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# Richard A. Posner: A Study in Judicial Entrepreneurship

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RICHARD A. POSNER: A STUDY IN JUDICIAL ENTREPRENEURSHIP

by

SEAN J. SHANNON

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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This manuscript has been read and accepted for the  
Graduate Faculty in Political Science to satisfy the dissertation  
requirement for the degree of Doctor of Philosophy

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Abstract

RICHARD A. POSNER: A STUDY IN JUDICIAL ENTREPRENEURSHIP

by

SEAN J. SHANNON

Adviser: Professor Thomas Halper

This dissertation analyzes the role of Richard Posner, one of the most prolific and innovative legal thinkers over the past forty years, as a judicial entrepreneur in his efforts to persuade the legal academy and judiciary to incorporate economic principles into the judicial decision making process in market and non-market areas of the law and legal discourse and thereby to re-examine the role of the judge. Though political scientists have explored the entrepreneurial activities of policy makers and political actors, they have given little attention to the role of judges as judicial entrepreneurs. This dissertation develops a comprehensive theoretical understanding of judicial entrepreneurship, analyzes Posner's entrepreneurial characteristics and strategies, and assesses his impact on judicial decision making in the federal courts and the broader legal community.

This dissertation is dedicated to the Taxpayers of the State of New York  
who enabled a young boy to fulfill his educational dreams.

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Having started down this intellectual path 23 years ago with one class at the Graduate Center, there are a number of people who have provided encouragement, guidance, and no small amount of understanding during periods of absence along the way, for which I am forever grateful. In particular, I would like to thank Dr. Patricia Sweeting, Dr. Joseph Sweeting, and the Sweeting Family for opening their home, family, and lives to me. They have had a profound influence on my intellectual development, encouraging me to pursue my educational goals and intellectual pursuits, and have exemplified the beauty of living a life of the mind or what Lionel Trilling called the “moral obligation to be intelligent.”

I would be remiss if I did not recognize the numerous friends who have played such an important part of my life over the last two decades. First, I would like to thank Kim Gallelli for introducing me to the Graduate Center and encouraging me to take my first class. Even though I have given her cause on several occasions to believe otherwise, I am grateful for her words of support, love, and continuing belief in my abilities as a writer and scholar. To my dear friend, intellectual doppelganger, and partner in crime, Mark Sweeting, who has been there every step of the way, no words can adequately describe my gratitude and appreciation for our friendship. For my friends, old and new, too many to list here, thank you for your encouragement and for providing me with the constructive, and occasionally less than constructive, recreational and social distractions. And to my Mother and siblings, who were ever present during the process, particularly the counsel and emotional support of my wonderful twin, Meaghan, I am indebted.

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## Table of Contents

I.	Introduction.....	1
II.	Entrepreneurialism I: Market Models	
	A. Introduction.....	8
	B. Schumpeterian Theories of Entrepreneurship: The <i>Unternehmergeist</i> , Creative Destruction and Timing.....	9
	C. Contemporary Entrepreneurs in the Knowledge Marketplace: Drucker – Creative Imitation and Knowledge-Based Innovation.....	14
III.	Entrepreneurialism II: Non-Market Models	
	A. Introduction.....	21
	B. Non-Market Models of Entrepreneurs: The Political and Policy Context.....	22
	C. Non-Market Models of Entrepreneurs: Judicial Entrepreneurs.....	25
	D. A New Model for Judicial Entrepreneurs.....	30
IV.	Judicial Entrepreneur: Richard A. Posner	
	A. Introduction.....	33
	B. Economic Analysis of Law: A Brief History.....	34
	C. Posner and Creative Imitation.....	45
V.	Legal Publication and Case Law Citation Analysis	
	A. Introduction.....	58
	B. Citation Analysis Methodology.....	59
	C. Citation Analysis: Law Review Articles.....	64
	<i>Graph #1 Top 100 Cited Posner Law Review         Articles.....</i>	67

	<i>Graph #2 Top 100 Cited Posner Law Review Articles</i> .....	68
	<i>Chart # 1 Top 100 Posner Legal Articles By Year</i> .....	69
	D. Citation Analysis: Federal Case Law.....	70
VI.	Posner and the Economics of Crime	
	A. Introduction.....	76
	B. Efficiency and the Exclusionary Rule.....	79
	C. Posner and the Case Law.....	86
	D. Conclusion.....	97
VII.	Posner and the Economics of Antitrust	
	A. Introduction.....	99
	B. Chicago School of Antitrust Analysis.....	103
	C. Extrajudicial Publications.....	111
	D. Posner and the Case Law.....	119
	<i>Chart #2 Use of the Term Efficiency in Case Law</i> .....	123
	E. Conclusion.....	133
VIII.	Judicial Entrepreneur: Scalia and Statutory Interpretation	
	A. Introduction.....	135
	B. Theories of Statutory Interpretation.....	137
	C. Scalia: Judicial Entrepreneur.....	143
	<i>Table #1 Legislative History Citations By Year</i> .....	161
	<i>Table #2 Legislative History Citations By Year - Updated</i> .....	163
	<i>Graph #3 Use of Legislative History By Supreme Court Justices</i> .....	165
	D. The Critics: Posner and Breyer.....	168

E. Frankfurter: An Unsuccessful Judicial Entrepreneur.....	170
F. Conclusion.....	192
IX. Dissertation Conclusion.....	193
Bibliography.....	203
List of Cases.....	209

## **List of Tables/Figures**

Graph 1: Top 100 Cited Posner Law Review Articles.....	67
Graph 2: Top 100 Cited Posner Law Review Articles.....	68
Chart 1: Top 100 Posner Legal Articles By Year.....	69
Chart 2: Use of the Term Efficiency in Case Law.....	123
Table 1: Legislative History Citations By Year .....	161
Table 2: Legislative History Citations By Year - Updated.....	163
Graph 3: Use of Legislative History By Supreme Court Justices .....	165

*“I am a judge as well as an academic; and I believe more deeply than other judges and academics . . . that the social sciences in general and economics in particular should inform both the study and the administration of law.”*<sup>1</sup> Richard A. Posner

## **Chapter I. Introduction**

Over the last forty years, perhaps no jurist or scholar has written as extensively on judicial decision making as has Richard A. Posner, a federal judge sitting on the 7<sup>th</sup> Circuit Court of Appeals, a law professor at the University of Chicago, and a public intellectual. Posner is a polymath, who has addressed numerous legal and non-legal topics, ranging from aging, antitrust, the role of public intellectuals, and law and literature to legal pragmatism, sex, terrorism, and most recently, economic and financial regulatory failures. He is, to this day, the nation’s most cited jurist and legal authority.<sup>2</sup> But Posner is not simply a prolific writer of over fifty books and literally hundreds of articles, and chapters, plus over 2,250 judicial opinions;<sup>3</sup> he is also a judicial and public intellectual, who, as an entrepreneur, has advocated the use of certain analytical tools, particularly, economic analysis of the law, in which economic principles such as efficiency, wealth maximization and rational self-interest, are utilized in the judicial decision making process. Some of his ideas are original, but many are innovative interpretations of existing or recycled ideas with a contemporary application to the law on which he has put his mark.

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<sup>1</sup> Richard A. Posner, *Law and Legal Theory in the UK and USA* (Oxford: Oxford University Press, 1996), vii.

<sup>2</sup> Robert F. Blomquist, *The Quotable Judge Posner: Selections from Twenty-Five Years of Judicial Opinions* (New York: State University of New York Press, 2010), 1.

<sup>3</sup> Ibid.

As one of the founders of the Economic Analysis of the Law Movement (EAL) that developed at Yale and the University of Chicago law schools, Posner produced the first comprehensive treatise on the economics of law, *Economic Analysis of Law* (1972),<sup>4</sup> in which he argued that there was an inherent preexisting economic paradigm in traditional common law judicial decision making.<sup>5</sup> By appealing to people's rational self-interest, judges could promote economic principles of efficiency and wealth maximization in their judicial decision making and apply market principles to nonmarket areas of the law. Since the publication of *Economic Analysis of Law* and *The Economics of Justice*<sup>6</sup> in 1981, intended for a broader non-legal audience, the application of law and economics, coupled with a pragmatic framework, has been the hallmark of Posner's approach to "the study and administration of the law."<sup>7</sup>

Posner did not invent the idea of applying economic analysis to judicial decision making, nor did he ever claim that he did - that intellectual path had been well trod in American legal history,<sup>8</sup> and economic and legal scholars led the contemporary revival, with such seminal works as Gary Becker's *The Economics of Discrimination*,<sup>9</sup> Ronald Coase's "The Problem of Social

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<sup>4</sup> Richard A. Posner, *Economic Analysis of Law* (New York: Little, Brown and Company, 1972).

<sup>5</sup> *Ibid.*, 98.

<sup>6</sup> Richard A. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981).

<sup>7</sup> Posner, *Law and Legal Theory in the UK and USA*, vii.

<sup>8</sup> Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press/Oxford University Press, 1995), 308.

<sup>9</sup> Gary S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957).

Cost,”<sup>10</sup> and Guido Calabresi’s “Some Thoughts on Risk Distribution and the Law of Torts.”<sup>11</sup> Posner had no formal economic training, and prior to law school, had been an English literature major. But what he did very well was to take a preexisting legal idea, economic analysis of the law, and make it his own. On and off the bench, through his innovative interpretations and judicial entrepreneurial efforts, he worked to make EAL into a mainstream, albeit controversial, legal doctrine, to the point where law and economics became synonymous with Posner. Richard Posner is a judicial entrepreneur.

What is a judicial entrepreneur? To address this question we must first inquire as to the nature of entrepreneurship generally. Although there is no consensus as to how to define an entrepreneur,<sup>12</sup> the Austrian economist, Joseph Schumpeter (1883-1950), probably best captures the entrepreneur as “the pivot on which everything turns”<sup>13</sup> who facilitates “innovation” and “creative destruction.”<sup>14</sup> The theory of “creative destruction” is that “technical change and

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<sup>10</sup> Ronald H. Coase, “The Problem of Social Cost,” *Journal of Law and Economics* 3, no. 1 (October 1960): 1-44.

<sup>11</sup> Guido Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts,” *The Yale Law Journal* 70, no. 4 (March 1961): 499.

<sup>12</sup> The Concise Oxford English Dictionary provides a rather skeletal definition of an entrepreneur as “a person who sets up a business, taking on financial risks in the hope of profit.” *Concise Oxford English Dictionary* (Oxford: Oxford University Press, 2004), 476-477. An economics textbook defines an entrepreneur as “a person who has an idea for a business and coordinates the production and sale of goods and services, taking risks in the process.” The “idea” may be original or borrowed. Arthur O’Sullivan and Steven Sheffrin, *Economics: Principles and Tools* (New Jersey: Prentice Hall, 1998), 229.

<sup>13</sup> Joseph A. Schumpeter, *History of Economic Analysis* (New York: Oxford University Press, 1954), 555.

<sup>14</sup> See Joseph A. Schumpeter, *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (Virginia: Transaction Publishers, 1982). For an excellent analysis of Schumpeter’s life and scholarly work, see Thomas K. McGraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Cambridge: Belknap Press, 2007).

business cycles are the result of creative innovations, which cluster together and renovate economic life.”<sup>15</sup> But it is the term that Schumpeter coined, “*Unternehmergeist*,” translated as the “entrepreneur spirit,” that truly reflects Posner’s drive as a judicial entrepreneur. Posner has the drive, temperament, legal and academic pedigree, and skills to take existing legal ideas, innovate and repackage them, and make them his own and new again. By advocating an economic interpretation of the law, he has helped to bring about significant “discontinuity”<sup>16</sup> in the existing paradigm of judicial decision making and legal discourse. Posner is also an *Unternehmergeist* because he does not limit his advocacy to his judicial opinions, but has also been an extraordinarily productive public intellectual,<sup>17</sup> consistently promoting his ideas to the legal and non-legal community in a variety of disciplines and on a variety of topics.

The management authority, Peter Drucker (1909-2005), has stressed that it not necessary for entrepreneurs to create ideas, but they must be willing to run with new or old ideas when opportunities are presented.<sup>18</sup> In Posner’s case, the rise of neoliberal economic thought and the decline of Keynesian economic theories presented the right climate for a new approach to the

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<sup>15</sup> Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper Perennial, 1947), 81-86. “Economic instability is for [Schumpeter] the effect of fully human actions, the motives of which include not only the making of profits, but the sense of creativeness, love of risk, ambition, etc.” Adrien C. Taymans, “Marx’s Theory of the Entrepreneur,” *American Journal of Economics and Sociology* 11, no. 1 (October 1951): 75-90, 79.

<sup>16</sup> Ivan Bull and Gary E. Willard, “Towards a Theory of Entrepreneurship,” *Journal of Business Venturing* 8, no. 3 (May 1993): 181-294.

<sup>17</sup> See Richard A. Posner, *Public Intellectuals: A Study in Decline* (Cambridge: Harvard University Press, 2004).

<sup>18</sup> Peter Drucker, *The Essential Drucker* (New York: Harper Collins, 2001), 165-166.



economic analysis of the law.<sup>19</sup> In this dissertation, I will create and utilize a broader operational definition of a judicial entrepreneur, which incorporates classical market-based Schumpeterian entrepreneurial elements and modern neoliberal entrepreneurial elements, primarily Drucker's entrepreneurial conception of the knowledge-based entrepreneur and creative innovation, within the theoretical context of the existing judicial entrepreneurial literature, as well as entrepreneurial models developed in non-market fields, such as public policy and political science.

"Every idea is an incitement, given the speaker's enthusiasm for the result,"<sup>20</sup> and this is a dissertation about an idea, the economic analysis of law, and how Posner's enthusiasm for it has incited change in existing intellectual paradigms. Some ideas have traction and others do not, and having written so extensively and advocated for the use of economic analysis in judicial decision making, Posner raises the central research question of this dissertation: How effective has he been in inducing federal appellate judges to incorporate economic principles into the interpretation and analysis of market and nonmarket areas of the law? In this, has he compelled judges to rethink the very role of a judge? My principal focus will be on what the Posner case tells us about judicial entrepreneurship, an intellectually important topic that has been oddly neglected in the literature. The value of my dissertation and the contribution it will make to the

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<sup>19</sup> "Around 1980, the governing-ideology pendulum unexpectedly swung the other way [from New Deal Keynesian economics]. Advocates of free markets, individualism, and elimination of government regulation recaptured political and intellectual control in America, England, and, within a decade, most of the first world countries. Chicago School Law and Economics controlled the agenda... this most recent era of free market ideological dominance has seen a rekindling of the cult of the entrepreneur primarily in the form of the modern CEO." Charles R.T. O'Kelley, "Robert Clark's Corporate Law: Twenty Years of Change: The Entrepreneur and the Theory of the Modern Corporation," *The Iowa Journal of Corporation Law* 31, no. 753 (Spring 2006): 755.

<sup>20</sup> *Gitlow v. United States*, 268 U.S. 652, 673 (United States Supreme Court 1925). Holmes, J., dissent.

political science and legal literature will be the development of a better theoretical understanding of the judicial entrepreneur and the influence of new theoretical frameworks and analytical tools on judicial decision making.

The research will be situated within several theoretical contexts, specifically, market and non-market entrepreneurialism, judicial entrepreneurship, economic analysis of the law, statutory interpretation, and the legal subject matters of antitrust and criminal law. Three research methodologies will be utilized in the dissertation to infer Posner's influence and to evaluate and develop a working model for the judicial entrepreneur: a quantitative citation analysis; a qualitative case law analysis; and, a comparative case study analysis. A quantitative citation analysis will be conducted to evaluate the frequency of citations to Posner's law review articles, legal publications, and case law opinions. To strengthen the inferential data from the quantitative citation analysis, a qualitative research analysis of Posner's case law will be conducted to determine the impact of Posner's entrepreneurial activity on federal appellate judicial decisions, in particular, a comparative analysis of his opinions in a traditional market area of the law, antitrust, as compared to a non-market area of the law, criminal, to determine influence and the incorporation of economic principles into the legal reasoning of his opinions. And finally, a comparative case study analysis will be conducted comparing two other judicial entrepreneurs, Felix Frankfurter, who was not a successful judicial entrepreneur, and Antonin Scalia, who is a successful judicial entrepreneur, to further evaluate Posner's success as a judicial entrepreneur, and to test, evaluate, and offer improvements to the model of the judicial entrepreneur created in the dissertation.

As a judicial entrepreneur, what makes Posner distinctive and worthy of a detailed study is that he explicitly, not merely implicitly, seeks to influence other judges, the legal community, and the general public by incorporating economic principles in nonmarket areas of the law. Has he been successful? I expect that my research will show that Posner has been more successful in his advocacy for the use of economic analysis of the law in the judicial decision making process in market oriented areas of the law, such as antitrust, than in nonmarket areas of the law, such as criminal law, because such areas of the law are less amenable to utilizing economic principles for resolution, but that overall, he has been an extremely successful judicial entrepreneur and public intellectual in promoting his ideas on economic analysis of the law, generally. It has been four decades since Posner published the first treatise on law and economics, and his activities as a judicial entrepreneur warrant an assessment.

## Chapter II. Entrepreneurialism I: Market Models

### A. Introduction

To understand and appreciate the need for the development of a model to better understand the character and activities of a judicial entrepreneur, it may be useful to focus on entrepreneurship, generally, and more specifically on the historical development of the concept and how it applies to contemporary usage, in particular, to judicial entrepreneurs. The term seems to have originated in thirteenth century France as a derivative of the verb “entreprendre,” meaning “to do something” or “to undertake,” and by the sixteenth century, the noun form, “entrepreneur,” had come into usage to denote someone undertaking a commercial venture.<sup>21</sup> For most, the entrepreneur is usually associated with someone initiating a commercial endeavor, reflecting the historical development of the market model theories of the entrepreneur traced back to the economist, Richard Cantillon, who first developed theories on entrepreneurialism, which were later elaborated on by the economists, Jean Baptiste Say and John Stuart Mill, all of whom stressed the role of the entrepreneur as the individual who assumed the risk and uncertainty of a business enterprise.<sup>22</sup> This simple idea that an entrepreneur is an individual who is a risk taker, fundamental to the concept of the entrepreneur, was the first step in laying down the foundation for how the individual’s role in economic and social change could be conceived and developed to be applied to market and non-market activities.

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<sup>21</sup> Joshua C. Hall and Russell Sobel, “Public Policy and Entrepreneurship,” The Center for Applied Economics, The University of Kansas School of Business, Technical Report 06-0717, (July 2006): 4.

<sup>22</sup> Bull and Willard, “*Towards a Theory of Entrepreneurship*,” 185.

## **B. Schumpeterian Theories of Entrepreneurship:**

### **The *Unternehmergeist*, Creative Destruction and Timing**

The first contemporary economist truly to develop a theory of entrepreneurs, their role in economic modeling, and influence on capitalistic change was Schumpeter. His primary focus, how firms operated and the role innovation and creative destruction played in the process of economic development. For him, the disruptive qualities of the entrepreneur invigorated capitalism, challenging and changing the status quo, in what he termed “creative destruction.”<sup>23</sup> Thus, the Schumpeterian entrepreneur may be identified by the effects of his actions, as well as by their motivations. As a legal analogy, in the criminal law, a crime requires two elements, a mental state or *mens rea* and an act or *actus rea*. Like the elements of a crime, any workable definition of an entrepreneur must also include the elements necessary for the *mens rea* and an *actus rea* to fully capture the characteristics of the entrepreneur. Most contemporary anecdotal conceptions of the entrepreneur incorporate some elements of the *mens* and *actus rea*.

