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A Quick Look At Justice Scalia's Antitrust Legacy

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The late Justice Antonin Scalia was not the biggest fan of antitrust law. As he famously quipped during his Senate confirmation hearing, "In law school, I never understood [antitrust law]. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then."

Nevertheless, he made his mark on the subject while on the U.S. Supreme Court. His most recent antitrust opinions exhibited the modern court's tendency to scrutinize class certification and to encourage arbitration. This should come as no surprise considering that he authored both landmark decisions in Wal-Mart v. Dukes, 131 S. Ct 2541 (2011) (finding that plaintiffs could not show that they suffered a common injury because individual factors informed their employment decisions) and AT&T Mobility v. Concepcion, 131 S. Ct 1740 (2011) (holding that Federal Arbitration Act preempted California's attempt to invalidate arbitration agreements).

For example, in Comcast v. Behrend, 133 S. Ct. 1426 (2013), Justice Scalia held that a class of cable subscribers alleging antitrust violations was improperly certified because the plaintiffs' expert failed to identify the damages attributable to the only surviving theory of antitrust impact. Consequently, he found that Rule 23(b)(3)'s predominance inquiry was not met because questions of individual damages calculations would overwhelm questions common to the class. Similar to Wal-Mart, the Behrend decision heightened the burden on antitrust plaintiffs seeking class certification.

Likewise, in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), Justice Scalia found that the prohibitively high cost of arbitration was not a sufficient reason to invalidate a class action waiver because the waiver did not ultimately restrict a party's right to pursue remedies via an arbitral forum. Justice Scalia dismissed assertions that waivers made pursuing claims cost-prohibitive. He noted that while Congress had enacted treble damages and other measures to facilitate antitrust claims, "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Relying on Concepcion, Justice Scalia emphasized that that the Federal Arbitration Act's command to enforce arbitration agreements trumps any interest in prosecuting "low value claims."

Older decisions also reflect Justice Scalia's penchant for limiting the scope of federal laws. For example, in City of Columbia v. Omni Outdoor Advertising Inc., 499 U.S. 365 (1991), Justice Scalia strengthened two important antitrust immunity doctrines. First, he extended state-action immunity to local governments when they took action pursuant to state laws that authorized local regulation of

competition. Second, he reinforced the Noerr-Pennington doctrine by limiting the “sham” exception to situations where parties are only using governmental process as an anti-competitive weapon and are not genuinely seeking favorable government action.

In Verizon v. Trinko, 540 U.S. 398 (2004), Justice Scalia limited the breadth of the Sherman Act when he held that Verizon’s alleged failure to carry out its network-sharing duties under the Telecommunications Act of 1996 did not give rise to antitrust claims. Justice Scalia recognized that refusal to cooperate with rivals could be antitrust violations, such as the conduct found to be problematic in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 427 U.S. 585 (1985). However, he found that Aspen’s limited exception was not applicable to the situation in Trinko. Specifically, he noted that Verizon’s purported misconduct was not motivated by a decision to cease a voluntary and profitable course of dealing (as in Aspen), but was instead motivated by reluctance to cooperate with aspects of a regulatory regime. Because the regulatory framework had its own mechanisms to remedy anti-competitive harm, expanding the scope of the Sherman Act would add little benefit to competition and would only chill other permissible conduct.

But just like in other areas of the law, Justice Scalia wrote many notable dissents in antitrust cases. In Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451 (1992), the Supreme Court held that Kodak’s restrictions on businesses operating in the service aftermarket for Kodak copiers and graphics equipment could raise antitrust claims even though Kodak lacked market power in the primary equipment market. Justice Scalia disagreed and found that the majority’s holding made “no economic sense” because it categorized a manufacturer’s inherent power over its own brands as “market power” for purposes of invoking the per se rule against tying arrangements.

More recently, in Oneok Inc. v. Learjet Inc., 135 S. Ct. 1591 (2015), the Supreme Court held that the Natural Gas Act did not preempt state law antitrust claims against natural gas pipeline companies, even though the claims arose out of areas traditionally recognized as within the federal government’s regulatory scope. In his dissent, Justice Scalia noted that previous cases previously drew a clear line between national and state authority: “If the Federal Government may regulate a subject, the States may not.” He cautioned that the majority’s holding “smudge[d] the line” and would introduce uncertainty by subjecting gas pipelines to the “discordant verdicts of untold state antitrust juries.”

Perhaps most notably, Justice Scalia’s opinion in Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) simultaneously served as a majority and dissenting opinion. In the majority portion of his opinion, Justice Scalia held that “boycotts” as used in section 3(b) of the McCarran-Ferguson Act referred to situations where parties refuse to engage in unrelated transactions with a target entity to coerce it into certain terms on another transaction. Justice Scalia distinguished these situations from “cartels,” which merely reflected concerted agreements to terms as a way to obtain and exercise market power.

In the dissenting portion of his opinion, Justice Scalia chastised the majority for broadly applying the Sherman Act to extraterritorial conduct. Relying on canons of statutory interpretation and principles of international comity, Justice Scalia found that it was unreasonable to apply U.S. antitrust law absent explicit congressional directives because of the potential disruption to another country’s legislative scheme. Justice Scalia later echoed this deference in his brief concurrence in F. Hoffmann-La Roche Ltd. v. Empagran SA, 542 U.S. 155 (2004).

Many of Justice Scalia’s other opinions contain more colorful language and better articulate his jurisprudence of “textualism.” But these aforementioned opinions have made important contributions to American antitrust law. His opinions will only become more relevant, specifically as courts continue to

contemplate the rigor of economic analysis needed for class certification, the limitations on the scope of federal power, and the extraterritorial application of American law.

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