every contract necessarily restrains trade—if only by precluding the alternatives that the contracting parties have, by committing to each other, promised to forgo. Similarly, a prohibition of monopolization by dominant or potentially dominant firms could authorize the government to regulate, under the statute, almost every decision a dominant firm makes, because almost everything a dominant firm does potentially affects rivals and could therefore have an exclusionary effect.

If a judge interpreting his authority under the Sherman Act is virtually unconstrained, as under the view of Learned Hand, then he can stand on the statute as justification for engaging in the most heavy-handed regulation one could imagine. Judges generally have not claimed the power under the statute to intrusively regulate businesses because they have taken a more limited view of the scope of their authority. But that limited view has mostly been an exercise in self-restraint, and if it is to remain in force must be based on some acceptable theory of the Sherman Act, or of the constitutional authority of judges, otherwise any judge could choose to deviate from the path of conformity, and other judges might follow. Perhaps more than any other Supreme Court Justice in living memory, Scalia recognized this problem and attempted to address it in his opinions with a theory of con-

strained adjudication under the statute.

The constraints came naturally from the strands described above—Chicago School economic analysis, historically grounded statutory construction, and originalist constitutional interpretation. The remainder of this article discusses Scalia's Sherman Act opinions in an effort to show how these sources shaped his thinking on antitrust and led to the formulation of a comprehensive framework for antitrust analysis. Decisions that are tangentially related to antitrust but really focusing on other areas of the law, such as Scalia's class action opinions in *Comcast v. Behrend*[4] and *American Express v. Italian Colors Restaurant*,[5] are excluded. While the excluded cases may be important from a particular perspective on antitrust (for example, *Comcast* and *Italian Colors* are important decisions on the matter of antitrust deterrence), they tend not to significantly clarify or modify the substantive reach of the Sherman Act, and for that reason fail to shed as much light on Scalia's conception of antitrust law as the cases selected here.

Verizon v. Trinko: Three Strands at Work—Balancing Incentives to Monopolize and Incentives to Innovate

In looking for cases that exemplify Scalia's perspective on antitrust, it is best to start with the part of his legacy that is safest—that is, most likely to survive the current Supreme Court and future changes in its composition. The case that is safest in this sense and at the same time best exemplifies the facets of Scalia's thinking is *Verizon v. Trinko*,[6] one of the most important and analytically rich opinions in the Supreme Court's antitrust case law. Verizon had been required, under a regulatory statute (Telecommunications Act of 1996[7]) overseen by the Federal Communications Commission, to connect rival phone companies to its telecommunications infrastructure. The plaintiff accused Verizon of monopolization by moving so slowly in this endeavor as to discourage people from becoming or remaining customers of its rivals. The Court held that Verizon's conduct did not violate Section 2 of the Sherman Act.[8]

Scalia led with one of the interesting paradoxes to have emerged from the Sherman Act case law: that the statute does not condemn a monopoly for simply exercising its monopoly power, in the form of setting its price and output levels at the combination that maximizes monopoly profits.[9] The reason, Scalia noted, is that short-run monopolization is the spur that drives investment and innovation in a capitalist economy. Given this, interpreting the Sherman Act to require a dominant firm to share its proprietary infrastructure with rivals would threaten to override one of the compromises at the heart of the statute, specifically the statute's implicit recognition of a safe harbor for innovation.

Scalia argued that the Sherman Act itself constrained judges from enforcing a facility-sharing requirement. Such a requirement would compel judges to regulate the dominant firm in an intrusive and continual manner to make sure that it had not engaged in some subtle evasive action, regulatory activity more similar to that of a public utility commission than a court. Judges would have to closely monitor the firm's conduct, or at least delegate the monitoring to some agent of the court.

Scalia's arguments in *Trinko* attempt to clarify important constraints on judges only sporadically mentioned in prior Supreme Court antitrust opinions. Scalia states the theory that the monopolization provision strikes a balance between incentives to monopolize and incentives to innovate more succinctly than had the judges before him, and this equipoise should be viewed as a necessary implication of the Sherman Act case law.[10] Otherwise there would be no sound economic reason to permit a dominant firm to freely exploit its monopoly position, as the law has done. Plenty of courts have drawn the distinction between monopolizing conduct and monopoly status, noting that size alone is not a violation of the Act,[11] but Scalia draws the line between exploitation, which is lawful, and exclusion, which is not. And the reason exploitation is lawful is fundamentally Schumpeterian: the prospect of short-run monopoly power drives incentives to enter new fields of endeavor and to create new goods or services, the type of dynamic competition that has long driven economic growth.