In respect to the *mens rea* of the entrepreneur, one of Schumpeter’s most important, but least understood, contributions to the entrepreneurial literature is the idea of the “*Unternehmergeist*,”<sup>24</sup> translated as the “entrepreneurial spirit;” the entrepreneur is the “man of action.”<sup>25</sup> Schumpeter writes:

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<sup>23</sup> Schumpeter, *Capitalism, Socialism and Democracy*, 84.

<sup>24</sup> Translation: <http://dictionary.reverso.net/german-english/Unternehmergeist>

<sup>25</sup> Markus C. Becker, Thorbjorn Knudsen, and Richard Swedberg, *The Entrepreneur: Classic Texts by Joseph A. Schumpeter*, (Stanford: Stanford Business Books, 2011), 101. Excerpt from

Here comes another element of great importance. Our man of action does not just follow given demand, or demand that is to be expected immediately. He forces his products onto the market... To introduce a product on the market, people need to be persuaded and sometimes even forced to use it.<sup>26</sup>

Schumpeter was probably familiar with the writings of Friedrich Nietzsche and his concept of the *Übermensch*,<sup>27</sup> and seems to be drawing a fine line between the *Übermensch* and the *Unternehmergeist*, when he describes the will behind the entrepreneur's drive, as

Then there is the will to conquer; the impulse to fight, to prove oneself superior to others, to succeed for the sake, not of the fruits of success, but of success itself. From this aspect, economic action becomes akin to sport... Again we should find countless nuances, some of which, like social ambition, shade into the first group of motives. And again we are faced with a motivation characteristically different from that of "satisfaction of wants" in the sense defined above, or from, to put the same thing into other words, "hedonistic adaptation."<sup>28</sup>

It is the individual who is the driving force of change in the economic marketplace, or in the marketplace of ideas, driven necessarily by pecuniary gain, but for personal reasons, as well. As compared to the historical producer, the shopkeeper, the entrepreneur is different because there is his inherent drive for "success itself."<sup>29</sup> The energy of the individual in a capitalist society is

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Schumpeter's *The Theory of Economic Development* (1911), Chapter: Fundamental Phenomenon of Economic Development.

<sup>26</sup> Ibid.

<sup>27</sup> The economic historian and author of *Prophet of Innovation: Joseph Schumpeter and Creative Destruction*, Thomas M. McCraw, has noted that, "The Schumpeterian entrepreneur has some characteristics in common with Max Weber's "charismatic" leader but falls short of the "superman" portrayed by Friedrich Nietzsche." McCraw, *Prophet of Innovation*, 71.

<sup>28</sup> Becker and Swedberg, *The Entrepreneur: Classic Texts of Joseph A. Schumpeter*, 71. Excerpt from Schumpeter's *The Theory of Economic Development* (1934), Chapter: Fundamental Phenomenon of Economic Development.

<sup>29</sup> There are similarities between Schumpeter's idea of the *Unternehmergeist*, Nietzsche's *Übermensch*, and the character Howard Roark in Ayn Rand's novel *The Fountainhead* and John Galt in *Atlas Shrugged* - there is an entrepreneurial character profile developed during this period which continues to permeate popular culture today.

profound and fosters change. With the *mens rea*, there is the complimentary *actus rea*; the role of the entrepreneur in an economic system was to provide creative destruction through the application of new innovations. Here, Schumpeter wrote of innovation as the “introduction of a new good – that is, one with which consumers are not yet familiar;” the “introduction of a new method of production;” and, “the opening of a new market.”<sup>30</sup> Though Schumpeter was thinking in terms of tangibles, the same categorization could apply to ideas, of which the economic analysis of the law is no exception. The legal market trades in ideas.

Another element, albeit less recognized, is the role of timing, which is crucial to the success or failure of the entrepreneur. Schumpeter recognizes the role of timing,<sup>31</sup> which affects the success or failure of the entrepreneur. Schumpeter’s own entrepreneurialism, advocating for his ideas and theories on capitalism, innovation, and entrepreneurialism, was itself fundamentally thwarted by timing: war, depression and other economic realities undermined the reception given his entrepreneurial theory,<sup>32</sup> instead proving ideal timing for Keynesian economics. Timing, and in some respects, the appreciation of the “zeitgeist” of the era, are also fundamental elements of entrepreneurial activity.

Thomas Kuhn, in his seminal work, *The Structure of Scientific Revolutions* (1962),<sup>33</sup> discusses the role of revolutions, scientific and intellectual, and how they change the

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<sup>30</sup> Becker and Swedberg, *The Entrepreneur: Classic Texts of Joseph A. Schumpeter*, 50.

<sup>31</sup> McCraw, *Prophet of Innovation*, 269. McCraw notes, “Much of the success enjoyed by individual entrepreneurs came down to their talent for seizing the opportunities of the moment.”

<sup>32</sup> *Ibid.*, 77. McCraw notes that “*The Theory of Economic Development* is an exemplary book, but the timing of its appearance was inopportune. Soon the First World War completely diverted readers’ attention from peacetime economic development.”

<sup>33</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

professional's world view, reset the paradigm, and force people to look at problems from a new and different perspective. Kuhn argued that scientific understanding did not develop gradually over time, but developed through periodic and turbulent paradigm shifts:

The transition from a paradigm in crisis to a new one from which a new tradition of normal science can emerge is far from a cumulative process, one achieved by an articulation or extension of the old paradigm. Rather it is a reconstruction of the field from new fundamentals, a reconstruction that changes some of the field's most elementary theoretical generalizations as well as many of its paradigm methods and applications. During the transition period there will be a large but never complete overlap between the problems that can be solved by the old and by the new paradigm. But there will also be a decisive difference in the modes of solution. When the transition is complete, the profession will have changed its view of the field, its methods, and its goals.<sup>34</sup>

Kuhn notes further:

[w]hen paradigms change, the world itself changes with them. Led by the new paradigm, scientists adopt new instruments and look in new places. Even more important, during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before. It is rather as if the professional community had been suddenly transported to another planet where familiar objects are seen in a different light and are joined by unfamiliar ones as well.<sup>35</sup>

These ideas could also be applied to politics and the law, although, the theories of "punctuated equilibria," borrowed from evolutionary biology and applied to public policy by Frank R. Baumgartner and Bryan D. Jones,<sup>36</sup> may be a more apt concept in describing the periodic changes in a variety of fields, including law.

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<sup>34</sup> Ibid., at 85.

<sup>35</sup> Ibid., at 111.

<sup>36</sup> Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: The University of Chicago Press, 1993).



Revolutions are not always obvious to most observers; some revolutions are rather “invisible” to most contemporary observers.<sup>37</sup> But paradigmatic changes require professionals to view their world differently after the revolution. In capitalism, Schumpeter would posit, it is “creative destruction” and innovation that foster Kuhn’s revolutions, but Schumpeter would ask: who is responsible for the revolution? It is the entrepreneur.<sup>38</sup> Due to its disruptive nature, entrepreneurship is, in itself, a “subversive activity” because it “disrupts accepted ways of doing things, and alters traditional patterns of behavior,” therefore giving rise to the Schumpeterian idea that innovation creates a process of “creative destruction”<sup>39</sup> by fostering new paradigms.

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<sup>37</sup> Ibid., 136.

<sup>38</sup> Schumpeter was born the same year as Keynes, and had a lifelong antagonism to Keynesian economics, but the great irony is that “it takes a new theory to kill an old theory,” and Schumpeter refused to accept the innovative theoretical changes of Keynes and also the “scientific revolution” of Keynesianism. Kate Crowley, *The Collected Scientific Papers of Paul A. Samuelson Vol. 4* (Cambridge: MIT Press, 1986), 177.

<sup>39</sup> “Entrepreneurship is a subversive activity. It upsets the status quo, disrupts accepted ways of doing things, and alters traditional patterns of behavior. It is, at heart, a change process that undermines current market conditions by introducing something new or different in response to perceived needs. It is sometimes chaotic, often unpredictable. Because of the dynamic nature of entrepreneurship and because of the entrepreneur’s ability to initiate change and create value, economist Joseph Schumpeter’s concept of “creative destruction” is an apt description of the process.” Raymond Smilor, “Entrepreneurship: Reflections on a Subversive Activity,” *Journal of Business Venturing* 12, no. 5 (September 1997): 1.

### **C. Contemporary Entrepreneurs in the Knowledge Marketplace: Drucker - Creative Imitation and Knowledge Based Innovation**

Peter Drucker developed a contemporary and comprehensive understanding of entrepreneurialism, which has been utilized extensively in the market models of entrepreneurialism literature. Where Schumpeter lays the intellectual foundation for contemporary entrepreneurialism with his concepts of *Unternehmergeist*, creative destruction, and timing, Drucker develops these themes with contemporary theories, particularly in the area of innovation and entrepreneurship, with such concepts as creative imitation, knowledge based innovation, specialty skills strategy, and convergence, as well by creating multiple paradigms to explain and understand categories of entrepreneurs, entrepreneurial strategies, and how to measure successful innovation. Drucker's ideas are important because they address a number of the missing elements in a contemporary understanding of knowledge based innovation and entrepreneurialism, and will prove useful in the development of a comprehensive understanding of the judicial entrepreneur.

Drucker is perhaps the most important writer on entrepreneurship at the end of the 20<sup>th</sup> and beginning of the 21st century. Like Schumpeter, he was born and raised in Vienna, but received his education in both Austria and England,<sup>40</sup> but it was in the United States that he felt most at home<sup>41</sup> where he became a prolific writer on business management. He was profoundly influenced by Schumpeter's ideas on innovation, entrepreneurship, and capitalism. With the publication of his famous book, *Innovation and Entrepreneurship* (1985), as well as other

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<sup>40</sup> Drucker, *The Essential Drucker*, Bibliographic Note.

<sup>41</sup> Andrea Gabor, *The Capitalist Philosophers* (New York: Times Books, 2000), 299.

significant writings, Drucker outlines a contemporary understanding of the entrepreneur, with an emphasis on corporations that is also applicable to numerous other situations and environments. Drucker incorporated many of Schumpeter's theories and applied them to the practical management of large corporations, such as General Electric, making concepts like "innovation" and "entrepreneurship" part of the lingua franca of contemporary business, particularly management practices.

For many, the idea of the entrepreneur continues to be associated with creating something new and original, but Drucker argued that originality is actually not the font of entrepreneurialism, and that innovation should not be mistaken or confused with originality. Instead, the entrepreneur was more likely to take other people's ideas, make them his own, and "exploits the success of others."<sup>42</sup> One of the entrepreneurial strategies that Drucker develops to explain how innovation tends not to be original, but rather a re-creation of an existing idea or product is through the concept of "creative imitation:"

The creative innovator exploits the success of others. Creative imitation is not "innovation" in the sense in which the term is most commonly understood. The creative imitator does not invent a product or service; he perfects and positions it. In the form in which it has been introduced, it lacks something. It may be additional product features. It may be segmentation of product or services so that slightly different versions fit slightly different markets. It might be proper positioning of the product in the market. Or creative imitation supplies something that is still lacking.<sup>43</sup>

Drucker defines innovation as "the specific instrument of entrepreneurship."<sup>44</sup> The definition may be broken down into two parts: innovation and opportunity. Drucker recognizes that

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<sup>42</sup> Drucker, *The Essential Drucker*, 167.

<sup>43</sup> *Ibid.*, 167-168.

<sup>44</sup> Peter F. Drucker, *Innovation and Entrepreneurship: Practices and Principles* (New York: Harper Row, 1985), 30.

entrepreneurship was “by no means confined solely to economic institutions,” and proceeds to use the development of the university as a prime example of entrepreneurial activities in a non-economic environment in which innovation is used.<sup>45</sup> The same is true for the law.

In particular, Drucker creates one category of innovation, “knowledge-based innovation,”<sup>46</sup> which is applicable and very helpful in understanding judicial entrepreneurs. He considers “knowledge-based entrepreneurs” to be the super-stars of entrepreneurship, which is not simply limited to what is traditionally perceived as “scientific or technical” innovations, but also applicable to “social innovations based on knowledge that can have equal or even greater impact.”<sup>47</sup> Knowledge-based innovations are developed over time, and it is not until a number of factors are present, including timing and opportunity, that knowledge-based innovation comes to fruition.

Drucker continues to develop his theory of knowledge based entrepreneurs by stressing the importance of “convergence” (or timing) of several different ideas, historical timing or confluence of other elements. He notes that one of the “second characteristics of knowledge-based innovations – and a truly unique one – is that they are almost never based on one factor but on the convergence of several different kinds of knowledge, not all them scientific or technological.”<sup>48</sup> This is an important determinant as to whether an entrepreneur is successful. Drucker continues to develop the theory of convergence by recognizing the entrepreneurial

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<sup>45</sup> Ibid., 23.

<sup>46</sup> Ibid., 115.

<sup>47</sup> Ibid., 107.

<sup>48</sup> Ibid., 111.

“Specialty Skills Strategy,” in which “timing is the essence of establishing a specialty skills niche. It has to be done at the very beginning of a new industry, a new custom, a new market, a new trend,”<sup>49</sup> and at the beginning of new legal idea, too. As well, timing continues to be an important point: “In the early stages of a major new development, the specialty skill niche offers an exceptional opportunity.”<sup>50</sup> So a key skill for the entrepreneur is to understand whether the time is right. It’s often not obvious, in fact, which is one reason they do not always succeed.

The history of jurisprudence in America may be characterized as a pattern of consistent opportunity and innovation within a limited framework of certain traditional legal theories and concepts. The legal historian, Neil Duxbury addresses the pattern of American legal thought:

American jurisprudence since 1870 is characterized not by the pendulum swing view of history but by complex patterns of ideas. Jurisprudential ideas are rarely born; equally rarely do they die.<sup>51</sup>

What does it mean to characterize American jurisprudence in terms of patterns of ideas? The pendulum swing vision of American jurisprudential history is premised on a fairly simple pattern. Formalism and realism perpetually supersede one another; as one dies, the other is born or is reborn.<sup>52</sup>

Duxbury considers the pattern of legal theories that develop in America to be more complex than a simple duality between formalism and realism, but it helps to explain Drucker’s concepts of innovation, opportunity, and in particular, convergence. The success of knowledge based innovation, according to Drucker, depends on several elements. First, it:

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<sup>49</sup> Drucker, *The Essential Drucker*, 176.

<sup>50</sup> *Ibid.*, 177.

<sup>51</sup> Duxbury, *Patterns of American Jurisprudence*, 2.

<sup>52</sup> *Ibid.*, 3.

[R]equires careful analysis of all the necessary factors, whether knowledge itself, or social, economic, or perceptual factors. The analysis must identify what factors are not yet available, so that the entrepreneur can decide whether these missing factors can be produced – or whether the innovation had better be postponed as not yet feasible.<sup>53</sup>

The entrepreneur must understand what factors are necessary, also often not obvious. This would also apply to innovations, which are intellectual ideas or paradigms. Second, the “innovation must proceed from a clear focus on strategic position. “It cannot be introduced tentatively.”<sup>54</sup> Knowledge-based “innovation creates excitement,”<sup>55</sup> and the field fills up quickly.

Drucker recognizes that there are certain “unique risks” to knowledge-based innovation, such as “innate unpredictability,” caused by the “long lead times and convergences – these give knowledge based innovations their peculiar rhythm.”<sup>56</sup> For a long time, there is awareness of an innovation about to happen – but it may not happen. Then, suddenly, there is a near-explosion, followed by a few short years of tremendous excitement, tremendous start-up activity, tremendous publicity.”<sup>57</sup> Drucker’s observation is similar to Kuhn’s arguments regarding changing paradigms and to Baumgartner and Jones’ punctuated equilibrium. Knowledge-based innovation, particularly at present, has become even more volatile and unpredictable, due to the pace at which information is disseminated, technology is developed, and ideas change.

Drucker’s theories go a long way to explain the cyclical nature of legal theories and the success of EAL’s prominence in contemporary legal discourse.

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<sup>53</sup> Drucker, *Innovation and Entrepreneurship*, 115.

<sup>54</sup> *Ibid.*, 117.

<sup>55</sup> *Ibid.*, 120.

<sup>56</sup> *Ibid.*, 120.

<sup>57</sup> *Ibid.*

Drucker also sets forth four, rather colloquial, entrepreneurial strategies necessary for the successful adoption of an innovative idea, which “are not mutually exclusive” and may not apply to all situations:

1. “Being fustest with the mostest.”
2. “Hitting them where they ain’t.”
3. “Finding and occupying a specialized “ecological niche.”
4. “Changing the economic characteristics of a product, a market, or an industry.”<sup>58</sup>

The four entrepreneurial strategies are rather self-explanatory and in some respects common sense: being first with an idea or innovation is important, but Drucker recognizes that first “aims from the start at a permanent leadership position,”<sup>59</sup> not simply to control, but to dominate the market. The second strategy, “Hitting them where they ain’t,” Drucker called “creative imitation” and “entrepreneurial judo,” which are attempts at market leadership by seeing an opening, a need, and exploiting them.<sup>60</sup> The idea of “finding and occupying a specialized ecological niche” is about creating a situation in which entrepreneurs are “immune to competition and unlikely to be challenged.”<sup>61</sup> The important entrepreneurial idea that develops from this point is the idea of the “specialty skills strategy,” in which “timing is the essence in establishing a specialty skills niche. It has to be done at the very beginning of a new industry, a new custom, a new market, a new trend.”<sup>62</sup> And the final strategy, “Changing the economic

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<sup>58</sup> Drucker, *The Essential Drucker*, 161.

<sup>59</sup> *Ibid.*, 162.

<sup>60</sup> *Ibid.*, 173.

<sup>61</sup> *Ibid.*, 174.

<sup>62</sup> *Ibid.*, 176.

characteristics of a product, a market, or an industry,” addresses the products or services that “have been around a long time,” but “converts this old, established product or service into something new. It changes its utility, its value, and its economic characteristics. While physically there is no change, economically there is something different and new.

Even though Drucker was more concerned with the concept of “entrepreneurial management” within the corporate framework, he also believed the principles were consistently the same regardless of the organizational structure – private or public – and the necessary role of creative innovation. The market-based literature on entrepreneurialism is very well developed and provides much of the framework for better understanding the character and strategies of the judicial entrepreneur and other non-market entrepreneurial actors. Based on the research and writing of Schumpeter and Drucker’s interpretation of the entrepreneur, important elements for the character and strategies of the judicial entrepreneurial model to be developed may be borrowed from their literature including the conceptual idea of the entrepreneurial character, the *Unternehmergeist*; the importance of creative destruction, timing, convergence, and the opportunities they present for paradigmatic changes to the existing status quo by a knowledge-based worker.



## Chapter III – Entrepreneurialism II: Non-Market Models

### A. Introduction

Market oriented models of the entrepreneur are useful in helping to create a working definition of a judicial entrepreneur, but when applied to non-market environments, such as the law, legal community, and courts, challenges may arise because other important considerations, such as justice and the rule of law, must be taken into consideration. Generally, in market oriented environments, economic principles of profit and loss dominate the decision making process, whereas in the public sector, other principles may dominate. This is not to say that the law and public policy do not address economic issues; on the contrary, they frequently engage powerful economic interests and generate major economic consequences, but other principles, beyond profit, will be considered the ultimate goal. Still, many of the principles in the market models of entrepreneurialism do have application to the public sphere. Elections change political players; political ideology influences policy changes; and, as in the market place, entrepreneurs act as “agents of change.”<sup>63</sup>

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<sup>63</sup> The authors attempt to move beyond the idea of entrepreneurs as simply “agents of change” and “argue that leaders who advocate political innovations can play the public sector equivalent of private sector entrepreneurs – they perceive opportunities for political and policy change, they advocate innovative ideas, and they transform political arenas (or “markets”). In this book, we study public entrepreneurs as agents of change in what we call the “local market for public goods.” Mark Schneider and Paul Teske with Michael Mintrom, *Public Entrepreneurs* (Princeton: Princeton University Press, 1995), 3.

## **B. Non-Market Models of Entrepreneurs: The Political and Policy Context**

In the political science literature, particularly the policy literature, significant attention has been paid to the entrepreneur in politics and the policy process beyond the simple concept as an agent of change. Considerable research was done in the 1970s and 1980s, “the era of the entrepreneur,” but there still is no consensus as to the definition of “policy entrepreneur” or even whether the term is an appropriate description for policy actors.<sup>64</sup> Indeed, much of the literature seems to reprint the same definition or references to established works, without adding any significant contribution to understanding or creating a more comprehensive definition of the entrepreneur in the non-market policy or political fields.

One scholar has summed up his scholarly review by defining policy entrepreneurs as “persons willing to use their own personal resources of expertise, persistence, and skill to achieve certain policy policies they favor,”<sup>65</sup> with two “especially important” characteristics: “expertise and persistence.”<sup>66</sup> David Pozen has noted four common characteristics in the policy literature attributed to the policy entrepreneur: “innovation;” “mobilization” of support; “diligence” or perseverance; and, “strategic timing.”<sup>67</sup> John Kingdon has developed perhaps the most comprehensive model of the policy entrepreneur in his classic work on public policy, *Agendas*,

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<sup>64</sup> David E. Pozen, “We Are All Entrepreneurs Now,” *Wake Forest Law Review* 43, 283 (Spring 2008): 301-304.

<sup>65</sup> Carol S. Weissert, “Policy Entrepreneurs, Policy Opportunists, and Legislative Effectiveness,” *American Politics Quarterly* 19, no. 2 (April 1991): 263.

<sup>66</sup> *Ibid.*, 264.

<sup>67</sup> Pozen, “We Are All Entrepreneurs Now,” 301-304.

*Alternatives, and Public Policies*, which is considered a primary reference for the policy literature. Here, he outlined three important entrepreneurial qualities: the entrepreneur must have a claim “to a hearing,” such as being an expert or being in an “authoritative decision-making position; he must possess strong “negotiating skills” and “political savvy;” and, most important, he must be persistent.<sup>68</sup>

In conjunction with his theories on policy development, Kingdon adds another principle for analyzing the policy entrepreneur, arguing that policy entrepreneurs must develop their ideas, expertise, and proposals well in advance of the time a policy “window” opens and an opportunity presents itself for the entrepreneur.<sup>69</sup> Although Kingdon’s theories were intended for policy makers in the political arena, the qualities and strategies of the entrepreneur for seizing and/or creating opportunities may be applied to judges and the judicial decision making process, as well. Much of the economic literature also addresses the issue of opportunity and timing. Judges cannot predict the timing or nature of a case, but a case may represent a “window” of opportunity for a judge to apply a novel theoretical approach to judicial decision making (e.g., *Brown*), or a judge may create a “window” by redefining the legal issue or question before the court so as to allow it to address certain jurisprudential goals (e.g., *Citizens United*). Unfortunately, Kingdon’s outline of a policy entrepreneur that summarizes a policy entrepreneur who is persistent, an expert, and has the political savvy to exploit policy “windows” is insufficient alone to define a judicial entrepreneur, though it remains helpful in the creation of a working paradigm to better understand the role.

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<sup>68</sup> John W. Kingdon, *Agendas, Alternatives, and Public Policies* (New York: Addison-Wesley Educational Publishers, 1995), 180-181.

<sup>69</sup> *Ibid.*, 165-166.

One attempt to synthesize the market based economic analysis of entrepreneurialism with the public policy literature was Mark Schneider and Paul Teske's article, "Toward a Theory of the Political Entrepreneur: Evidence From Local Government." Their entrepreneurial model is somewhat similar to the approach taken in this dissertation to create a model for the judicial entrepreneur, in that they "synthesize aspects of an economic approach to entrepreneurship, with concepts used in political science and apply the results to local government;"<sup>70</sup> unfortunately, their model fails to include a number of principles, particularly those of Drucker to explain knowledge-based innovation, but their work does recognize the importance of including market based principles in the development of a public policy theory of entrepreneurialism.

David Osborne and Ted Gaebler attempted to utilize market oriented principles of entrepreneurialism and apply them to public policy through their book, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (1992). Utilizing the definition created by J.B. Say, the French economist, of an entrepreneur who "shifts economic resources out of an area of lower and into an area of higher productivity and greater yield," they posit an entrepreneurial model that may be applied to "public sector institutions that habitually... use their resources in new ways to heighten both their efficiency and their effectiveness."<sup>71</sup> And *Reinventing Government* is helpful in addressing one of the misconceptions of entrepreneurialism, that entrepreneurs are risk takers, noting that "as careful studies demonstrate,

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<sup>70</sup> Mark Schneider and Paul Teske, "Toward a Theory of the Political Entrepreneur: Evidence from Local Government," *American Political Science Review* 86, no. 3 (September 1992): 737.

<sup>71</sup> Ted Gaebler and David Osborne, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Penguin Group, 1992), xix.

entrepreneurs do not seek risks, they seek opportunities.”<sup>72</sup> What differentiates the entrepreneur is actually a more opportunistic nature that sees opportunities through intentional innovation. After reviewing the public policy literature on entrepreneurialism, it continues to remain relatively piecemeal and inadequate for the purposes of creating a comprehensive definition of judicial entrepreneur.

### **C. Non-Market Models of Entrepreneurs: Judicial Entrepreneurs**

The existing literature on judicial entrepreneurs is extremely slim, with only two scholars having done any significant research in the area. Wayne McIntosh and Cynthia Cates developed a rudimentary definition of a judicial entrepreneur in their book, *Judicial Entrepreneur: The Role of the Judge in the Marketplace of Ideas* (1997),<sup>73</sup> and in a related article, “Retail Jurisprudence: The Judge as Entrepreneur in the Marketplace of Ideas” (1995).<sup>74</sup> Even McIntosh and Cates recognize the paucity of literature on the subject, observing that, “with rare exceptions, the notion of judicial entrepreneurship is conspicuously absent in the legal and political science literature.”<sup>75</sup> The authors attempt to explain the deficiency by noting the “longstanding legal tradition warning judges of the dangers of policy entrepreneurship... Judges, after all, are

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<sup>72</sup> *Ibid.*, xx.

<sup>73</sup> Wayne V. McIntosh and Cynthia L. Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas* (Westport, Connecticut: Greenwood Press, 1997).

<sup>74</sup> Wayne V. McIntosh and Cynthia L. Cates, “Retail Jurisprudence: The Judge as Entrepreneur in the Marketplace of Ideas,” *Journal of Law and Politics* 11 (Fall 1995): 709-50.

<sup>75</sup> Cates and McIntosh, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas*, xiv. Referring to Marc Galanter, et al., “The Crusading Judge: Judicial Activity in Trial Courts,” *Southern California Law Review*, 52, 699 (1979): 17.

supposed to remain “passive” and “neutral,”<sup>76</sup> and not entrepreneurial in their actions. This argument is insufficient to explain the paucity of research in the area of judicial entrepreneurship, particularly when the literature on judicial decision making demonstrates that judges are neither passive nor neutral.

McIntosh and Cates’ book focuses on four judges viewed from the perspective of “sellers” in the “marketplace of ideas,” who have assumed the risk of promoting a specific jurisprudential idea. Asserting the primacy of the risk, they have as its subtitle Supreme Court Justice’s Oliver Wendell Holmes’ “metaphor of a “marketplace of ideas,” which created the enduring image of ideological goods vying for supremacy in a democratic marketplace.”<sup>77</sup> Through case analysis, they review the decision making of four appellate judges by examining their written opinions: Supreme Court Justice Louis Brandeis, whom they refer to as “The Consummate Entrepreneur”; U.S. Second Circuit judge Jerome Frank, whom they identify with the “Hard Sell”; Hans Linde, a lesser known Oregon Supreme Court judge, who “Trade[s] in Legal Ideas”; and, Supreme Court Justice Sandra Day O’Connor, whom they view from the vantage point of the “Soft Sell.”<sup>78</sup> The purpose of evaluating the four judges is to “begin to develop the notion of judicial entrepreneurship as a useful concept for understanding the intellectual contests involved in legal reasoning.”<sup>79</sup>

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<sup>76</sup> McIntosh and Cates, “Retail Jurisprudence,” 709.

<sup>77</sup> McIntosh and Cates, “Retail Jurisprudence,” 709. Quoting Holmes’ dissent in *Abrams v. United States*, 250 U.S. 616, 631 (U.S. Supreme Court 1919) (Holmes, J., dissenting).

<sup>78</sup> McIntosh and Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas*, 91.

<sup>79</sup> *Ibid.*, xiv.

They make several contributions to the research on judicial entrepreneurship, specifically, by distinguishing between the role of judicial entrepreneur and of judicial activist, noting that “judicial activism can mean all things to all people.”<sup>80</sup> They point out that an appellate judge’s primary role is to write opinions in the normal course of his responsibilities, therefore it raises the question, if an appellate judge’s responsibility is to write opinions and rationalize their legal interpretation is already expected of them, then what distinguishes the opinion writing of a judicial entrepreneur from that of a regular appellate judge doing what is expected of him in his capacity as a judge?<sup>81</sup> Opinion writing is the normal course of their business and all judges have particular viewpoints on different legal questions. Are all appellate judges, in one way or another, judicial entrepreneurs? It will be argued that a judicial entrepreneur must do more than simply write appellate opinions, but must actively promote a legal idea through other means, too, including, but not limited to, extra-judicial writings aimed at both the legal academy and the general public. The judicial opinion may be the primary tool, but in some respects, it is also quite limiting because an opinion addresses the details of a particular case, and including tangential information and arguments is frowned upon and usually avoided by the opinion writer.

McIntosh and Cates consider entrepreneurship only within the institutional framework of courts and the justices’ opinions on particular cases, and do not address the judicial entrepreneur’s use of extra-judicial writings as a strategic tool for the judge to advocate for and disseminate the judicial entrepreneur’s ideas. Their definition of judicial entrepreneur does address the “written word” but within limited parameters:

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<sup>80</sup> McIntosh and Cates, “Retail Jurisprudence,” 710.

<sup>81</sup> William J. William, “Entrepreneurship in Economic Theory,” *The American Economic Review* 58, 2 (May 1968): 64.

one who is alert to the opportunity for innovation, who is willing to invest the resources and assume the risks necessary to offer and develop a genuinely unique legal concept, and who must strategically employ the written word to undertake change.<sup>82</sup>

They continue to elaborate on their definition by noting that they will evaluate the judges using the “case method” by limiting themselves to evaluating opinions.<sup>83</sup> In the battle for ideas, the “written word” is the primary vehicle for undertaking change, but judicial entrepreneurs are not limited simply to opinions. The emphasis on appellate decisions fails to recognize the role that law reviews and treatises play in the development of legal ideas and their dissemination into the larger legal discourse that takes place in the legal academy and the larger legal community. Appellate opinions are extremely important and an effective way to gauge a judge’s judicial philosophy, but they also represent what judges normally do on a day to day basis: they are expected to write opinions as part of their position.

What judges are not expected to do, and in some respects are discouraged from doing, is candidly discussing the judicial decision making process, its faults, and alternative methods for deciding cases that may challenge conventional practice. This is an important factor when considering what differentiates a judicial entrepreneur from an appellate judge acting within the scope of his normal duties. In some respects, a judge is addressing multiple audiences in their opinion. First and foremost, his opinion is addressing the parties in the dispute and the questions they have asked the court to decide, but the litigants are not the only people that judges have in mind when they’re writing their opinions. Judges are also writing with the possible precedential

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<sup>82</sup> McIntosh and Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas*, 5.

<sup>83</sup> *Ibid.*, 16. One element of evaluating Richard Posner as a judicial entrepreneur will be to review some of his cases to determine the extent of his use of economic analysis of the law in deciding them, but this will be just one element of a larger attempt to understand his role in the economic analysis of law movement.



value of his opinion. The opinion is therefore directed at other judges and courts, the legal community, the legal academy, and ultimately, to the general public. Legal opinions serve many purposes for different people and the judicial entrepreneur understands how to utilize the opinion as one of many strategic tools to advocate for his ideas.

A broader definition is required to capture the judicial entrepreneur. A judicial entrepreneur's activities extend well beyond his written judicial opinions. Additionally, even though they rely on some of Schumpeter and Kirzner's ideas on entrepreneurialism, they disregard Drucker entirely, particularly his work on creative imitation and knowledge-based innovation, another example of the lack of market oriented entrepreneurial literature in the social science context. When reviewing the policy literature, they utilize Schneider and Teske, and Mintrom's definition of public entrepreneur:

[All] entrepreneurs must perform three functions. First and foremost, entrepreneurs discover unfilled needs and select appropriate prescriptions for how those needs may be met – that is, they must be alert to opportunities. Second, as they seize these opportunities, entrepreneurs bear the reputational, emotional, and frequently, the financial risk involved in pursuing a course of action with uncertain consequences. Finally, entrepreneurs must assemble and coordinate teams or networks of individuals and organizations that have the talents and/or resources necessary to undertake change.<sup>84</sup>

Although helpful, the Schneider, Teske, and Mintrom definition is general in its scope and inadequate for understanding the role of the judicial entrepreneur, and Posner in particular, by relying on three basic principles of entrepreneurialism: being alert to opportunities; willing to assume risk; and, undertaking change.

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<sup>84</sup> Ibid., 6. Quoting from Schneider, Teske and Mintrom, *Public Entrepreneurs*, 2.

Unfortunately, there is very little legal or political science scholarship in respects to the topic of judicial entrepreneurship and its role in the development of jurisprudence. Conducting a simple search of the term, “Judicial Entrepreneur” in the LexisNexis database, All US Law Reviews and Journals, returned only nineteen articles, indicating a woefully neglected area of study, particularly considering the significant role appellate judges play in a common law system. Prior to and since the publication of *Judicial Entrepreneurs* by Cates and McIntosh, there has been essentially no scholarship on the topic. In contrast to the lack of scholarship in the legal and political science literature, the concept of the market-based entrepreneur continues to be researched, developed, and written about in scholarly and general publications unabated.

#### **D. A New Model for Judicial Entrepreneurs**

There remains the quintessential problem of creating a definition of an entrepreneur, and more particularly, that of the judicial entrepreneur. The review of the market and non-market literature on entrepreneurialism has demonstrated that researchers tend to use descriptive concepts of an entrepreneur; they know an entrepreneur when they see one, but they have not developed a useful operational definition. Of course, as a definition is merely a record of a determination to use a term in a particular way:

No definition is good in itself. A definition is a construct at the service of the research questions that are of interest to a scientific community at a given time. From this standpoint, it can be described as “biodegradable” or transitional. It and only if:

1. It can be used to build theories and carry out more effective empirical research, in order to gain a better understanding of the phenomenon and, eventually, to make good quality predictions;

2. It is shared by the researchers in the field with a view to promoting the accumulation of knowledge.”<sup>85</sup>

An exact working definition of a judicial entrepreneur may be insufficient and counterproductive in attempting to better understand the role of the judicial entrepreneur in the judicial decision making process and the development of new legal ideas, but a larger working model of a judicial entrepreneur that is based on the characteristics and strategies of the judicial entrepreneur, operating within in certain conditions and measures of success, may be more appropriate. Utilizing the market and non-market concepts of the entrepreneur discussed in previous chapters, the following two part model of characteristics and strategies may offer a better definitional paradigm to help understand the judicial entrepreneur.

Characteristically, the judicial entrepreneur will possess the “entrepreneurial spirit, or what Schumpeter termed, *Unternehmergeist*, and as a knowledge-based innovator, will seize upon a legal idea or principle, whether novel or not traditionally utilized or underutilized, and publicly take ownership of it and actively and persistently advocate for the idea over a period of time in order to change or modify an existing legal paradigm. He is personally and professionally driven, seeks the risks and assumes personal responsibility for the endeavor, and is willing to utilize his professional stature, reputation, and position as a platform to advocate for his ideas. The judicial entrepreneur becomes a recognizable public figure.

Strategically, a judicial entrepreneur consciously and intentionally takes advantage of existing opportunities, and creates new ones, to strategically promote his innovative legal ideas through

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<sup>85</sup> Christian Bruyat and Pierre-Andre Julien, “Defining the Field of Research in Entrepreneurship,” *Journal of Business Venturing* 16, no. 2 (March 2001): 4.

the written word. The primary vehicle for the judge is the written opinion,<sup>86</sup> but he does not limit himself only to legal opinions; he must also promote his ideas through extra-judicial writings, such as law review articles and treatises intended to persuade judges, lawyers, and legal academics, and more general legal books tailored to reach the larger reading public. He strategically engages in debate and conversation, both in the written word and through public personal engagement, with judges, legal academics, and the general public to promote his ideas. Judicial entrepreneurs utilize their unique and special knowledge based skills and status, and taking advantage of timing and convergence, they commit to causing discontinuity in existing intellectual paradigms, and creating new paradigms through creative destruction. And ultimately, the judicial entrepreneur strives to create new intellectual paradigms through innovation of ideas.

This comprehensive model of a judicial entrepreneur incorporates many of the ideas from the market and non-market entrepreneurial literature and builds on the principles of knowledge based skills, opportunity, timing, convergence, creative imitation, strategy, methods, persistence, risk, and creative destruction. A judicial entrepreneur is not simply a mere producer of judicial opinions on the courts, but is actively engaged and meets the criteria set forth above. Based on the criteria outlined, Posner has been the consummate judicial entrepreneur in his advocacy in the use of economic analysis of law in judicial decision making.

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<sup>86</sup> McIntosh and Cates, *Judicial Entrepreneurship*, 4.

## Chapter IV. Judicial Entrepreneur: Richard A. Posner

### A. Introduction

*“For the rational study of law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” Oliver Wendell Holmes<sup>87</sup>*

*“As always in the history of thought, one can find predecessors.” Richard Posner<sup>88</sup>*

Richard A. Posner is the consummate judicial entrepreneur, on and off the bench. Since embracing economic principles as tools to better understand, interpret, and apply the law, he has not only become the leading proponent of economic analysis of law, but also the leading scholar, judge, and public intellectual most associated with the EAL movement. Posner did not invent the idea of economic analysis of law, which had existed in a number of permutations throughout legal history; over a century ago, Oliver Wendell Holmes had noted that the future of the law would include statistics and economics.<sup>89</sup> But Posner was beginning his legal career when few leading scholars were seriously exploring the use of economics in law in the 1960s, and was intellectually drawn to this developing analytical field.<sup>90</sup> As a knowledge-worker and innovator, through “creative imitation” he helped to reinvent EAL and take the lead in what would become

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<sup>87</sup> Oliver Wendell Holmes, “The Path of the Law,” *Harvard Law Review* 10, 457 (1897): 469.

<sup>88</sup> Posner, *The Economics of Justice*, 3-4.

<sup>89</sup> Holmes, “The Path of the Law,” 469.

<sup>90</sup> Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008), 98.

known as the EAL movement.<sup>91</sup> He would later continue pursuing his advocacy of the use of the economic analysis of the law as a judicial entrepreneur, on and off the federal appellate bench.

### **B. Economic Analysis of the Law: A Brief History**

*“Economics is considered by its jurisprudential advocates to be not just any old social science, but the queen of the social sciences, the only social science capable of providing analytical models which facilitate the discovery of precise, verifiable answers to many difficult questions about legal policy and decision-making.”<sup>92</sup> Neil Duxbury*

Economic analysis of the law, or law and economics, or EAL, is not easily defined, for it has come to represent a larger movement of diverse academic interests utilizing economic principles for the analysis of legal issues. At its most basic level, EAL could be defined as simply the utilization of economic principles as analytical tools to interpret laws, improve efficiency, maximize wealth, and understand the general nature of law and legal processes. But that definition would be insufficient to truly understand the history and dynamic interplay of law and economics as a jurisprudential movement. EAL is both descriptive and normative.<sup>93</sup> Law and economics is interested in an empirical understanding of the impact of the law and judicial decisions, but it is also normative in its attempts to make the law more efficient and in turn, maximize wealth and utility.