The point about the statute not turning courts into public utility commissions has appeared sporadically in the case law too[12] and has an appealing logic. Public utility regulation existed before the passage of the Sherman Act, and certainly the legislature could have been explicit about its purpose if it had intended to authorize judges to act as rate regulators. The statute had been justified, even by Senator John Sherman,[13] as an attempt to codify common law principles in federal law. None of this signals an intent to establish an intrusive regulatory system; the plausible inference would be the opposite.

Scalia's view of the Constitution plays no direct role in *Trinko*, but it is lurking in the background and helps resolve some of the tensions in his argument. Were Scalia to act alone as an unconstrained judge, he presumably would have found the Sherman Act impliedly preempted by the comprehensive telecommunications regulatory apparatus, but in the absence of supportive statutory language he could only try to accommodate the two statutes (Telecommunications Act and Sherman Act) by relegating greater scope of authority to the relevant regulatory bodies, with more expertise on the matter, than to judges. The deeper tension here is between antitrust and regulation, and Scalia wanted to keep antitrust from being transformed into regulation implemented by judges. The policy arguments against crossing this line are noted in his opinion: the general unfitness of the judiciary as a regulatory body, the lack of a need for and inevitable conflict between duplicate regulatory systems, and the difficulty of courts acting as regulators to issue comprehensible final orders. In addition, there are constitutional issues in the background connected to the separation of powers concern—

because judges, to be effective regulators, must also exercise executive authority as enforcers of the law.

These policy views would have little lasting weight without the doctrinal analysis that binds them to the Court's antitrust case law. That important piece is supplied by Scalia's discussion of antitrust intent. Scalia distinguished Verizon's conduct at issue in *Trinko* from that of the defendant in the most important antitrust case finding a duty to deal with a rival, *Aspen Skiing v. Aspen Highlands Skiing*,[14] by noting that whereas Aspen, the dominant firm, had turned down profitable sale opportunities with Highlands, Verizon had merely been accused of being reluctant to participate in a statutorily compelled relationship that was unlikely ever to be profitable. The refusal to deal in *Aspen Skiing* raised a genuine question about the motivation of the dominant firm—why would it pass up an opportunity to maintain a profitable relationship if its motive were not to destroy its comparatively weak rival? Verizon, by contrast, had been forced to sell at regulated prices to rivals, hence its refusal to participate eagerly could not justify an inference of anticompetitive intent. Refusing to subsidize is not the same as seeking to destroy.

To be sure, a distinction between subsidizing and harming is a difficult one to make. If a rival firm needs to be subsidized by the dominant firm to survive, then withdrawal of support is the same as destroying the rival. But a distinction between harming and refusing support must be made, as Judge Posner noted in *Olympia Equipment Leasing v. Western Union Telegraph*,[15] if antitrust is to avoid generating perverse results. Firms aware that any cooperative conduct with a rival might lead to a relational lock-in might abjure such relationships altogether, which could be harmful to consumers.

More than any other antitrust case, *Trinko* represents a significant retreat from the ideas of Judge Hand in *Alcoa*. Hand held that specific intent—i.e., intent to harm—is irrelevant under Section 2 of the Sherman Act because "no monopolist monopolizes unconscious of what he is doing."[16] Scalia's search for evidence of specific intent is inconsistent with *Alcoa*. Under *Trinko*, intent is not only relevant under Section 2, but necessary to find liability in the duty to deal context.

The clearest sign that *Trinko* will have staying power is that its doctrine was effectively expanded by Justice Roberts in *Pacific Bell Telephone v. linkLine Communications*.[17] Roberts, reading *Trinko*, asserted that a monopoly firm does not have a duty to deal with a rival. This is not exactly what Scalia had said in *Trinko*, but it suffices as a highly simplified version of it. Roberts's expansion may be scaled back closer to Scalia's intent formulation in the future as judges think more about the function of intent doctrine in antitrust. It is an old workhorse, though quite powerful and effective, dusted off and put back to work in *Trinko*.