The advent of contemporary law and economics is to some degree a revolutionary idea because it represents a radical departure from traditional jurisprudential norms and goals of

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<sup>91</sup> It should be noted that EAL is not one monolithic school of thought. Like most movements, although they may share some fundamental principles, there are many branches of discourse and research which have only continued to develop and expand.

<sup>92</sup> Duxbury, *Patterns of American Jurisprudence*, 310.

<sup>93</sup> Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Belknap Press, 2004). 1.

justice or order. It presented a challenge to the existing status quo. Most criticism of law and economics tends to be based on these normative efforts which are viewed as part and parcel of a conservative neo-liberal agenda, and although there may be some truth in that assessment in certain quarters, it is not controlling. Even critical legal scholars utilize economic analysis in their attempts to understand the law.<sup>94</sup> The empirical analysis of EAL reflects a general attempt to create an impartial and objective measure with which to evaluate the law and the decision-making through rational choice and other theories. EAL makes use of many economic tools to view legal issues, but the confusion as to how to define law and economics as a movement today abounds. As one historian of American legal jurisprudence has commented:

Today, law and economics is a subject over which controversy and confusion reign. Defining the subject is like trying to eat spaghetti with a spoon. Law and economics can be positive, normative, neo-classical, institutional, Austrian—quite simply, the subject is weighed down by a multitude of competing methodologies and perspectives which are not always easily distinguishable. However one conceives it, one finds that between promoters and detractors, misunderstanding abound. There is even a debate over whether or not the subject is coming or going. For some, law and economics has reached the peak of its popularity. For others, it continues to grow from strength to strength. Literature criticizing the subject proliferates as rapidly as the literature expounding it. For anyone coming fresh to law and economics, disorientation is a state quickly achieved.<sup>95</sup>

The attention and confusion that EAL receives speaks to its prominence it plays in contemporary legal discourse and jurisprudence; the fact that it remains a major topic of discussion, and has not been superseded by another dominant legal theory, demonstrates its adaptability and continuing promise as a movement. Perhaps the continuing interest in EAL

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<sup>94</sup> James R. Hackney, Jr., *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York: New York University Press, 2012), 34. Interview with Duncan Kennedy.

<sup>95</sup> Duxbury, *Patterns of American Jurisprudence*, 314-315.

reflects the fact that the use of economic analysis of the law is not new and has existed in a number of permutations.

There has been much debate as to the origins of the present permutation of economic analysis of the law movement. Not unlike politics, jurisprudential history can also be broken down into legal movements and theories, and EAL, as a movement, is no exception. EAL is part and parcel of an ongoing jurisprudential debate over the different attempts, or theoretical schools, to better understand the nature of the law and judicial decision making:

[S]ince the Langdellian era, American jurisprudence has been constituted by certain movements and responses to movements—which often themselves become movements—and that, as one movement builds upon another, some of the legal perceptions and beliefs of the past are either rejected or revised. Langdellianism, conceptionalism, formalism, or whatever we want to call it was replaced by realism, functionalism, pragmatism, or whatever we want to call that, which in turn was superseded by something else—the process tradition, certainly, but perhaps also law and economics.<sup>96</sup>

Even though there has been much debate as to the origins of the EAL movement, most scholars have attributed its origin to the realist movement.<sup>97</sup> The present EAL movement, and the focus of the dissertation, began with the publication of several seminal law review articles and books in the 1960s and 70s. Ronald Coase’s “The Problem of Social Cost” (1960)<sup>98</sup> was one of the first, and perhaps the most influential, article in law in economics published to date, its influence on academic discourse, particularly law and economics, cannot be overstated.

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<sup>96</sup> Ibid., 308.

<sup>97</sup> Henry E. Smith, “The People’s Common Law: Is Law and Economics Anti-Democratic? Law and Economics: Realism or Democracy.” *Harvard Journal of Law and Public Policy* 127 (Winter 2009): 128.

<sup>98</sup> Ronald H. Coase, “The Problem of Social Cost.” *Journal of Law and Economics* 3, no. 1 (1960).



Research has shown that it is the most cited law review article of all time, surpassing Holmes', "The Path of the Law," and Brandeis', "The Right to Privacy" by a significant margin.<sup>99</sup> What makes "The Problem of Social Cost" such a seminal article in law and economics, and other fields is that it provided an entirely new framework for understanding the allocation of costs and liability.<sup>100</sup> The article forced scholars to reevaluate their analytical tools and look at legal problems from a different perspective. Whether one agrees with Coase's arguments or not, new economic tools and perspectives drive the intellectual debate on how to approach traditional questions, often taken for granted by scholars.

There were other influential pioneering studies utilizing economic analytical tools to evaluate the law, such as Guido Calabresi's "Some Thoughts on Risk Distribution and the Law of Torts" (1961)<sup>101</sup> and his book *The Cost of Accidents: A Legal and Economic Analysis* (1970).<sup>102</sup> A scholar at Yale Law School and now a federal judge, Calabresi reevaluated costs and liability in tort laws; Gary Becker's *The Economics of Discrimination* (1971)<sup>103</sup> and his prior scholarly work in applying economic analysis to traditionally non-market fields, such as race, family, and addiction, started an entire cottage industry of applying economic analysis to numerous topics. It is hard to even think about contemporary issues without considering a Beckerian approach which

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<sup>99</sup> Fred Shapiro and Michelle Pearse, "The Most-Cited Law Review Articles of All Time," *Michigan Law Review* 110, no. 8 (2012): 1489.

<sup>100</sup> Posner, *Economic Analysis of the Law*, 50-51.

<sup>101</sup> Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," *The Yale Law Journal* 70, no. 4 (March 1961).

<sup>102</sup> Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970).

<sup>103</sup> Gary Becker, *The Economics of Discrimination* (Chicago: The University of Chicago Press, 1971).

uses economics to analyze traditionally non-market issues. And, then there is Posner's seminal treatise, *Economic Analysis of the Law* (1972),<sup>104</sup> which synthesized much of the academic literature to that date for use into a treatise used by legal practitioners, judges, and students. Since then, there has been a steady stream, some might even argue, a deluge, of articles and books written specifically about EAL, or incorporating economic principles in legal articles in some form. EAL has become an established subject in jurisprudential considerations and law school curriculums, as it embraces such economic principles as efficiency, wealth maximization, rational decision making, and transaction costs, and applies them to particular areas of the law, both substantive and procedural. This development did not happen by accident, but required a concerted effort to introduce a paradigm shift in legal discourse and education.

The wellspring for the contemporary use of law and economics is the University of Chicago. Other law schools played a role in the development of EAL, or at a minimum, provided forums from which to critique the movement, such as Harvard and Yale, but suffice it to say, the University of Chicago Law School, in conjunction with the Economics Department, provided a fertile home for economists and lawyers inclined to the use of economics in law which laid the foundation necessary for the movement to thrive. Interestingly, the movement was not founded by lawyers, but instead by influential economic academics who moved from the Economics Department of the University of Chicago to the law school. Scholars have pinpointed the beginning of the economic analysis of law at the University of Chicago with the appointment of Henry Simmons, an economist, to the law school in 1939 to teach Economic Analysis and Public

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<sup>104</sup> Richard A. Posner, *Economic Analysis of Law*, (New York: Little, Brown and Company, 1972).

Policy,<sup>105</sup> and subsequently the appointment of Aaron Director in 1946.<sup>106</sup> Director was a key figure who led the movement, particularly in the area of antitrust,<sup>107</sup> and hired and marshalled colleagues to join the law school over the next few decades. It was under his direction that the first law review dedicated to law and economics, *Journal of Law and Economics*, was founded at the University of Chicago in 1958.

The focus on economics, particularly a neo-liberal market-oriented approach, became synonymous with the school, and scholars simply referred to the intellectual ideas coming out of the school as the “Chicago School.” The Chicago School has been summarized as standing for the “belief in the efficacy of the free market as a means of organizing resources, for skepticism about government intervention into economic affairs, and for emphasis on the quantity of money as a key factor in producing inflation.”<sup>108</sup> The Chicago School’s influence, in numerous fields, but in particular, law and economics, has been profound.

One of the most significant developments of the Chicago School was the application of economic analysis to traditional common law subjects, such as torts, contracts, criminal, and property law, which are considered not exclusively market areas of the law versus non-common law areas or statutory areas of the law, such as antitrust. Although not a perfect distinction, it is a useful dichotomy to differentiate between traditionally market areas of the law, such as antitrust

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<sup>105</sup> Duxbury, *Patterns of American Jurisprudence*, 335-336.

<sup>106</sup> *Ibid.*, 342.

<sup>107</sup> *Ibid.*, 344. “Even those not predisposed to that tradition generally acknowledge the massive influence of Chicago law and economics on the development of modern antitrust policy.” *Ibid.*, 349.

<sup>108</sup> *Ibid.*, 366.

and corporate, and non-market areas, the common law, to appreciate the development of EAL into areas of the law otherwise ignored by economic considerations. Like so many movements, the economic interpretation of the common law and scholars had recognized the inherent economic nature of the common law in the early 20<sup>th</sup> century,<sup>109</sup> but it is the contemporary Chicago School which has made it the subject of much research.

The bridge between traditionally market and non-market areas of the law is the fundamental economic assumption that “people are rational maximizers of their satisfactions.”<sup>110</sup> Based on that assumption, economics may be a useful tool to improve outcomes in what were traditionally known as non-economic areas of the law. If people are rational maximizers of their satisfaction in the market, then they should also be rational maximizers in their non-market decisions and actions, as well. Much of the general criticism of EAL is based on the assumption that practitioners still rely upon a simple neoclassical model of the rational decision maker. Even though the concept of the rational decision maker has largely been discarded by scholars such as Richard Thaler and other behavioral economists and replaced with more nuanced models of decision making, it remains as foundational point for beginning any economic analysis. The model of the rational choice decision maker is recognized as being deficient, just as the reasonable person model in law has deficiencies, but both are helpful benchmarks from which to begin any economic analysis or discussion.

In many respects, the breadth of law and economics continues to grow to accommodate developments in other academic disciplines, and to respond to criticism of the utilization of

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<sup>109</sup> Ibid., 322-323.

<sup>110</sup> Posner, *The Economics of Justice*, 1.

economic principles and models in their application to law. EALs' malleability and lack of finite definition facilitates its expansive interpretation and application. Another legal historian noted unequivocally that "Law and Economics is securely established in American jurisprudential culture."<sup>111</sup> The EAL movement is considered by some to be the "intellectual movement that has had the greatest influence on American academic law"<sup>112</sup> over the past half century. The influence of EAL is best summed up by the former Dean of the Yale Law School and early Critical Legal Studies (CLS) advocate, Anthony Kronman, when he described the comprehensive influence of EAL in his book, *The Lost Lawyer*:

Law and economics is today a permanent, institutionalized feature of American legal education. Specialized journals are devoted to it, and its presence is pervasive in the older law reviews as well; faculty positions at many law schools are explicitly reserved for its adherents; and it is now represented by a professional organization of its own, the American Association of Law and Economics. Even these external markers of success do not fully measure the movement's influence, which is nearly unrivaled in some fields (corporations and commercial law) and dominant in others (torts, contracts, and property). The law-and-economics movement has transformed the way that teachers in these fields think about their subject and present it to their students. And in almost every area of law a working knowledge of economics is now required to keep abreast of scholarly developments, whether one is sympathetic to the movement or not.<sup>113</sup>

EAL is not without its critics, and there are many. Critiques of EAL include both criticism of the impact economic analysis on substantive areas of the law and the motivations behind the movement. Critics point out that the law is different and that there are fundamental goals of the law, such as justice, which should be the law's primary consideration, and they find fault with EAL's use of such economic principles as wealth maximization, efficiency, and rational choice

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<sup>111</sup> Duxbury, *Patterns of American Jurisprudence*, 305.

<sup>112</sup> Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993), 166.

<sup>113</sup> *Ibid.*

decision making as legal tools for understanding the law.<sup>114</sup> Others criticize the economics of analysis of law movement as an attempt to foster an economic and political neo-liberal agenda masked as scientific objectivity on American jurisprudence.<sup>115</sup> Critical Legal Studies advocates have leveled criticism that EAL is simply an excuse for the perpetuation of a neo-liberal interpretation of the law, and a pawn of the developing conservative legal movement, although it has been pointed out that “many of the field’s most prestigious practitioners are quite liberal and motivated primarily by a desire to make law an empirical discipline.”<sup>116</sup> These arguments are not without merit, but are not the subject of the dissertation, and will not be addressed in detail here, but it is necessary and important to appreciate that EAL was not readily accepted by the legal community, and that there has been opposition since the beginning.

### *Critical Legal Studies*

In a pointed contrast to EAL, during this period of development of the school of law and economics, there was a second legal school of thought, Critical Legal Studies or CLS, which developed and became prominent in the 1960s and 1970s. Critical Legal Studies represents several interpretations of legal processes, but at its most basic, CLS advances the idea that law and politics cannot be separated and that the use of traditional legal reasoning masks established hierarchical legal norms and relationships between and among parties. Whereas EAL is most associated with conservative legal thought, CLS is associated with legal thought on the Left. For

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<sup>114</sup> Amy Wiener Katz, “Positivism and the Separation of Law and Economics,” *Michigan Law Review* 94, no. 7 (June, 1996): 2229.

<sup>115</sup> See James R. Hackney, Jr., *Under the Cover of Science: American Legal-Economic Theory and the Quest for Objectivity* (Durham: Duke University Press, 2006).

<sup>116</sup> Teles, *The Rise of the Conservative Legal Movement*, 90.

a variety of reasons, CLS has been significantly less successful than law and economics, which has become the dominant legal theory taught in law schools. CLS has come under a great deal of criticism from a variety of quarters:

But the critical legal studies movement has failed to capitalize on the sense of disenchantment out of which it was born. Like the legal realists before them, proponents of critical legal studies have proved to be better debunkers than reformers. Indeed, the reforms which they have advocated have tended to be thoroughly utopian, prompting the popular criticism of critical legal studies is all bark and no bite, that it is a style of critique which, for all its pretensions to radicalism, suggests no viable alternative to existing legal arrangements.<sup>117</sup>

CLS is still taught and written about, but it remains a relatively minor legal theory in comparison to EAL, although it did branch off and create a number of other legally related theoretical legal movements, such as Critical Race Theory. This comparison raises some interesting questions, which will not be addressed at length here, as to whether the success of EAL may be attributable to the substantive elements of law and economics being more appealing to the larger legal community, better advocacy and dissemination, timing, or some other factors that made EAL acceptable as a legal theory. CLS has certainly attracted support among prominent law professors – Roberto Unger, Duncan Kennedy – but perhaps because of its radical critique of the law and American society generally, it failed to break out of academia.

Even though it continues to have its advocates, CLS broke down into a number competing intellectual disciplines. As one critic of EAL has noted:

While critical legal studies, its great combatant for the minds of the legal academy, has been all but vanquished, law and economics continues to increase in its influence.<sup>118</sup>

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<sup>117</sup> Duxbury, *Patterns of American Jurisprudence*, 422.

<sup>118</sup> Teles, *The Rise of the Conservative Legal Movement*, 182.

Duncan Kennedy summed up a possible reason for the failure of CLS in an interview:

The role of critique in the story is a complex one. Critique is a practice of rationalists. It is wrong to think of critique people or the skeptics as different in that respect from the people building the rational structure over time. My picture of it is that the glory of rationalism is its commitment to critique, and its comedy or tragedy, depending on how you look at it, is that in the generational play, and in the course of historical drift, the oedipal young trash their rationalist elders in order to clear the ground for their own rationalist theories. That's how you succeed in life. You first clear some ground, then you build your own. The irony of history, the sort of Hegelian trick of history here, is that the critical process has turned out to be more cumulative than the constructive process. This is an irony. The development of critical techniques is preserved generation after generation, and developed as the young critique the old in order to lay waste to their structures so that they can build their own.<sup>119</sup>

Kennedy's analysis could also be applied to a number of other jurisprudential theories.

Economics analysis of the law is a series of tools to analyze the law, as compared to a critical analysis of the structure of the law. This may be a simplification, but it may go a long way to understanding why EAL has thrived, whereas CLS has petered out. There is a demand to create new models to understand the operations of the law. New models create opportunities for dialogue, analysis, and publications. The use of EAL by both liberal and conservative legal scholars demonstrates that economics is but just one more tool to better understanding the law.

It has been argued that we are now in a period called the post-Chicago School era of law and economics, in which EAL has been broken down into two main intellectual branches: one branch "seeks to discredit the Chicago School directly by maintaining that there is an ideological bias inherent in the application of economics of law;" and, the other attempts to "incorporate law and economics into a broader spectrum of interdisciplinary theories about law," or the "Socio-economic approach."<sup>120</sup> A cursory review of the popular literature of behavioral economics,

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<sup>119</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 32-33.

<sup>120</sup> Jeffrey L. Harrison, *Law and Economics* (St. Paul: Thomson/West Publishing, 1995).



such as *Nudge* by Richard Thaler and Cass Sunstein, and other popular books, demonstrates the ongoing influence of the law and economics movement on legal and public policy discourse.

Whether the research falls under the umbrella of EAL or not, economic modelling and the use of economic analysis of law and behavior are here to stay and will only continue to grow.

### C. Posner and Creative Imitation

*“Creative imitation” is clearly a contradiction in terms. What is creative must surely be original. And if there is one thing imitation is not, it is “original.” Yet the term fits. It describes the strategy that is ‘imitation’ in its substance. What the entrepreneur does is something somebody else has already done. But it is ‘creative’ because the entrepreneur applying the strategy of ‘creative imitation’ understands what the innovation represents better than the people who made it and who innovated. Peter Drucker<sup>121</sup>*

“Nothing comes from nothing,” as King Lear observed in a somewhat different context.

Everything new emerges from what had come before. Moreover, even what we call invention is by itself only of limited interest, for it normally requires entrepreneurs to apply it to the world and change how we live. The question of originality, therefore, is usually less important than it appears, and that Posner did not devise EAL is only of passing concern. Interestingly, Posner is not a trained economist. As an undergraduate he majored in English Literature.<sup>122</sup> In law school he had limited exposure to any forms of legal tools utilizing economic analysis of the law, except for editorial work done on the law review and working on antitrust matters while clerking for Supreme Court Justice William Brennan. Then, while working at the Federal Trade Commission and Communications Task Force, he developed his interest in the use of economics in the law,

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<sup>121</sup> Drucker, *The Essential Drucker*, 165-166.

<sup>122</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 47-48.

which was only strengthened when in 1969 he joined the faculty at the University of Chicago, where a group of scholars were working on law and economics issues.<sup>123</sup>

Law and economics had existed in American law for quite some time prior to Posner going to the University of Chicago in 1969 to teach which was considered the heart of the EAL movement. Posner's timing was fortuitous and perfect. He was in the right place at the right time, but more importantly he seized on an emerging intellectual opportunity and through creative imitation, he developed and made it his own. In the legal academy of the 1960s, except for the University of Chicago, economic analysis of law was on the fringes and was not fashionable, but the legal academy became more receptive to the ideas in the 1970s.<sup>124</sup> In many respects, the rise of EAL, conservative think tanks, and the Federalist Society go hand in hand from 1960s to the present.

Posner led the intellectual assault of the movement and provided it with respectability; first as an academic, later as a federal judge, and finally as a public intellectual and advocate for EAL, but in all cases, as a prolific writer in constant engagement with fellow EAL scholars and critics of EAL. The quantitative and qualitative research method of citation and case study analysis conducted, respectively, in the next two chapters will provide a degree of measure of influence that Posner has had on the legal academy and courts. A cursory review of his writing during the early period when EAL was just gaining traction gives an example of his scholarly productivity during his academic tenure at the University of Chicago before joining the federal bench. Prior to 1980, through the late 1960s and 70s, Posner published over sixty law review articles,

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<sup>123</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 48.

<sup>124</sup> Teles, *The Rise of the Conservative Legal Movement*, 91.

including several seminal articles, including, “A Theory of Negligence” in 1972, which has been cited over 536 times; “An Economic Approach to Legal Procedure and Judicial Administration” in 1973, which has been cited 449 times; “The Chicago School of Antitrust Analysis” in 1978, which has been cited 434 times; “An Economic Analysis of Legal Rulemaking” in 1974, which has been cited 410 times; and, “Utilitarianism, Economics, and Legal Theory” in 1979, which has been cited 408 times, just to name just a few of the articles.<sup>125</sup> Additionally, he published the first edition of his treatise *Economic Analysis of Law* in 1972, which is now in its eighth edition and has been cited in over 122 federal court opinions. This just represents a fraction of the output prior to 1980, when the law and economics movement was just beginning. Posner’s entrepreneurial efforts have always been marked by intellectual combat – and his relentless advocacy led one law professor to title his law review article: “Does Richard Posner Ever Sleep?”<sup>126</sup>

Where Posner led the intellectual debate and became the face of EAL, many others were involved in the process of disseminating the ideas, particularly Henry Manne, who did much to marshal interest through organizational efforts, and it has been noted that “his activities are essential in explaining the rapidity and depth of [EAL] diffusion in the 1970s and 1980s.”<sup>127</sup> Manne, a law professor and law school administrator, was much more ideological in his approach to law and economics and desired to change the structure of law schools to be more

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<sup>125</sup> All citations reflect citation analysis through HeinOnline.

<sup>126</sup> John Henry Schlegal, “Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals,” *Buffalo Law Review* 45, 277 (Winter 1997).

<sup>127</sup> Teles, *The Rise of the Conservative Legal Movement*, 101.

law and economics oriented,<sup>128</sup> and would eventually found the Law and Economics Center at the University of Miami, which was funded by the conservative Olin Foundation.<sup>129</sup> Yet, even though there is a strong conservative and libertarian influence within law and economics, one critic has noted that it was other less ideological practitioners who helped EAL to find acceptance in the legal academy:

[They] were not Chicago-style libertarians, and as they moved on to more prestigious law schools, they helped eat away at the perception that the approach was simply thinly veiled ideology. This legitimated law and economics in the legal academic mainstream, and opened the way to its institutional advances in the 1980s and 1990s.<sup>130</sup>

Posner's intellectual tour de force, and the debates he entered into with scholars on economic analysis of law issues, made EAL not only fashionable, but also required reading for any scholar who wanted to enter the debate.<sup>131</sup> An understanding of economics was necessary to be well versed in the debate among serious legal scholars.<sup>132</sup> Law was not the only institution in America to be impacted by the development of neo-liberal theory during this time. The Chicago School of economic thought had a profound impact on all quarters of American society. Would the law have eventually incorporated principles of economic analysis of the law without Posner? Perhaps, but it would seem that what differentiates EAL's acceptance from a simple neo-liberal revival was Posner. Posner elevated the debate. As one critic has noted, "While the work of

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<sup>128</sup> Ibid., 104.

<sup>129</sup> Ibid., 104-105.

<sup>130</sup> Ibid., 133.

<sup>131</sup> Ibid., 132-133.

<sup>132</sup> Ibid., 99.

Director and Coase helped to establish law and economics as a respectable field, it was the emergence of Richard Posner that made it an academic phenomenon of the first rank.”<sup>133</sup>

For many, law and economics meant many things and Posner recognized the challenges of creating a working definition for law and economics when he wrote:

Because of the enormous range of behavior regulated by the legal system, law and economics could be defined so broadly as to be virtually coextensive with economics. This would not be a useful definition.<sup>134</sup>

When asked in an interview to “describe the major tenets of law and economics,” Posner responded that it, “would be hard to do, but I would say that on the side of positive analysis there is an effort to understand the structure of the law. Do the various rules and doctrines have economizing features, and what are the consequences?”<sup>135</sup> The key to understanding Posner is not only understanding the “economizing features” of EAL, but also the “consequences.” Posner is interested in the impact that decisions have beyond simply the contestants in a legal dispute. What is the impact of any decision? He is interested in policy considerations of legal decisions. Do they maximize wealth? Utility? Efficiency?

Posner differentiates the “old” school of law and economics, the historical, in which “economics confined its attention to laws governing explicit economic relationships,” such as antitrust law, from the “new” school of law and economics, of which he is a proponent, which applies economics to laws that may not traditionally have been considered explicitly economic in

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<sup>133</sup> Ibid., 96.

<sup>134</sup> Richard A. Posner, “The Law and Economics Movement,” Richard T. Ely Lecture, *American Economic Review Papers and Proceedings* 77, no. 2 (May 1987): 3.

<sup>135</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 49.

nature, such as criminal law.<sup>136</sup> Posner addresses this point in the first page of his seminal treatise, *Economic Analysis of Law*:

Economics is the science of human choice in a world in which resources are limited in relation to human wants. It explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his “self interest.”

It is implicit in the definition of man as a rational maximizer of his self-interest that people respond to incentives – that if you change a person’s surroundings so that he could increase his satisfactions by altering his behavior, most of the time he will do so.<sup>137</sup>

As Posner points out, “The formal structure of economics is designed to present a simplified model of reality, which can then be made more complicated and realistic.”<sup>138</sup> It can be argued that it is the economic modelling that provides tools to help understand legal issues from a variety of different angles not traditionally found in American jurisprudence.

Even though Posner took the lead in the debate over the economic analysis of the law, he was not, nor is he, dogmatic. On the contrary, one of Posner’s hallmarks is his intellectual flexibility and willingness to look at a situation from a variety of angles and to evolve his position over time, while remaining persistent in his goal of utilizing economic principles to better understand the law. This is a unique characteristic of entrepreneurial knowledge based workers: there is constant re-creative imitation and an opportunistic tendency to incorporate new ideas and arguments. This is in contrast to other judges, such as Supreme Court justice Antonin Scalia, who has a tendency to be rigid in his views, and except for engaging with the justices on the Supreme Court, particularly Stephen Breyer, is unwilling to address or engage with critics

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<sup>136</sup> Posner, *Economics of Justice*, 4.

<sup>137</sup> Richard, *Economic Analysis of Law*, 1.

<sup>138</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 54.

outside the Court in a constructive manner. Posner relentlessly asks: Does it work? What are the consequences? Can the goals be accomplished more efficiently for greater wealth-maximization and utility? Another area of interest for Posner, not addressed in the dissertation, is his interest in pragmatism, particularly as it relates to judicial decision making.

A judicial entrepreneur is consciously strategic and is alert to opportunities to promote innovative legal ideas or methods, either original or through creative imitation, and is capable of strategically employing the written word to disseminate the ideas, and Posner saw EAL as exciting and different. As a judicial entrepreneur, he was alert to the emerging ideas of law and economics, and was able to promote EAL as an innovative new legal idea through his extensive writing. Timing was also a key element to Posner's success as a judicial entrepreneur. Utilizing his unique and special skills, and his position and status as a professor at the University of Chicago and later as a federal appellate judge, and taking advantage of timing and convergence, he contributed to a discontinuity in the existing intellectual paradigm that helped to create a new paradigm through the innovation of existing ideas, and make them his own.

As a judicial entrepreneur, his advocacy for the use of law and economics in the interpretation and application of laws could not have been more opportune and salient. Posner's advocacy of law and economics was perfectly timed because not only was he able to ride the tide of the Chicago School of economics, but his ideas coincided with a general revival of neo-classical economics in the modern economy; a growing belief in laissez faire economics; and government deregulation; a reinterpretation of antitrust laws; and a general conservative shift both politically and economically to market based solutions being applied to political and legal issues. Like the business cycle, legal ideas go in and out of fashion, depending on a variety of economic,

political, social, and historical circumstances that may or may not be in the control of the judicial entrepreneur. What the judicial entrepreneurs control is their ability to see an opportunity, seize it, and promote the new idea.

There are certain attributes and traits the judicial entrepreneur possesses that help to facilitate success, particularly within the conservative and status oriented confines of the legal academy and profession. Such attributes include judicial position, status and reputation, of the judicial entrepreneur, professional expertise, personality, personal and professional motivation, and perseverance. Posner is one of the most respected jurists sitting on the federal courts, as well as perhaps one the greatest living legal scholars. This does not guarantee success for his ideas and his entrepreneurial activities, but deference is accorded both on the bench and within the legal community, which has its own form of cache. The federal judiciary, the legal community and the law in general, are extremely status conscious and deferential, so certain characteristics and positions will be given significantly more deference and provide an opportunity and audience for new ideas. This is most significant in the area of the legal academy, where most new legal ideas are created and disseminated.

Posner exhibits Schumpeter's entrepreneurial spirit, or *Unternehmergeist*, in his intense engagement with other scholars and judges debating the principles of economic analysis of the law, which might raise the question: Did he win on the merit of his ideas or simply wear down his opponents? Posner never shies away from an intellectual debate on a particular topic, and although forceful in his arguments, he is not ideologically dogmatic, and remains receptive to new ideas and willing to modify his existing idea, a hallmark of the knowledge-based



entrepreneur and judicial entrepreneur. Had he simply been dogmatic and unwilling to enter into a meaningful debate, he would probably have been regarded as no more than a very bright crank.

There are some strategies that a judicial entrepreneur may use that are more successful than others. Judicial entrepreneurs need not confine themselves simply to writing judicial opinions. Although Posner has written well over 2,250 opinions, he has also written over fifty books and countless articles. In a profession in which the written word is paramount, Posner is perhaps second to none. Posner recognizes the importance of what he calls “extrajudicial writings by judges,” when he notes in “Reflections on Judging” that his,

book belongs to the genre of extrajudicial writings by judges. American judges have done a lot of such writing, in part because of the lateral-entry character of an American judicial career; the judicial opinion is not the only vehicle in which judges who had another legal career before they became judges know how to express their thoughts.<sup>139</sup>

The extrajudicial writings of Richard Posner are a significant part of his strategy as a judicial entrepreneur to express his view on the judiciary and legal questions. Legal opinions, if published, tend to be limiting, and it is through articles and books, that Posner has been able to address contemporary legal questions and argue for an economic analysis of the law. He does this in public intellectual venues directed at the general educated reader, as well as academic venues. The judicial entrepreneur becomes a public figure beyond simply his stature as a judge. Whether writing about the *Economics of Justice*, arguing for an inherent economic perspective of the common law, or more recently writing about economic concerns in *The Crisis of Capitalist Democracy*, Posner steps beyond the court and the robe to strategically reach a larger public audience with his ideas.

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<sup>139</sup>Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), 10.

Another strategy that Posner uses as a judicial entrepreneur is to attempt to use economic analysis of law in his judicial decision making as a federal judge. He admits so much when discussing why he became a judge:

I also thought a federal appellate judgeship would be an interesting and challenging job because of the variety and importance of many federal cases, that I would have an opportunity both to apply economic analysis in a real-world setting and to employ rhetorical methods that would be out of place in academic writing, and that it would be fun to test myself against the great judges of the past. And all this has turned out to be true.<sup>140</sup>

But there are other ways to communicate, too, and Posner frequently lectures to legal and other audiences. There are entrepreneurial methods and strategies that consider timing and context; understanding historical opportunity; leveraging institutional changes; developing personal relations within the court; and, nurturing personal and professional relationships within the scholarly network of the legal academy. Even today, in his late seventies, he had a blog with Gary Becker, who recently passed away, in which they debated controversial legal issues of the day, keeping abreast of both the issues and new technology. One of the distinguishing qualities that Posner has, as a judicial entrepreneur and a knowledge worker, is his intellectual flexibility and willingness to develop his ideas and modify them when necessary. His intellectual flexibility is itself a form of creative imitation because he is always incorporating new ideas to improve upon the original ideas developed during the early years of the economic analysis of law movement which reflects his pragmatic approach.

A very telling example of Posner's intellectual honesty and flexibility is his ability to truly engage in an academic debate and to listen and learn from other scholars. Posner would not be so respected and admired if he was simply a dogmatic ideologue; to the contrary, in addition to

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<sup>140</sup> Posner, *Reflections on Judging*, 25.

having a fecund mind, he appreciates the intellectual engagement to tease out ideas. An excellent example is how Posner reacted to Richard Dworkin's famous critique, "Is Wealth a Value?" When asked about Dworkin, Posner responded:

Yes, when I started off I was very dogmatic about the application of economics in a very pure form. I modified my views – partly because I got very good criticism from Dworkin in his article "Is Wealth a Value?" That was pretty convincing. So I have modified my position. I also think that being a judge, now for twenty-five years, has taken off some of the hard edges of my thinking.<sup>141</sup>

The impact and energy that Posner had upon EAL cannot be underestimated. One critic of the law economics movement summed up Posner's abilities and success:

First and foremost, the breadth of the ambition of Posner's major work, *Economic Analysis of Law*, signaled to the legal academy that law and economics could identify major defects in traditional approaches across the entirety of legal scholarship, thereby inducing others, especially prospective law professors, to follow his lead. Second, Posner legitimated law and economics as mainstream field by setting off so many arguments with legal academia's incumbent scholars. Third, because he was publishing in so many different fields, Posner created a strong incentive for even the unsympathetic to become competent in law and economics.<sup>142</sup>

It is generally agreed that EAL has become the dominant legal school of thought today. This may be attributed, in part, to Posner's activities as a judicial entrepreneur, taking a new legal idea, and through creative innovation and innovation, working tirelessly to disseminate that idea. Much of the literature discusses the influence Posner has had on the legal academy and legal thought over the last forty years, but a more challenging area to assess is his impact, and the receptivity of EAL in the area of federal appellate judicial decision making and opinions, which will be the focus of the remainder of the dissertation.

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<sup>141</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 52.

<sup>142</sup> Teles, *The Rise of the Conservative Legal Movement*, 96-97.

Though Posner is much less involved in EAL today than he had once been, his impact on the incorporation of EAL has been profound and lasting. A critic of EAL noted his initial influence on the EAL movement when he wrote, “it was the emergence of Richard Posner that made it [EAL] an academic phenomenon of the first rank.”<sup>143</sup> It is not a far reach to argue that not only has Posner become the personification of EAL, but his innovation, persistence, and entrepreneurialism has helped to secure EAL as perhaps the dominant legal theory in the legal academy today. Is EAL a perfect tool for legal analysis or to understand the law? No. It is just one tool of many with which to analyze the law. Posner recognizes that the use of the economic analysis of the law is imperfect and is just an analytical tool that can be used, but as a tool of legal analysis it tends to be more effective than other traditional theoretical frameworks for interpreting, understanding, and applying the law. He concedes:

Should the weaknesses of economics discourage attempts to apply economics to nonmarket behavior? Surely not. Although much non-market behavior is indeed baffling, this is so whether one approaches it from the standpoint of economics, which assumes that humans behave rationally, or from the standpoint other human sciences, which do not make that assumption but have nothing to put in its place. The economics of law may well be a weak field, partaking of the general weakness of economics and of additional weaknesses specific to itself. But is the psychology of law strong? The sociology of law? Legal anthropology? Jurisprudence as a positive theory of law? These fields of interdisciplinary legal studies, and others that could be named, are older than economic analysis of law yet are weaker candidates for a leading role in fashioning a positive theory of law.<sup>144</sup>

The tensions that Posner confronted during the early years of the EAL movement continue to this day, but economic analysis of the law is securely a part of the contemporary legal canon,

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<sup>143</sup> *Ibid.*, 96.

<sup>144</sup> Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), 367.

which in no small part is attributed to his entrepreneurial activities and creative imitation of economic analysis of the law.

There is much commentary and anecdotal reflection about Posner's influence upon the law and economics movement and American jurisprudence in general that can be cited. For example, in 2005 the New York University Annual Survey of American Law ran several tribute articles to Posner, and in 2007 both the University of Chicago Law Review and Harvard Law Review dedicated issues to articles "Commemorating Twenty-Five Years of Judge Richard A. Posner,"<sup>145</sup> analyzing his jurisprudence in a number of cases. These tributes are but a small sample of the accolades he has received, and continues to receive to this day; and he is still alive. As one of the tribute authors candidly noted:

The encomiastic mode is often in vogue in legal gatherings. It is not my own preference because it almost always ends in self-congratulation as its primary motivation. Even so, I think it is appropriate in every sense on this occasion. Richard Posner is not only our most frequently cited scholar in the legal academy, he is also the most important.<sup>146</sup>

Moving beyond the professional accolades and anecdotal evidence to determine influence based on empirical findings, a quantitative citation analysis and a qualitative case law analysis will be conducted to determine what influence Posner has had in the next two chapters.

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<sup>145</sup> See "Commemorating Twenty-Five Years of Judge Richard A. Posner," *University of Chicago Law Review* 74, 1641 (2007); "Commentary: Twenty-Five Years of Richard Posner, The Judge," *Harvard Law Review* 120, 1121 (March 2007).

<sup>146</sup> Robert A. Ferguson, "Tribute to Judge Richard A. Posner," *New York University Anniversary Survey of American Law* 61, 1 (2005).

## V. Legal Publication and Case Law Citation Analysis

### A. Introduction

*“Citation analysis is growing mainly because it enables rigorous quantitative analysis of elusive but important social phenomena such as reputation, influence, prestige, celebrity, the diffusion of knowledge, the rise and decline of schools of thought, stare decisis (that is, the basing of judicial decision on previous decisions – precedents), the quality of scholarly output, the quality of journals, and the productivity of scholars, judges, courts, and law schools.”<sup>147</sup>*

Posner is an extremely prolific writer on a variety of legal and non-legal topics. A cursory review of Posner’s publications listed on the University of Chicago’s School of Law’s web site lists fifty-five books authored; editor or contributor to another eighty-four books; author of nearly four hundred journal articles; and, the author of countless other articles appearing in general newspapers and magazines, and regarding case law, he is considered one of the most cited legal authorities. Based simply on his prodigious amount of writing, it is tempting to simply assume that he has had a significant impact on legal discourse and judicial decision making because of the sheer volume of his published work, but a first, and important step, in evaluating Posner’s impact as a judicial entrepreneur, it is necessary to empirically evaluate, to the extent possible, the impact he has had on both the federal judiciary and the legal academy through his legal writings. To do so, it is necessary to conduct a quantitative analysis of citations to his legal publications, both law review articles and treatises, and citations to the case law opinions he has authored through the latest tools in citation analysis.

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<sup>147</sup> Richard A. Posner, “An Economic Analysis of the Use of Citations in the Law,” *American Law and Economics Review* 2, no. 2 (2000): 382.

## B. Citation Analysis Methodology

Quantitative citation analysis, or legal citology, is important in providing “relatively objective tools for assessing scholarly impact,” but the methodology is not without its critics as a tool for determining causation.<sup>148</sup> Empirical analysis of legal citations is a relatively recent methodology, which can be largely attributable to technological advancements in online research tools, such as LexisNexis and Westlaw, Shepard’s citation services, primarily for case law, and HeinOnline, primarily for law review articles. These systems provide tools to quantify the number of times an author might cite to a particular publication in either case law or law review articles.<sup>149</sup> The importance of citation analysis in determining influence, particularly within the courts and legal research cannot be underestimated. Posner noted in his 2000 article, “An Economic Analysis of the Use of Citations in the Law”:

Both adjudication, a central practical activity of the legal system, and legal research are citation-heavy activities. Judges, lawyers, who brief and argue cases, and law professors and students engaged in traditional legal-doctrinal research could all be thought, with only slight exaggeration, to make their living in part by careful citation both of judicial decisions and of law-review articles and other secondary materials. The seriousness with which the legal profession takes citations suggests that the analysis of citations in law is likely to uncover more systematic features, a more consistent practice, of citing than would a similar analysis in fields for which citing is of less consequences.<sup>150</sup>

Citation analysis is not a perfect form of empirical analysis, but it does provide strong inferential value for understanding impact. There are a number of concerns that citation analysis presents, and the most obvious issue is that older articles have had more time to be cited than

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<sup>148</sup> Shapiro and Pearse, “The Most-Cited Law Review Articles of All Time,” 1484-1485.