Eastman Kodak v. Image Technical Services Dissent: A Skillful Use of Chicago School Economics

Another opinion that is properly placed in the "safe legacy" category is Scalia's dissent in *Eastman Kodak v. Image Technical Services*,[18] though it is far less safe than *Trinko*. This was a tying case in which the Court found that Kodak violated the moth-eaten per se rule against tying when it required purchasers of its copying machines who sought to buy parts for repair to also contract exclusively with Kodak for service of their machines. This policy had the effect of severely diminishing the market for independent service organizations. Obviously, Kodak had monopoly power in the parts for its own machines, and because of this the Court held that the per se rule applied to Kodak's parts-service tie. However, there was a serious potential flaw in the Court's reasoning because the original equipment market had been deemed to be competitive.

Scalia's dissent notes that if Kodak had tied parts and service to the initial purchase of the machine, Kodak would have evaded the per se rule. It followed that the Court's application of the per se rule depended entirely on a relatively unimportant feature: whether Kodak had informed original equipment purchasers of the tie-in. This may have been a matter of consumer protection—though the businesses that were the primary consumers of Kodak machines probably needed little protection—but it was not a matter of antitrust.

Scalia's thesis is straightforward, but the fascinating piece is his skillful use of Chicago School economics and the tying case law to counter the economic arguments accepted by the majority. The broader issue, Scalia recognized, was not the one presented by the case but the question whether a finding of monopoly power in derivative aftermarkets can be upheld when the entry-point market is competitive. Although he failed to gain a majority of his colleagues, his argument did influence the way courts have interpreted *Kodak*, viewing the Supreme Court's rule as applying only under the scenario of a retroactively applied change in policy on aftermarket services.[19]

The broader issue remains in play. The question of whether competitive entry-point markets can generate monopolistic derivative aftermarkets is not substantially different from that of whether competitive interbrand markets can generate monopolistic intrabrand markets. Traditional antitrust has long held that the answer to the latter question is no.[20] Yet modern decisions such as *Kodak* and the first *FTC v. Staples*[21] suggest that proof of the existence of switching costs or a SSNIP ("small but significant non-transitory increase in price") might be sufficient to overturn decades of precedent on the market power question.

Indeed, the question at bottom is whether it is useful to define markets at all. While this has been debated by economists for years, the function of the market power inquiry in antitrust law has always been somewhat broader than it appears on its face. Like the "duty of care" question in tort law, the market power inquiry has served many purposes: to keep antitrust from intervening where the likelihood of consumer harm is low relative to the administrative cost of intervention, to keep antitrust from intervening where efficiencies

are likely but not well understood and the potential for consumer harm is minimal, and to prevent antitrust from obstructing ordinary processes of industrial rationalization where consumer harm is a remote possibility. In such circumstances, returning to one of Scalia's central concerns, antitrust is at risk of being transformed into overly burdensome regulation. In the looming controversy over the usefulness of market definition, Scalia's dissent is likely to continue to offer insights to lower courts.

City of Columbia v. Omni Outdoor Advertising and the *Summit Health v. Pinhas* dissent: The Effect of Scalia's Perspective on Constitutional Law

While the Chicago School economics used so skillfully in *Kodak* was an important strand in Scalia's antitrust jurisprudence, the other equally important strands consisted of a historically grounded theory of the Sherman Act's scope and originalist-leaning constitutional interpretation. Interestingly, and perhaps not surprisingly, the cases most closely associated with the third strand—Scalia's perspective on constitutional law—appear to be a bit less well woven into prior antitrust doctrine and also less likely to have the continuing impact of *Trinko*.

In *City of Columbia v. Omni Outdoor Advertising*,[22] Columbia Outdoor Advertising (COA) had successfully lobbied for a municipal ordinance in Columbia, South Carolina, restricting the number of new billboards in the city. Its rival, Omni Outdoor Advertising, was effectively strangled by the regulations and brought an antitrust claim against the city and COA.

The antitrust issues revolved around the degree to which state actors are immune under the state action doctrine of *Parker v. Brown*,[23] and private actors who lobby state actors are immune under the derivative protection recognized in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*.[24] The city officials had acted under their zoning power, and therefore seemed clearly immune from the Sherman Act under *Parker*. COA had lobbied city officials in the traditional manner—financial support, developing relationships, and so on—and would therefore seem to be within the scope of *Noerr* immunity.

The plaintiff asked the Court to recognize exceptions to *Parker* and to *Noerr* immunity based on "conspiracy" and "corruption." According to the plaintiff, COA had conspired with city officials to block entry by the plaintiff, and the cozy relationship of social and business reciprocity that had developed between COA and city officials was indistinguishable from ordinary bribery or pay-to-play schemes.