<sup>149</sup> *Ibid.*, 1485-1486.

<sup>150</sup> Posner, “An Economic Analysis of the Use of Citations in the Law,” 381-382.

newer articles, and the number of citations may not necessarily reflect influence, just longevity.

Posner also recognizes this concern:

Differences in the vintages of works also make comparison difficult. The older the work, the more time it has had to accumulate citations, but the number of citations is apt to be depressed by shifts in interest away from the topic of the cited work or by the appearance of up-to-date substitutes for it.<sup>151</sup>

The problem of measuring citations over time was also recognized in a seminal law review article on citation analysis titled, “The Most-Cited Law Review Articles of All Time,” by Fred Shapiro and Michelle Pearse. This was a third, and most recent, article in series authored by Shapiro and Pearse on case citation analysis.<sup>152</sup> In the article, they follow a similar analysis to the one utilized in the dissertation, and recognize “it takes decades for an article to amass the stratospheric citation count.”<sup>153</sup> Interestingly, in the Shapiro/Pearse rankings, Posner has only one article in the top 100 most cited-law review articles of all time. Ranked at 64<sup>th</sup> on the list, Posner’s 1974 article, “Theories of Economic Regulation,”<sup>154</sup> has been cited 765 times,<sup>155</sup> although the number of all of Posner, does not rank very high on HeinOnline citation results because Shapiro and Pearse go beyond utilizing law review articles for their analysis, and include additional social science databases, which provide more citations beyond law review articles. For purposes of the dissertation, the citation analysis will be limited to federal case law and law review articles.

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<sup>151</sup> Ibid., 388.

<sup>152</sup> Shapiro and Pearse, “The Most-Cited Law Review Articles of All Time,” 1484.

<sup>153</sup> Ibid., 1488.

<sup>154</sup> Richard A. Posner, “Theories of Economic Regulation,” *The Bell Journal of Economics and Management Science* 5, 335 (1974).

<sup>155</sup> Shapiro and Pearse, “The Most-Cited Law Review Articles of All Time,” 1491.



The number one article cited on their list is Coase's "The Problem of Social Cost,"<sup>156</sup> which has been cited 5157 times according to their analysis.<sup>157</sup> "The Problem of Social Cost" is foundational to the economic analysis of law movement. Except for Coase, and Calabresi's article, "Some Thoughts on Risk Distribution and the Law of Torts,"<sup>158</sup> law and economics articles are woefully deficient from the Shapiro/Pearse list, which may simply reflect the recent historical development of EAL and the inclusion of social science publications in their citation analysis research parameters, skewing the citation analysis to older more established journal publications. The authors recognize the lack of law and economics articles in the top 100 rankings, but point out:

Of the several movements of the late twentieth century that rebelled against the doctrinal traditions of law as an autonomous discipline, law and economics is the one that most obviously became "normal science," being integrated into the work of a wide range of mainstream scholars.<sup>159</sup>

Citation analysis works well in measuring the citations and possible influence of law review and journal articles, but measuring the impact and finding causation in federal appellate decision making presents certain challenges. A number of factors make measuring Posner's influence on judicial decision making a challenge, but not impossible. First, even though there may be a case in which parties are litigating, a final opinion on a point of law may not emerge. In fact, contrary to popular belief, very few case law opinions are ever written, except at the appellate level.

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<sup>156</sup> Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3, no. 1 (1960).

<sup>157</sup> Shapiro and Pearse, "The Most-Cited Law Review Articles of All Time," 1489.

<sup>158</sup> *Ibid.*, 1491. Calabresi, Guido, "Some Thoughts on Risk Distribution and the Law of Torts," *The Yale Law Journal* 70, 499 (1961). Ranked 69<sup>th</sup> with 739 citations.

<sup>159</sup> *Ibid.*, 1507.

Second, Posner's influence may not be directly cited in a final court's opinion, but may be contained in the supporting documents created during the litigation, such as a memorandum of law or legal brief, documents attorneys submit to support their legal arguments. In the memorandum of law, the attorneys will cite cases, statutes, law review articles, and treatises to support their legal arguments, including citations to Posner's articles, treatises, and published opinions. Since memorandums of law and briefs do not have legal precedential value, they are considered less important than legal opinions issued by a court, and these documents are as of yet not easily searchable with present technology, but services, such as Courtlink, are now permitting such citation analysis to a limited extent.

Through such research tools as Shepard's Citations, the frequency in which opinions are cited may be easily and reliably determined, but for what legal proposition a case is being cited presents additional challenges. A case may include several different legal propositions, and the citation may reflect only one of them. Opinions tend not to be explicitly clear as to the legal principles on which they are relying in their decision. For example, judges usually do not explicitly state in their opinion that economic analysis of the law was the principle upon which they relied in their legal analysis, particularly since concepts, such as efficiency, tend not to be legally recognized legal principles, unless expressly codified or stated in the common law. Posner recognizes the challenges of trying to determine the impact of economic analysis in judicial opinions:

The normative role of economic analysis in the law is fairly obvious. The positive role – that of explaining the rules and outcomes in the legal system as they are – is less obvious, but not less important. As we shall see, many areas of the law, especially the great common law fields of property, torts, and contracts, bear the stamp of economic reasoning. *Few legal opinions, to be sure, contain explicit references to economic concepts and few judges have a substantial background in economics.* (Italicized for

emphasis) But the true grounds of decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions. Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds. It is an advantage of economic analysis rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves.<sup>160</sup>

It is easier to make a substantive correlation between a published law review article and a citation to it for authority, than a citation to a particular legal opinion, but to remedy this possible deficiency, a qualitative case study analysis of a selection of his opinions in antitrust and criminal cases will be conducted in the next two chapters.

In order to focus on the question of Posner's impact as a judicial entrepreneur on the legal academy and the federal judiciary, the citation analysis will break down the analysis into two areas: secondary sources, law review articles, and texts; and, primary law, judicial opinions. The law review articles and texts will be broken down into the following: 1) a list of the top 20 legal articles published by Posner, and the number of times they have been cited by other law review articles; 2) Posner's top 100 legal articles published and the number of times they have been cited by other legal articles over the period from 1968 to 2013; 3) the frequency of citations to his primary treatise, *Economic Analysis of Law*, his general book on the topic, *The Economics of Justice*, and his three primary texts on judicial decision making, *The Problems of Jurisprudence*, *How Judges Think*, and his most recent book, *Reflections on Judging*; and, 4) and, an analysis of the frequency of his case citations. Utilizing the commercially available research tools HeinOnline, LexisNexis, and Shepard's Citation Service, it is possible to evaluate the frequency of citations to his law review articles, treatises, general legal books, and legal

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<sup>160</sup> Posner, *Economic Analysis of Law*, 6.

opinions over the years. The period addressed will evaluate the frequency of his journal publications and their citations from 1968 to 2013.

### **C. Citation Analysis: Law Review Articles**

As noted, Posner has written almost four hundred journal articles, and counting. Not all of these journal articles are legal in nature. In order to evaluate the citation frequency of only the legal journal articles, I utilized the commercial research products HeinOnline and LexisNexis. The services provide different coverage and research methodology, but combined represent the most comprehensive tools for evaluating the influence of Posner's writings. Based on the frequency of citations to Posner's published legal journal articles, his influence, particularly in the area of law and economics, is unquestionable. In order to come to this conclusion, I conducted the following queries on the respective databases that produced the following results below.

#### General Citation Summary

- 1) The number of legal journal articles that note Posner as the primary author (HeinOnline): 310 articles. Limited to primary authorship.
- 2) Number of legal journal articles in which Posner was primary and co-author (LexisNexis): 600 articles. These results would include papers in which Posner was a panelist in which the comments were published as an article – a common practice for law journals.
- 3) Number of legal journal articles in which Posner was mentioned in the title (HeinOnline): 239 articles. This does not reflect the articles in which Posner's arguments were discussed in the article, but his name may not have been mentioned in the title.
- 4) Number of legal journal articles in which Posner was mentioned in the title (LexisNexis): 343 articles.
- 5) Number of legal articles in which "Law and Economics" in the title (HeinOnline): 543 articles.

- 6) Number of legal articles in which “Law and Economics” in the title (LexisNexis): 994.
- 7) Number of legal articles in which “Economic Analysis of Law” in the title (HeinOnline): 162 articles.
- 8) Number of legal articles in which “Economic Analysis of Law” in the title (LexisNexis): 47 articles.

Based on the analysis above, “Economic Analysis of the Law,” even though the title of Posner’s seminal treatise, is less popular than “Law and Economics” as a title to describe the movement. As well, although the results demonstrate a significant amount of articles, the disparities in the numbers between the two providers demonstrate the content differences between the commercially available databases, providing a strong inferential interpretation.

#### Top Twenty Cited Posner Articles

- 1) “An Economic Analysis of Copyright Law.” (18 J. Legal Stud. 325 (1989)) - Cited 571 times.
- 2) “A Theory of Negligence.” (1 J. Legal Stud. 29 (1972)) - Cited 536 times.
- 3) “Market Power In Antitrust Cases.” (94 Harv. L. Rev. 937 (1980-1981)) - Cited 482 times.
- 4) “An Economic Approach to Legal Procedure and Judicial Administration.” (2 J. Legal Stud. 399 (1973)) - Cited 449 times.
- 5) “Statutory Interpretation—in the Classroom and in the Courtroom.” (50 U. Chi. L. Rev. 800 (1983)) - Cited 444 times.
- 6) “The Independent Judiciary in an Interest-Group Perspective.” (18 J.L. & Econ. 875 (1975)) - Cited 440 times.
- 7) “The Chicago School of Antitrust Analysis.” (127 U. Pa. L. Rev. 925 (1978-1979)) - Cited 434 times.
- 8) “An Economic Analysis of Legal Rulemaking.” (3 J. Legal Stud. 103 (1979)) - Cited 410 times.
- 9) “Utilitarianism, Economics, and Legal Theory.” (8 J. Legal Stud. 103 (1979)) - Cited 408 times.

- 10) “An Economic Theory of the Criminal Law.” (85 Colum. L. Rev. 1193 (1985)) - Cited 370 times.
- 11) “Trademark Law: An Economic Perspective.” (30 J. L. & Econ. 265 (1987)) - Cited 348 times.
- 12) “The Decline of Law as an Autonomous Discipline: 1962-1987.” (100 Harv. L. Rev. 761 (1986-1987)) - Cited 342 times.
- 13) “The Ethical and Political Basis for the Efficiency Norm in Common Law Adjudication.” (8 Hofstra L. Rev. 487 (1979-1980)) - Cited 332 times.
- 14) “Adjudication as a Private Good.” 8 J. Legal Stud. 235 (1979)) - Cited 273 times.
- 15) “Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution.” 37 Case W. Res. L. Rev. 179 (1986-1987)) - Cited 268 times.
- 16) “Rational Choice, Behavioral Economics, and the Law.” (50 Stan. L. Rev. 1551 (1997 – 1998) - Cited 262 times.
- 17) “Natural Monopoly and Its Regulation.” (21 Stan. L. Rev. 548 (1968-1969)) - Cited 261 times.
- 18) “The Right to Privacy.” (12 Ga. L. Rev. 393 (1977-1978)) - Cited 258 times.
- 19) “Economics, Politics, and the Reading of Statutes and the Constitution.” (49 U. Chi. L. Rev. 263 (1982)) - Cited 243 times.
- 20) “The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality.” (48 U. Chi. L. Rev. 6 (1981)) - Cited 242 times.

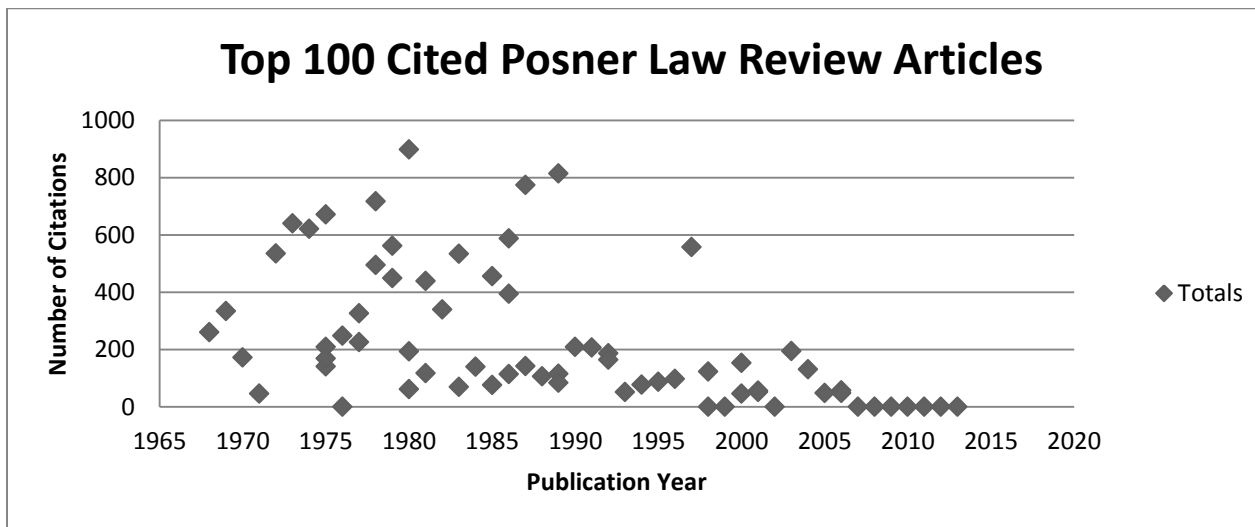
Utilizing HeinOnline, which is known for its historic coverage of law review articles, the list represents the top twenty articles cited which were authored by Posner. According to this database, his top twenty law review articles have been cited 7373 times to 2013. Considering the number of law review articles that he has written or co-authored, the top twenty only represents a fraction of the corpus of his work.

### Posner’s Top 100 Cited Articles

The graphs below represent Posner’s top 100 articles based on the number of citations beginning in 1968 and ending in 2013. As predicted by Shapiro and Pearce’s research, early

articles are cited substantially more frequently than the most recent articles. His top 100 articles, according to HeinOnline research have been cited for a total 15,901 times by other articles – this does not include case law, treatises, and other secondary social science resources that may not be included in the HeinOnline database. Although not a complete accounting, it does provide strong inferential data as to the profound influence Posner has had on academic discussion and law reviews. It can be anticipated, with the passage of time, Posner will continue to be cited and his articles from his later years. The decline may also reflect Posner’s publication direction. Rather than write law review articles, Posner is choosing to dedicate more of his time to writing books and updating his blog.

Graph No. 1: *Top 100 Cited Posner Law Review Articles*



Graph No. 2: *Top 100 Cited Posner Law Review Articles*

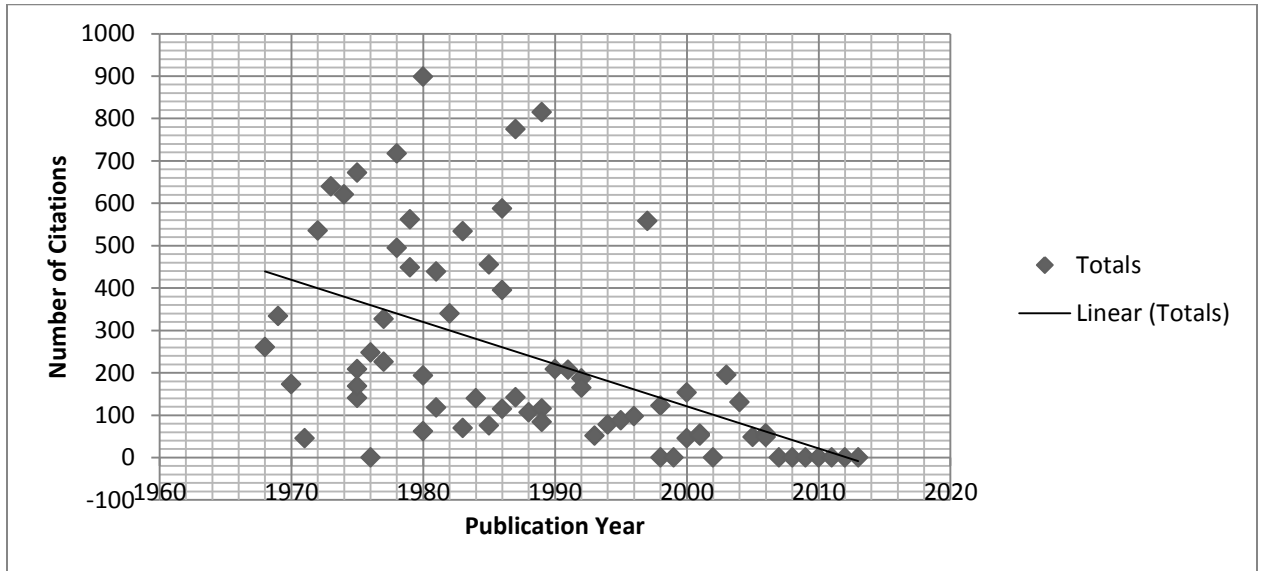


Chart No. 1: *Top 100 Posner Legal Articles*

The chart is located on page 69 (next page).



Top 100 Legal Articles by Year												
Year	Published	Rank 1-20	Citations	Rank 21-40	Citations	Rank 41-60	Citations	Rank 61-80	Citations	Rank 81-100	Citations	Totals
1968	1	17-Jan	17-Sep									261
1969	2			23	231	58	103					334
1970	1			34	173							173
1971	1									95	46	46
1972	1	2	536									536
1973	2	4	449	31	191							640
1974	2	8	410	27	211							621
1975	2	6	440	22	232							672
1975	1			39	141							141
1975	1			29	209							209
1975	1			35	169							169
1976	2			33	177			76	71			248
1976	0											0
1977	2			24	229			61	98			327
1977	1			25	226							226
1978	3	7	434	21	238					98	46	718
1978	3	18	258	40	140			63	97			495
1979	3	9	408			59	102			88	52	562
1979	3	14	273			44	130			99	46	449
1980	5	3	482	37	144	43	132	69	85	85	56	899
1980	2					54	116	73	78			194
1980	1							80	62			62
1981	3	20	242			47	123	75	74			439
1981	1					51	118					118
1982	2	19	243					62	97			340
1983	2	5	444					65	90			534
1983	1							77	70			70
1984	2							64	94	97	46	140
1985	2	10	370					68	86			456
1985	1							74	76			76
1986	3	12	342	36	158			67	88			588
1986	2	15	268			46	127					395
1986	1					55	115					115
1987	4	11	348	26	212	45	128	71	87			775
1987	1			38	142							142
1988	1					57	107					107
1989	4	1	571			50	119	79	66	81	59	815
1989	1					53	116					116
1989	1							70	84			84
1990	1			28	209							209
1991	1			30	207							207
1992	2					42	138			93	49	187
1992	2					49	120			100	45	165
1993	1									90	52	52
1994	1							72	78			78
1995	1							66	88			88
1996	1					60	98					98
1997	3	16	262	32	179	52	117					558
1998	1					48	123					123
1998	0											0
1999	0											0
2000	2					56	107			94	47	154
2000	1									96	46	46
2001	1									84	56	56
2001	1									86	55	55
2001	1									89	52	52
2002	0											0
2003	2					41	138			82	57	195
2004	2							78	69	87	53	131
2005	1									92	49	49
2006	1									83	57	57
2006	1									91	49	49
2007	0											0
2008	0											0
2009	0											0
2010	0											0
2011	0											0
2012	0											0
2013	0											0

#### D. Citation Analysis: Federal Case Law

*“I have continued to do academic writing, mainly though not only academic writing that applies economic analysis (and sometimes related fields of social science) to law, throughout my judicial career. I have applied such analysis to various substantive and procedural areas of law, but also to judicial behavior itself. And I have used economic analysis in a number of my judicial opinions.”<sup>161</sup>*

As demonstrated, it may be inferred that by citing Posner’s publications in a judicial opinion, judges are recognizing Posner’s legal views as worth noting, whether to support or criticize. It is more challenging to determine for what legal proposition the citation is being utilized without an analysis of the text, which will be done in later chapters. Unfortunately, many of his early and most cited publications are not available on LexisNexis, and therefore cannot be Shepardized to measure influence on case law. Measuring Posner’s impact on judicial decision making is a little more challenging, but not impossible. Shapiro and Pearse view the influence upon case law as the “Real World” Impact on Law and Practice and Beyond.” As they recognize:

Because legal scholarship relates to the law and, thus, to the making and interpreting of law, another metric for measuring legal scholarship is whether it has influence on the bar, judges, legislators, and other policymakers. Recent blogging commentary and articles have discussed the lack of importance or relevance of legal scholarship to the bar and the courts. Impact among scholars and citation in other scholarship do not necessarily correlate with how much the courts rely on the articles.

One of the most popular and respected measurements of impact is reference in court opinions. Both KeyCite on Westlaw and Shepard’s on Lexis cover citations to law review articles made in judicial opinions. Unfortunately, the citation reports are only for articles indexed in their databases. For articles not included, a homegrown citation search in the all-state and all-federal case law databases was done. Unlike some traditional citation studies, these metrics give some indication of the extent to which an article was referenced.<sup>162</sup>

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<sup>161</sup> Posner, *Reflections on Judging*, 26.

<sup>162</sup> Shapiro and Pearse, “The Most-Cited Law Review Articles of All Time,” 1513-1514.

The same methodology as discussed above was utilized in the dissertation, but only the LexisNexis All Federal Cases was utilized. Conducting searches in LexisNexis' All Federal Cases database, Posner's seminal treatise, "Economic Analysis of Law," has been cited in 136 Federal court case opinions, but it is also safe to say that it has been cited in numerous legal briefs and memorandums of law submitted to the courts on behalf of litigants. In the LexisNexis Law Review articles database, the citations to the treatise exceeds the permissible limit on LexisNexis of 3000 citations. It is a significant treatise, now in its 8<sup>th</sup> edition. "The Economics of Justice," published in 1981, has been cited in 764 law review articles, but only three cases; "The Problems of Jurisprudence," published in 1990, has been cited in 1125 law review articles, but only eleven cases; "How Judges Think," published in 2008, has been cited in 427 law review articles, but only nineteen cases; and, his most recent book, "Reflections on Judging," published in 2013, had been cited in one law review article, and in one case, to date.

The small sample of Posner's publications submitted for citation analysis indicates his strong influence in law reviews, but less so in case law opinions. This is not surprising. Courts tend not to cite to general books on the law for precedential value, except for treatises. Posner's "Economic Analysis of Law" has been cited in 136 federal court decisions. Legal treatises are written with the legal practitioner in mind, and less for the academy, although they are utilized there, too. What is surprising is that his general legal books have been cited at all in court opinions, and from this small sample, demonstrates the respect and influence that Posner has within the federal judiciary.

Unfortunately, due to the structure of legal opinions, measuring the number of citations to Posner's articles and/or publications in case law opinions presents certain challenges, but once

again, it is not impossible. Utilizing search query “(Richard /2 Posner) and not (before or honorable /15 Richard /2 Posner) was used to search All Federal Cases on LexisNexis from 01/01/1968 to 02/14/2014, and the search returned 1282 cases that had citations to Posner not as the judge writing the opinions, but citations to his published works. The “and not” function of the Boolean search was designed to remove all cases that referred to cases “Before” Richard A. Posner, or the “Honorable” Richard A. Posner, in his capacity as a judge, in order only to capture citations to secondary sources. Although not a perfect methodology, it does provide a reasonably good accounting of all the cases that have cited to Posner’s publications. As noted, not all cases have final opinions, nor do all opinions reflect references to Posner contained in the litigation briefs, motions, or pleadings. For example, a search in Courtlink’s Single Search of Federal Dockets, found approximately 1233 briefs and memorandums of law cite to a Posner publications, but this list is not exhaustive by any means because the coverage is limited to the last several years and only to a few federal courts, but is once again indicative of Posner’s legal authority that attorneys rely upon his writings in their legal arguments.

Posner’s writings have not received the same reception in the legal academy and the courts. The chart below outlines his top twenty articles and the number of times they have been cited in other articles, but when a search is conducted in All Federal Cases, the number of citations seems rather small, except in the areas of antitrust and statutory interpretation, but his law review articles and publications are cited in Federal case opinions, which is relatively rare. To give some perspective, the number one cited law review article is Coase’s “The Problem of Social Cost,” but when a LexisNexis search is run for the title in All Federal Cases, only eighteen cases have cited to Coase, and only a few specifically for “The Problem of Social Cost.” The citations to Posner may seem miniscule, but in the aggregate, it is a rather impressive record. Although

the Coase has the most cited article, Posner still receives more cites for his articles in case law. Considering that case law tends to be significantly briefer and addresses only a few points of law in any given opinion, judges need not address competing theories in their opinions or explain the full complexity of their views. They may be approaching their decision from an economic analysis, but they need not spell out or directly support with citations, such analysis.

### Top Twenty Cited Posner Articles in Federal Case Law Opinions

- 1) “An Economic Analysis of Copyright Law.” (18 J. Legal Stud. 325 (1989)) - Cited 571 times. *Case law citations = 8.*
- 2) “A Theory of Negligence.” (1 J. Legal Stud. 29 (1972)) - Cited 536 times. *Case law citations = 6.*
- 3) “Market Power In Antitrust Cases.” (94 Harv. L. Rev. 937 (1980-1981)) - Cited 482 times. *Case law citations = 38.*
- 4) “An Economic Approach to Legal Procedure and Judicial Administration.” (2 J. Legal Stud. 399 (1973)) - Cited 449 times. *Case law citations = 6.*
- 5) “Statutory Interpretation—in the Classroom and in the Courtroom.” (50 U. Chi. L. Rev. 800 (1983)) - Cited 444 times. *Case law citations = 16.*
- 6) “The Independent Judiciary in an Interest-Group Perspective.” (18 J.L. & Econ. 875 (1975)) - Cited 440 times. *Case law citations = 1.*
- 7) “The Chicago School of Antitrust Analysis.” (127 U. Pa. L. Rev. 925 (1978-1979)) - Cited 434 times. *Case law citations = 3.*
- 8) “An Economic Analysis of Legal Rulemaking.” (3 J. Legal Stud. 103 (1979)) - Cited 410 times. *Case law citations = 3.*
- 9) “Utilitarianism, Economics, and Legal Theory.” (8 J. Legal Stud. 103 (1979)) - Cited 408 times. *Case law citations = 0.*
- 10) “An Economic Theory of the Criminal Law.” (85 Colum. L. Rev. 1193 (1985)) - Cited 370 times. *Case law citations = 2.*
- 11) “Trademark Law: An Economic Perspective.” (30 J. L. & Econ. 265 (1987)) - Cited 348 times. *Case law citations = 17.*
- 12) “The Decline of Law as an Autonomous Discipline: 1962-1987.” (100 Harv. L. Rev. 761 (1986-1987)) - Cited 342 times. *Case law citations = 0.*

- 13) “The Ethical and Political Basis for the Efficiency Norm in Common Law Adjudication.” (8 Hofstra L. Rev. 487 (1979-1980)) - Cited 332 times. *Case law citations = 0.*
- 14) “Adjudication as a Private Good.” 8 J. Legal Stud. 235 (1979)) - Cited 273 times. *Case law citations = 0.*
- 15) “Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution.” 37 Case W. Res. L. Rev. 179 (1986-1987)) - Cited 268 times. *Case law citations = 1.*
- 16) “Rational Choice, Behavioral Economics, and the Law.” (50 Stan. L. Rev. 1551 (1997 – 1998) - Cited 262 times. *Case law citations = 2.*
- 17) “Natural Monopoly and Its Regulation.” (21 Stan. L. Rev. 548 (1968-1969)) - Cited 261 times. *Case law citations = 6.*
- 18) “The Right to Privacy.” (12 Ga. L. Rev. 393 (1977-1978)) - Cited 258 times. *Case law citations = 3.*
- 19) “Economics, Politics, and the Reading of Statutes and the Constitution.” (49 U. Chi. L. Rev. 263 (1982)) - Cited 243 times. *Case law citations = 6.*
- 20) “The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality.” (48 U. Chi. L. Rev. 6 (1981)) - Cited 242 times. *Case law citations = 28.*

Based on the data, it is safe to infer influence, and of the top twenty articles mentioned above, thirteen concern the application of economics to law. As noted, due to the nature of opinions, it is challenging to measure the influence of one area of the law, but Posner’s articles addressing antitrust, trademark, and statutory interpretation tend to receive the most cites, indicating influence in those particular areas of the law. The concept of efficiency is a central element to law and economics and by searching the concept of “efficiency” one can infer the influence of economic analysis of law in the opinion. A search of Posner will return over well over 3000 opinions, LexisNexis results limit, but when combined with the term “efficien!”, truncated to provide any root endings, 499 opinions mention the concept of efficiency. Searching the concept

of efficiency by circuit demonstrates a consistent pattern of use, supporting Posner's argument that economic concepts are inherent to the common law.

The use of citation analysis is not an exact science, but as an empirical tool, it does provide some utility in making inferential claims. The level of Posner's citations, particularly with law review articles are clearly impressive and demonstrate a significant degree of influence.

Although the influence seems to disproportionately favor law review citations, the citations to his articles, treatises, and books in case law is significant, too. Causation may be more tenuous in the case law citations, but a qualitative analysis of several cases will prove helpful in demonstrating causation and the influence that Posner has had as a judicial entrepreneur.

## VI. Posner and the Economics of Crime

### A. Introduction

*“I contend, in short, that most of the distinctive doctrines of the criminal law can be explained as if the objective of the law were to promote economic efficiency.”<sup>163</sup>*

*“My interest in the economics of non-market behavior began with, and remains centered on the field known as economic analysis of law or somewhat confusingly, “law and economics.”<sup>164</sup>*

Having outlined the necessary definitional elements of a judicial entrepreneur, it is necessary to ask whether Posner has applied his theories of economic analysis to the legal issues he has addressed as a federal judge. A central element of economic analysis of law is the goal of promoting efficiency, and criminal law is no exception. Posner’s impact in traditional market oriented areas of the law, such as antitrust, is well established, but in respect to non-traditional market oriented areas of the law, such as criminal law, the record is less clear. Still, it is important to evaluate his case law opinions to assess his efficacy through the application of the principles to the cases before him as a federal judge. Of course, we need to know not only whether he practice what he preaches, but whether he promotes what he practices and is he successful at these promotions. To further understand Posner’s efforts and influence, a qualitative case law analysis will be conducted to investigate his use of economic analysis in Fourth Amendment criminal cases addressing the exclusionary rule and common law tort alternatives.

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<sup>163</sup> Richard A. Posner, “An Economic Theory of the Criminal Law,” *Columbia Law Review* 85, 1193 (October 1985): 1195.

<sup>164</sup> Posner, *The Economics of Justice*, 2.



Criminal law would seem an area of the law in which economic concepts would be inapplicable, for discussions of crime and punishment often focus on justice, but the idea of using economic principles in criminal law has a long history beginning with the work of the utilitarian philosopher, Jeremy Bentham. It is hard to imagine that practical administrators in existing criminal justice systems did not take costs and benefits into account as they made operational decisions. Posner notes this dissonance in the treatment of crime in non-economic terms:

The areas of law and economics about which economists and lawyers display considerable unease are the (sometimes arbitrary classified as) nonmarket areas – crime, torts, and contracts; the environment; the family; the legislative and administrative processes; constitutional law; jurisprudence and legal process; legal history; primitive law; and so on... All the reasons that I gave at the outset for why some economists resist the extension of economics beyond its traditional domain of explicit market behavior coalesce in regard to these areas. And because they are also close to the heart of what lawyers think distinctive about law – of what they think makes is something more than a method of economic regulation – this branch of economic analysis of law dismays many lawyers. Furthermore, lawyers tend to have more rigid, stereotyped ideas of the boundaries of economics than economists do, in part because most lawyers are not aware of the extension (which is recent, though its roots go back to Adam Smith and Jeremy Bentham) of economics to market behavior... Indeed, a demarcation which places secured financing on one side of the divide and contract law on the other seems entirely artificial. The distinction between market and nonmarket economics may be as arbitrary as it is uninteresting.<sup>165</sup>

The contemporary interest in the economic analysis of criminal behavior may largely be attributable to Posner's colleague at the University of Chicago and Nobel Laureate in economics, Gary Becker.<sup>166</sup> In 1968 Becker published a seminal work, "Crime and Punishment: An Economic Approach," which represented a radical departure from existing academic work on crime, in that he reinterpreted how criminal activity should be viewed through the lenses of

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<sup>165</sup> Posner, "The Law and Economics Movement," 4.

<sup>166</sup> Posner, "An Economic Theory of the Criminal Law, 1194.

economics. For Becker, ““crime” [is] an important economic activity or “industry” notwithstanding the almost total neglect by economists.”<sup>167</sup> Crime is not simply a sociological issue of deviant behavior, but a form of economic activity, in which criminal behavior could be understood in economic terms. The perpetrator and victim may be considered parties in non-voluntary economic exchanges, in which there are measurable costs, and it is in society’s interest to make a system of criminal justice that is more efficient for the victim, perpetrator, and society in general. In contrast to torts and breaches of contract, which are mostly private causes of action, criminal law requires the intervention of the state, in which the “criminal is ordered to pay a fine to the state or suffer a nonpecuniary sanction such as being imprisoned.”<sup>168</sup> The perpetrator does not pay the victim in criminal proceedings, although there are civil actions that may be brought against them by the victim, making it a private cause of action.

Since Becker’s early work, the economic analysis of law movement has embraced theoretical economic alternatives to understand criminal activity and punishment. At its basic level, criminal activity may be viewed from two perspectives: criminal activity is a form of economic behavior operating outside the normal legal market of exchange of goods and services; and criminals, like all rational decision makers in the market place, consciously weigh the benefit of their behavior against the possible cost, which would be the possibility of being caught and punished by the state. Weighing these considerations, criminals make their decisions accordingly. Simply, Posner notes in his landmark treatise, “A person commits a crime because

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<sup>167</sup> Gary S. Becker and William M. Landes, *Essays in the Economics of Crime and Punishment* (New York: Columbia University Press, 1968), 170.

<sup>168</sup> Richard A. Posner, *Economic Analysis of Law* (Chicago: Wolters Kluwer Publishing, 2007), 215.

the expected benefits exceed the expected costs.”<sup>169</sup> For Posner and advocates of EAL, the purpose of the criminal law is to promote efficiency and to force people back into the market of mutual exchange and to deter inefficient transactions through criminal activity:

The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchanges – the “market,” explicit or implicit – in situations where, because transaction costs are low, the market is a more efficient method of allocating resources rather than forced exchange. Market bypassing is inefficient.<sup>170</sup>

Market bypassing is inefficient because there are costs incurred by the individuals and society. In most cases, Posner uses the concept of efficiency to mean that one party is made better off, without making another party any worse off.<sup>171</sup> This is also known as Pareto Superiority efficiency, an economic concept commonly used in economic analysis of the law. Obviously, there are limitations to the extent economic principles may be applied to criminal law, and certain crimes, such those of passion, cannot easily be equated as transactions bypassing the market, but economic analysis of the law provides another framework for interpreting and understanding criminal behavior in economic terms.

### **B. Efficiency and Exclusionary Rule**

A significant percentage of the caseload a federal appeals court judge addresses are criminal matters on appeal from lower trial courts, and within these cases there are several areas of criminal law worth evaluating to determine the impact economic analysis of law has had on criminal law. There is one area of criminal law which has been of particular interest to Posner,

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<sup>169</sup> Posner, *Economic Analysis of Law*, 219.

<sup>170</sup> Posner, “An Economic Theory of the Criminal Law,” 1194.

<sup>171</sup> Posner, *Economic Analysis of Law*, 12.

and that is the Fourth Amendment and the development of the exclusionary rule, which excludes illegally obtained evidence from criminal proceedings. Posner is not opposed to the exclusionary rule *per se*, believing it serves as a behavioral deterrent to poor policing practices by state and federal authorities, but he argues that it over-deters, that there are alternatives to the rule, that it provides a right to the accused that is not in the Fourth Amendment.<sup>172</sup> If economic analysis of the law is concerned with efficiency, then the exclusionary rule is not an efficient way of redressing the problems associated with tainted evidence, nor does it provide an efficient remedy to those whose Fourth Amendment rights have been violated. For Posner, the remedy for violations of the Fourth Amendment, and an alternative to the exclusionary rule, may be found in common law tort law and civil action against state and federal violators.

The exclusionary rule is a common law rule of evidence created by some state and federal courts during the 20<sup>th</sup> century to suppress evidence acquired without a proper search warrant by law enforcement. There was a lack of consistency in the rule's application throughout the states,<sup>173</sup> but in *Mapp v. Ohio* (1961) the Supreme Court applied the exclusionary rule to the states through the incorporation of the Fourth Amendment into the Fourteenth Amendment's due process clause. The exclusionary rule is described in the criminal procedure treatise, *Moore's Federal Practice*:

A violation of the Fourth Amendment usually results in suppression of the evidence gained from the illegal search or seizure. Generally, under the exclusionary rule, any

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<sup>172</sup> Richard A. Posner, "Rethinking the Fourth Amendment," *The Supreme Court Review* 1981, 49 (1981): 51-52.

<sup>173</sup> Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 301.

evidence that is either the direct or indirect result of illegal government conduct must be suppressed.<sup>174</sup>

There are numerous exceptions to the exclusionary rule that address such issues as the "fruits of the poisonous tree," but they will not be addressed in the dissertation. The focus of the chapter is on alternatives to the exclusionary rule, not the exceptions, which do, however, indicate a measure of judicial dissatisfaction with the rule.

The exclusionary rule is one of the most controversial criminal procedural rules expanded under the Warren Court's revolution in criminal law and procedure in the 1960s.<sup>175</sup> At its most basic level, there are two basic arguments in favor of utilizing the exclusionary rule as a remedy: it deters untoward conduct by police and prosecutors, and courts should not legitimate illegal conduct because it discredits courts. The popular argument in opposition to the exclusionary rule was easily summed up by Judge Benjamin Cardozo's famous remark, "The Criminal is to go free because the constable blundered."<sup>176</sup> Obviously, the debate surrounding the exclusionary rule, legally and politically, is much more complex with a long jurisprudential history throughout its development, but also has been in relative decline over the last thirty years, reflecting its unpopularity, a narrowing of the rule's applicability by the courts, and the tendency to less criminal trials.

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<sup>174</sup> Daniel R. Coquille, Gregory P. Joseph, Sol Schreiber, Jerold Solovy, and Georgene M. Vairo, *Moore's Federal Practice – Criminal* (New Jersey: Matthew Bender, 2015), Sec. 604.06.