Scalia rejected these arguments, noting that in just about any politically determined allocation, the losers will be able to credibly argue that the winners were in cahoots with officials who brought them the victory. Similarly, almost any such transaction will have at its core relationships that will tend to have the smell of bribery. Thus, exceptions to *Parker* and *Noerr* immunity based loosely on ideas of conspiracy or corruption would leave little to the scope of such immunity. Few would argue against these points. But Scalia appeared to reject the possibility of *any* corruption-based exception to *Noerr* immunity, a position that seems difficult to reconcile with the Court's clear warnings in *California Motor Transport v. Trucking Unlimited*[25] and *Allied Tube v. Indian Head*[26] that corrupt dealings in government will not necessarily be treated as immune from the Sherman Act.

A theory of judicial constraints implied by the Constitution probably explains Scalia's departure from precedential language. The chief constitutional constraint flows from the First Amendment in this case. The freedom to petition legislators and government officials would be compromised if the Court were to hold that rather ordinary political transactions could give rise to antitrust liability—and it was not easy, in spite of facts suggesting that city officials had seemed overly eager to aid COA, to confidently distinguish the events leading to the dispute in *City of Columbia* from the numerous routine political allocation decisions that happen on a daily basis in states and municipalities all over the country.

This unusual sensitivity to political freedoms may have been unique to Scalia, because he tended toward free speech absolutism.[27] However, the Court has stopped well short of Scalia's First Amendment enthusiasm in some important areas closely related to the corruption issue at the heart of *City of Columbia*. The court has stressed the distinction between ordinary political transactions and quid-pro-quo bribery in some cases—notably *Caperton v. Massey*,[28] and also in *McCutcheon v. FEC*.[29] It seems that the same distinction could have been applied in *City of Columbia*, especially to the question of immunity for private actors.

In view of the Court's general tendency to distinguish quid pro quo and ordinary political transactions, and also in view of the Court's admonitions regarding *Noerr* immunity and corruption in *California Motor* and *Indian Head*, it is only a matter of time before the Court reconciles these disparate holdings that converge on drawing a distinction between clear cases of quid pro quo and more ambiguous cases of reciprocal dealing. The First Amendment dedication reflected in *City of Columbia* seems unlikely to stand, though it is entirely unclear that whatever emerges in the future from this doctrine will be superior to Scalia's framework.

In addition to the First Amendment as a general constraint, another constitutional constraint that worried Scalia, especially in the context of antitrust, is that on Congress's power to regulate interstate commerce. This has largely been a problem ignored in the antitrust case law. Perhaps the last antitrust case to explore the issue carefully was *United States v. E.C. Knight*,[30] and the exploration provided there remains quite worthy of the attention of constitutional lawyers more so than antitrust lawyers. *E.C. Knight* provides an especially clear and thorough discussion of the interstate commerce requirement and its application to business transactions. But today,

most antitrust lawyers give little thought to the matter and would be shocked if any court were to forswear jurisdiction over any antitrust dispute, no matter how localized in importance, on the basis of the interstate commerce constraint.

In *Summit Health v. Pinhas*,[31] Scalia, speaking for four justices in dissent, argued that a boycott that excluded an eye surgeon from the Los Angeles market did not violate the antitrust laws because it could not have affected interstate commerce in the relevant service market, eye surgery. Again, the matter was not the wisdom of the statute, or the constraint, or the economics of boycotts—Scalia argued that the exclusionary act was quite anticompetitive, and perhaps more so than the majority had recognized. Instead, the question framed by the case fell within an entirely different area of concern to Scalia, the jurisdiction of the federal courts to resolve the dispute.

Scalia did not challenge the constitutional question directly because he viewed the activity's connection to interstate commerce, especially in light of established precedent, sufficient to uphold Congress's power to regulate within the relevant market. Instead, Scalia framed the question as whether Congress had intended to reach the defendant's activity through the Sherman Act, given the language in Sherman Act Section 1 limiting its scope to conspiracies restraining interstate commerce. He argued that the answer was unambiguously negative, and consequently the federal courts could not assert jurisdiction to resolve the dispute. Still, since the consumer welfare basis for making such a technical distinction is unclear at best, the key motivation underlying Scalia's dissent must have been a desire to maintain the constitutional division between matters of state and federal concern reflected in the Commerce Clause. Irrespective of the economic basis for a particular antitrust enforcement decision, it had to fit within broader constitutional constraints in Scalia's view. Those constraints, in turn, reflect interests not necessarily captured within the four corners of the statute, such as, for example, leaving ample room for the individual entry and exit decisions of citizens choosing among the states to serve as a structural limitation on the government's power over the individual.

Of course, since Scalia's *Summit Health* opinion is a dissent, it is on the outer fringes of antitrust jurisprudence. Scalia's *Summit Health* may be reinvigorated in the future as the Court's composition changes; perhaps a majority favoring Scalia's theory of constrained adjudication will form and latch on to his dissent. But, for now, this seems unlikely.

The question in the background is whether antitrust lawyers and scholars should care at all about the interstate commerce requirement in the Sherman Act, especially in light of the generally accepted view that the statute is mostly concerned with consumer welfare. Most antitrust economists, once apprised of the issue, would find it puzzling today, and pointless too. And why should they not, given that the requirement has nothing to do with maximizing consumer welfare? It has a great deal to do, however, with the relative powers of the federal and state governments. A purely economic approach to antitrust might miss this point.

***Business Electronics v. Sharp Electronics*: Interplay of Economics and Per Se Violations**

The final Scalia opinion of this review also awaits reinvigoration, though in a more generalized form. It has a more urgent applicability to current issues than does Scalia's *Summit Health* opinion, and it is much more closely connected to the consumer welfare concerns of antitrust economics.

Business Electronics v. Sharp Electronics[32] is one of the Court's resale price maintenance cases decided in 1988, during the era of the per se prohibition of resale price maintenance agreements. Paradoxically, this case is at risk of being ignored in the future largely because of its success in weakening the force of the per se prohibition. Resale price maintenance is no longer per se illegal, since the Supreme Court's decision in *Leegin Creative Leather Products v. PSKS*,[33] and so it probably seems unnecessary to most judges to go back to cases decided under the per se prohibition.

Business Electronics gave Sharp an ultimatum that it would no longer serve as a retailer for Sharp products if it continued to do business with another retailer, Hartwell, which had undercut Sharp's suggested retail prices. The likely reason for the ultimatum was that Hartwell had been taking customers from Business Electronics by cutting prices, rather than expanding the retail market for Sharp products through offering service and investing in promotion. After Sharp terminated Hartwell, Hartwell sued Sharp for violating the antitrust laws by fixing retail prices with Business Electronics.

Scalia held that in order to prove that Sharp and the surviving retailer had agreed to fix prices, the terminated retailer would have to show that the parties had agreed on a particular price level. In other words, it was not enough to show that there were suggested minimum resale prices and that the manufacturer and surviving dealer had agreed to terminate the price cutting dealer.

The reason for setting this extremely high burden of proof, Scalia elaborated, is to ensure sufficient leeway in the manufacturer-retailer relationship for the manufacturer to encourage interbrand competition, which was more important to antitrust than intrabrand competition. Such leeway was desirable under the antitrust laws because retail price maintenance could support efficiency-enhancing investments by either the manufacturer or the retailer. Of course, the concern for efficiency reflects the first of three strands of Scalia's antitrust analysis alluded to earlier, that of Chicago School economics. The efficiency interest affects not only the choice between per se and rule of reason as substantive rules in a specific area of antitrust, but also the proof threshold necessary to justify application of the per se rule. Scalia's broader message in *Business Electronics* is that if, in an area of antitrust where the per se rule is established, its application to a par-

ticular type of case, such as a vertical relationship, would risk imposing substantial efficiency losses, then the evidentiary hurdle necessary to trigger the per se rule should be raised accordingly.

Business Electronics does not appear to be an important case now, after *Leegin*. But Scalia's broader message is still relevant to modern disputes. Quite recently the Supreme Court denied the petition for certiorari from Apple Corporation in a case, *United States v. Apple*,[34] in which the famous maker of the revolutionary iPhone had been found guilty of creating a horizontal conspiracy among book publishers when it contracted with them to sell electronic versions of books (ebooks) over the Apple iPad. The publishers had been complaining about the pricing of ebooks by Amazon, the dominant ecommerce website. What Apple had done was enter into contracts with the book publishers in which they agreed to a most-favored-nation clause that would permit Apple to sell ebooks for the same price as Amazon if the publisher continued to do business with Amazon. Since Apple operated under an agency contract, taking a cut of 30 percent from the price, the book publishers would earn even less from Apple than from Amazon sales. Armed with the contracts, the book publishers presented Amazon with an ultimatum: raise your ebook prices or we will not deal with you.

Stare at the facts for a few seconds, and it appears that *United States v. Apple* looks somewhat similar to *Business Electronics*. Both involved vertical relationships, and an ultimatum issued by one party in the vertical chain to discipline the conduct of a price-cutting retailer. Scalia's analysis in *Business Electronics* would seem to be potentially applicable.

It is an irony that so shortly after his death, a case arose before the Court that arguably fell under the precedent of a Scalia antitrust opinion. But the votes were not there to consider it. Perhaps the most charitable view is that *Business Electronics* is now seen as a narrow opinion dealing with the question of proving the existence of a resale price agreement.

But anyone who reads carefully Scalia's antitrust opinions would hesitate to view any of them as narrow. Scalia did not appear to be interested in issuing decisions confined to the minutiae of antitrust, or to questions of interest only to the antitrust cognoscenti. For him, antitrust had to fit in the bigger picture; based on durable propositions of economics rather than highly particularized models of market failure, consistent with the historical experience of the Sherman Act's reach, and within a constitutional structure that from inception has imposed well-defined limits on the federal government's power to regulate political and entrepreneurial activity. This is quite a set of demands, but by insisting on them, Scalia left us with an antitrust doctrine considerably richer than it was when he first encountered it. ■

1 15 U.S.C. § 1, 2.

2 148 F.2d 416 (2d Cir. 1945).

3 166 U.S. 290 (1897).

4 133 S. Ct. 1426. (2013).

5 133 S. Ct. 2304 (2013).

6 540 U.S. 398 (2004).

7 Pub. L. No. 104-104, 110 Stat. 56.

8 *Trinko*, 540 U.S. at 410.

9 *Id.* at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

10 This notion (understood broadly) perhaps was suggested in the prolix and confusing language of Justice White in *United States v. Standard Oil*, 221 U.S. 1 (1911), but it would take quite a bit of work to find it there.

11 *See, e.g.*, United States v. Am. Can Co., 230 F. 859, 901 (D. Md. 1916) ("[S]ize and power . . . do not offend against the law . . . ."); United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offense or the existence of unexerted power an offense . . . .").

12 *See, e.g.*, United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 349 (D. Mass. 1953) ("And while price discrimination has been an evidence of United's monopoly power, a buttress to it, and a cause of its perpetuation, its eradication cannot be accomplished without turning United into a public utility, and the Court into a public utility commission, or requiring United to observe a general injunction of non-discrimination between different products an injunction which would be contrary to sound theory, which would require the use of practices not followed in any business known to the Court, and which could not be enforced.").

13 *See, e.g.*, John C. Peppin, *Price-Fixing Agreements Under the Sherman Antitrust Law*, 28 Cal. L. Rev. 297, 306 n.29 (1940).

14 472 U.S. 585 (1985).

15 786 F.2d 794 (7th Cir. 1986).

16 *Alcoa*, 148 F.2d at 432.

17 555 U.S. 438 (2009).

18 504 U.S. 451, 486–504 (1992) (Scalia, J., dissenting).

19 *See, e.g.*, Metzler v. Bear Auto. Serv. Equip. Co., 19 F. Supp. 2d 1345, 1356–58 (S.D. Fla. 1998).

20 *See, e.g.*, Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957).

21 970 F. Supp. 1066 (D.D.C. 1997).

22 499 U.S. 365 (1991).

23 317 U.S. 341 (1943).

24 365 U.S. 127 (1961).

25 404 U.S. 508 (1972).

26 486 U.S. 492 (1988).

27 For an opinion that clarifies the importance Scalia attached to the First Amendment, see *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

28 556 U.S. 868 (2009). *Caperton* reflects a somewhat hypersensitive approach to the corruption issue since it suggests disqualification of a judge may be appropriate because of a high likelihood of bias. Still, even under much older case law, quid pro quo bribery would be a sufficient basis for disqualification. *See* Tumey v. Ohio, 273 U.S. 510 (1927).

29 134 S. Ct. 1434 (2014).

30 156 U.S. 1 (1895).

31 500 U.S. 322 (1991).

32 485 U.S. 717 (1988).

33 551 U.S. 877 (2007).

34 United States v. Apple, Inc., 791 F.3d 290, 296, 311 (2d Cir. 2015), *cert. denied*, No. 15-565, 2016 WL 854227 (Mar. 7, 2016) (mem.).