<sup>175</sup> Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge: Belknap Press, 2000), 199.

<sup>176</sup> *People v. Defore*. 1926. 242 N.Y. 13, 21.

Posner has been a leading advocate, on and off the bench, to modify the exclusionary rule, and create alternative remedies to address tainted evidence, which he has argued can be better addressed through private common law tort actions brought by the victim against the offending authority. The exclusionary rule lacks the political and legal resonance that it once had for a variety of reasons, including limitations placed upon it over the last forty years and the increase in plea bargaining at the expense of criminal trials, but when Posner entered the legal profession in the 1960s, the exclusionary rule was a very important and contentious legal topic. In the 1960s there was a dramatic increase in crime, and public reaction to the exclusionary rule was hostile. The idea that a criminal may be set free due to a “technicality” was not only a salient legal issue, but a political issue.<sup>177</sup> The exclusionary rule and the debates surrounding it would not have been lost on Posner and other conservative legal thinkers of the time who believed the Warren Court had gone too far in protecting the rights of the accused.

Posner’s entrepreneurial activities aimed at changing the exclusionary rule’s application, decreasing the frequency of its use, and relying upon private tort claims of action may be divided into a two-part entrepreneurial campaign involving scholarly articles and legal opinions. Prior to and since joining the federal bench, he utilized his scholarly writings, articles, and treatises to attack the exclusionary rule; and, though he had constraints placed upon him by the cases before him, he used his legal opinions as a federal judge to address the deficiencies of the exclusionary rule and advocate for changes.

In the same year that Posner joined the Seventh Circuit, he published a seminal law review article on the exclusionary rule titled, “Rethinking the Fourth Amendment,” in which he argued

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<sup>177</sup> Powe, Jr., *The Warren Court and American Politics*, 199.

“for a new way of looking at the Fourth Amendment prohibition against unreasonable searches and seizures” by relying upon common law tort remedies to address evidence illegally seized, rather than use the exclusionary rule. Posner has long argued that criminal law and tort law are very similar because they both address violations of bodily integrity, trespass on property, etc.,<sup>178</sup> and that the exclusionary rule is problematic because “the interest a criminal has in avoiding punishment for his crime is not protected by the Fourth Amendment,”<sup>179</sup>

Defendants who believe their Fourth Amendment rights have been violated by the police should avail themselves of the traditional private common law tort remedies, such as trespass on property, in order to provide a more efficient outcome, but not permitting evidence to be suppressed and a possibly guilty criminal freed. Rather than the court simply suppressing the evidence and possibly let the defendant go free, an inefficient result. Instead, the defendant should seek redress against the governing agency through a private cause of action for torts. Posner is not saying a criminal defendant does not have a right against the state for violation of their rights, but that violation would be more efficiently addressed as a private cause of action against the state. The criminal evidence would still remain admissible and the defendant would be made whole through private compensation by the offending government agency or agent. Another issue raised is that the exclusionary rule may not efficiently deter, as it fails to penalize the wrongdoer, the police.

The tort idea and article was a radical departure from existing jurisprudence on the matter. Posner recognized that his arguments might have seemed unconventional for the time, noting

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<sup>178</sup> Posner, “An Economic Theory of Criminal Law,” 1194.

<sup>179</sup> Posner, “Rethinking the Fourth Amendment,” 49.

that, “I approach the Fourth Amendment not from the usual directions – that is, not from a background in constitutional law or criminal procedure – but from an interest, heavily economic, in privacy, in remedies, and in tort law.”<sup>180</sup> His article, less designed as a framework for specific policy change, is rather an attempt to look at the exclusionary rule differently and to open a dialogue on its fundamental problems from an economic perspective. Mindful of the obstacles he faced, he wrote:

Whether the Court should change direction as sharply as suggested here depends not only on the intrinsic merits of the proposed changes but also on institutional factors, notably the weight to be given the principle of stare decisis, that the paper does not discuss.<sup>181</sup>

What is most problematic to Posner is that the Fourth Amendment should “not be seen as protecting the criminal’s interest in avoiding punishment. It is a real interest – if the criminal is punished he incurs a cost – but not a lawful interest.”<sup>182</sup> To address this anomaly between incurring a cost and creating a lawful interest, Posner suggests that criminals should turn to common law tort remedies to address any infringement of Fourth Amendment rights. Rather than creating a right for the accused to have evidence excluded, the accused would have a right in common law torts and could exercise that right by bringing a civil tort action, such as trespass, for damages against the offending official, rather than seeking to have evidence obtained improperly from being suppressed.

Efficiency is one of Posner’s primary concerns, and the common law tort claims are a much more efficient avenue for addressing violations of the Fourth Amendment:

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<sup>180</sup> Posner, “Rethinking the Fourth Amendment,” 50.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*, 51.



Tort law is the natural avenue for redressing invasions of lawful interests other than breaches of contract; and actions for the torts listed earlier – conversion, false arrest and imprisonment, trespass to land and to chattels, assault, battery, infliction of emotional distress, and invasion of the right of privacy – are the natural avenue for recovering damages for impairment of lawful interests through unreasonable searches and seizures.” These actions are available to criminal and noncriminal alike, although naturally a criminal could not hope to recover, as part of his damages, the cost to him of being punished for a crime of which he was guilty; nor should he be compensated for this cost.<sup>183</sup>

Posner recognizes that he was swimming against the tide of judicial and academic opinion, noting a prior 1955 law review article, “Tort Remedies for Police Violations of Individual Rights,” which raised a similar concern that tort remedies may be an inadequate and ineffective remedy because there were too many hurdles for the accused to overcome to achieve redress.<sup>184</sup> Commencing a civil action to redress illegal searches and seizures may be impractical for many defendants:

Courts believe that the exclusionary rule serves to protect individuals from unlawful searches under the Fourth Amendment. Civil actions may provide some deterrence, but the practical problems involved in prosecuting a civil suit, such as cost, delay and a jury's reluctance to give money damages to an unsympathetic plaintiff, mitigate against their effectiveness.<sup>185</sup>

His suggested remedies for evidence illegally seized was a radical departure from existing jurisprudence in 1981, less so today, but interestingly he advocated these reforms at an opportune time in his career when he was making the transition from academic to federal judge. In some respects, it was the perfect opportunity to take what many perceived as an academic idea on how to reform a controversial subject of criminal procedure and apply and incorporate it, as a judicial

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<sup>183</sup> Ibid., 53.

<sup>184</sup> Caleb Foote, “Tort Remedies for Police Violations of Individual Rights,” *Minnesota Law Review* 39, 493 (1954-1955).

<sup>185</sup> *Bivens v. Six Unknown Named Agents*. 1971. 403 U.S. 388, 390.

entrepreneur, into his legal opinions to create a new body of jurisprudence that relied upon tort remedies as an efficient alternative to the exclusionary rule. “Rethinking the Fourth Amendment,” although not one of his most famous articles, has been cited in 123 law review articles, many of them in prominent journals, and five court opinions, and it has contributed significantly to the flow of arguments on the exclusionary rule and its alternatives. For example, Akhil Reed Amar, a prominent constitutional law professor, recognized in a Harvard Law Review article<sup>186</sup> Posner’s original contribution to treating a Fourth Amendment violation as a tort claim.

### **C. Posner and the Case Law**

How has Posner applied these ideas in his judicial opinions? In order to evaluate the impact of Posner’s interpretation of the exclusionary rule, it is necessary to review his written opinions as a federal judge. Since he published “Rethinking the Fourth Amendment” in 1981, and his follow-up article in 1985, “An Economic Theory of the Criminal Law,” which has been cited over 370 times and is his tenth most cited article, Posner has written opinions in 106 cases in which the exclusionary rule is mentioned. Only twelve, however, mention the term “tort” or tort as a possible remedy. To better appreciate the influence of Posner’s influence of economic analysis of law, a qualitative case law analysis of these cases will be conducted.

It is important to recognize that every case that addresses the exclusionary rule may not present an opportunity to address exclusionary rule reform via common law tort action. The

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<sup>186</sup> “And the Amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials; its global command that all government searches and seizures be reasonable sounds not in criminal law, but in constitutional tort law.” Akhil Reed Amar, “Fourth Amendment First Principles,” *Harvard Law Review* 107, no. 4 (February 1994): 757.

particular facts of a case and legal issue on appeal before the court must provide an opportunity to raise the issue of both the exclusionary rule and tort remedies, and federal appellate courts, unlike the Supreme Court, rarely are presented with cases that provide the perfect opportunity to change the law. The Supreme Court is in a position where it can pick and choose its cases and is in a better position to change a legal rule. In fact, due to the history of the exclusionary rule, only the Supreme Court is in the position to truly modify the rule. Congress has created exceptions, but on the ultimate Fourth Amendment question, only the Supreme Court can overturn the precedent. The lower courts may facilitate the process by raising novel constitutional interpretations to help mold how the exclusionary rule is applied. An additional issue will prevent an appellate court judge from utilizing a novel legal principle, and that is the possibility that the appellate court's opinion will be reversed on appeal by the entire circuit sitting en banc, or by the Supreme Court. Thus, Posner writes not only for the Supreme Court and other circuits, but also to persuade his colleagues on the Seventh Circuit.

An important strategy available to the appellate court judge as a judicial entrepreneur is to raise points of law or legal ideas in opinions that may not be relevant to the resolution of the issues of the case as trial balloons for consideration down the road. The most famous of these trial balloons is Footnote #4 in *Carolene Products* (1938), where Justice Harlan Fiske Stone suggested that a heightened level of constitutional scrutiny was required for legislation targeting “discrete and insular minorities” rather than the simple rational basis standard of review applied to economic legislation.<sup>187</sup> Raising peripheral points of law, either through such strategic tools

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<sup>187</sup> “[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial

of dicta, which are not binding, or in a rationale for the decision, are tactics for tentatively raising ideas without risking losing the case or for testing the jurisprudential water to see whether an idea can attract support. Posner has often made use of this trial balloon tactic, which demonstrates strategic planning on his part. Raising the issue of private common law tort actions in his exclusionary rule opinions is a strategic attempt to influence future opinions.

Of the twelve opinions in which Posner mentions the exclusionary rule and torts, only a couple of cases are relevant to the points he raised in his 1981 article. Beginning with *United States v. Salgado* in 1986, Posner raises the possibility of tort remedies as an alternative to the exclusionary rule, and continues this argument in the following cases until his more recent decision in *United States v. Williams* (2013). During that time, Posner develops and fine tunes his ideas on the exclusionary rule. In *Salgado*, Posner sets forth his jurisprudential marker as to how he views the exclusionary rule, and the rule's fundamental drawback of providing certain rights to the accused not found in the Fourth Amendment. In the opinion, in which Posner wrote for the majority, he establishes his precedential definition of the exclusionary rule and his opposition to how it is applied:

The exclusionary rule is a sanction, and sanctions are supposed to be proportioned to the wrongdoing that they punish. The exclusionary rule punishes the government for obtaining evidence by unconstitutional means. It does this by forbidding the government to use such evidence to convict the person whose constitutional rights it violated. It does not go further and forbid the government to convict him on the basis of lawfully obtained evidence. It thus does not seek to make the person whose rights have been violated better off than he would have been if no violation had occurred. We conclude that the exclusionary rule does not require the exclusion of evidence that would have been obtained lawfully, just in order to punish a search that did not harm the defendant in any

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inquiry.” *United States v. Carolene Products Co.* 1938. 304 U.S. 144, 153.

sense relevant to a criminal proceeding, because the search was not a necessary step in obtaining evidence used to convict him.<sup>188</sup>

Although Posner is not saying it directly, he is establishing efficiency as a goal when he writes that the exclusionary rule “*does not seek to make the person whose rights have been violated better off than he would have been if no violation had occurred*” because this would result in an inefficient result. This is pure economic analysis of the law language discussing the Pareto efficiencies, in less than academic terms. By excluding evidence obtained illegally and perhaps allowing the convicted to go free, the defendant is made better off by the result, even if the rule had not been violated and the information gathered lawfully. If the defendant is made better off, but society is at a loss, this violates the Pareto Superiority efficiency that some can be made better off without others being made worse off.

Posner continues to expand upon the basic exclusionary rule by raising for the first time the possibility of a tort remedy as an alternative to the exclusionary rule. This language is unnecessary for the disposition of the legal question before the court, but he seems to be raising the possibility with his colleagues of providing alternatives through common law torts in future cases.

Maybe Salgado's privacy was invaded, though in rather an ethereal sense, by the fact that Bridges laid eyes on his drug paraphernalia. But for such invasions the only remedy is a tort remedy unless evidence that would not otherwise have been obtained is used in a criminal proceeding against the owner of the paraphernalia.<sup>189</sup>

This is the first time Posner has strategically raised the possibility of a common law tort remedy for invasion of privacy. Including a novel legal theory in an opinion may have

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<sup>188</sup> United States v. Salgado. 1986. 807 F. 2d 603, 611 (7<sup>th</sup> Cir. Ill.).

<sup>189</sup> Ibid., 612.

implications for other cases, even if the idea in question was not relied upon in the legal reasoning to decide the case. A Shepard's citation analysis of *Salgado* case reveals that it has been cited ninety-eight times in forty-three other cases, forty law review articles, and in fifteen treatises, statutes, and other court documents.

The second case that provided Posner with an opportunity to address the issue of tort remedy and the exclusionary rule was *United States v. Stefonek* (1999). Writing for the majority in the case, Posner once again treats the actions of government officials as a tort, maintaining that the exclusionary rule should not apply unless there was an actual injury:

. . . just as careless or even willful behavior is not actionable as a tort unless it causes injury, *Restatement (Second) of Torts* § 907 (1977), so there must be a causal relation between the violation of the Fourth Amendment and the invasion of the defendant's interests for him to be entitled to the remedy of exclusion. In a case of inevitable discovery, the defendant would by definition have been no better off had the violation of his constitutional rights not occurred, because the evidence would in that event have been obtained lawfully and used lawfully against him. This is a similar case, the only difference being that here the lack of injury to a protected interest is a certainty rather than merely a probability. We *know* that if the warrant had complied with the Fourth Amendment, the very same evidence would have been seized as was seized, because we know that Magistrate Judge Gorence intended to permit the search and seizure that occurred; it was the very search and seizure specified in the application for the warrant that she issued. We thus know that no lawful interest of Stefonek's was harmed by the constitutional error, and equally that the taxpaying and law-abiding public will be harmed if her conviction is thrown out because of the error. Where a violation of the particularity requirement of the Fourth Amendment can be shown to have had no causal relation to the scope of the search or to the quantity or character of evidence seized, suppression of the evidence is not a proper sanction.<sup>190</sup>

Once again Posner is using the concept of the Pareto efficiency, when he writes "*the defendant would by definition have been no better off had the violation of his constitutional rights not*

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<sup>190</sup> *United States v. Stefonek*. 1999. 179 F. 3d. 1030, 1035 (7<sup>th</sup> Cir. Ill.).

*occurred.*” It would be an inefficient windfall to the defendant to exclude the evidence. He continues to evaluate the case as a tort when he writes:

The broader principle that encompasses both types of "harmless error," plus the common law principle noted earlier that there is no tort without an injury, is that a litigant may not complain about a violation of rights that does not harm the interest (whether in privacy or in a fair trial) that the rights protect. (There are no "attempted torts.") The principle is applied to virtually all errors, including constitutional errors, that occur in the course of a criminal trial.<sup>191</sup>

A pattern begins to develop in Posner’s opinions of critiquing the exclusionary rule, establishing that the situation is not Pareto efficient, and then establishing that the facts fit the common law interpretation of torts. A Shepard’s citation analysis of the case found that it had been cited 223 times, of which 121 were in other cases, forty in law review articles, and eighty-two in miscellaneous treaties, statutes, and court documents.

Five years later in *United States v. Johnson* (2004), Posner, writing for the majority, uses the concept of tort to explain the problems associated with the case and the exclusionary rule exceptions of independent-source and inevitable-discovery doctrines:

The First Circuit's analysis merely recognizes that if there is a lawful basis for the seizure of some evidence, the fact that the seizure was also based on illegal acts need not trigger punishment, because the acts did no harm (no harm so far as obtaining the evidence was concerned-- there might be collateral damage, remediable by suits under 42 U.S.C. § 1983 or state tort law, to property or privacy interests of the defendant). There is a need for punishment when the only basis for the seizure of the evidence is a series of illegal acts. The assumption that the independent source must be "lawful" is thus not merely an accidental dictum; it is part of the essential logic of the rule and of its origins in fundamental principles of tort law.<sup>192</sup>

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<sup>191</sup> *Ibid.*, 1036.

<sup>192</sup> *United States v. Johnson*. 2004. 380 F.3d 1013, 1017-1018 (7<sup>th</sup> Cir. Ill.).

Posner is re-directing the defendant's legal recourse for violation of his Fourth Amendment rights to the Federal Tort Claims Act<sup>193</sup> or state tort laws, rather than relying upon the exclusionary rule for redress. This is the practical application of the law, no longer simply relying upon the exclusionary rule, but directing the defendant to bring a private tort claim. Later in the case he raises the point that there has to be an actual harm to the defendant by the state's action:

Proliferation of legal categories is a chronic problem for American law, as it deflects attention from practical to definitional concerns. The independent-source and inevitable-discovery doctrines are easily collapsed into the familiar rule of tort law that a person can't complain about a violation of his rights if the same injury would have occurred even if they had not been violated. To punish a person for an act that does no harm is not required in order to deter harmful acts. But this is in general, not in every case; the defendant, Antoine Johnson, is arguing in effect for an exception to the tort rule.<sup>194</sup>

Posner continues his analysis of comparing criminal procedure to common law torts:

A fundamental principle of tort law is that there is no tort without an injury, and so since neither fire was a sine qua non of the plaintiff's injury, it could be argued that neither fire maker had committed a tort. Tort law rejects this conclusion for the practical reason that tortious activity that produces harm would go unsanctioned otherwise. The reason for denying liability when there is no causal relation between the violation of a duty and the harm of which the plaintiff is complaining is, as we noted earlier, that punishing a person for an act that does no harm is not needed to deter harmful acts. The reason fails when there is harm that would not have occurred had there not been unlawful acts.<sup>195</sup>

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<sup>193</sup> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 United States Code Service § 2674. For example, "Plaintiff's complaint would state cause of action under Federal Tort Claims Act for invasion of privacy and for illegal warrantless search where plaintiff's mail was opened by CIA although plaintiff was not on any watch list at time that any of his mail was intercepted or at any time thereafter; plaintiff would be entitled to an award of \$ 1,000 in general damages, suitable letter of regret and assurance of non-recurrence to be furnished by government, attorney's fee of \$ 250 payable out of award to plaintiff, and costs." *Cruikshank v United States*, 467 F. Supp. 539 (United States District Court for the District of Hawaii 1979).

<sup>194</sup> *United States v. Johnson*. 2004. 380 F.3d 1013, 2014 (7<sup>th</sup> Cir. Ill.).

<sup>195</sup> *Ibid.*, 1016.



This is a more tenuous case, but it does concern a criminal matter, tort law as recourse, and his critique of relying upon the exclusionary rule. A Shepard's citation report of the case lists fifty-three overall citations, of which twenty are for other cases, ten law review articles, and the remainder for treatises, statutes, and court documents. Two of the cases do cite to the case regarding the use of tort remedies - one was another Seventh Circuit cases and the other a state case from Kansas.

Four years later Posner had another opportunity to address the question of torts as a remedy in *Samuel v. Frank* (2008), but by 2008 the exclusionary rule, although still applied in numerous cases, had been scaled back in a number of opinions providing many exceptions to the rules on evidence. Writing for the majority, Posner held:

There is . . . no rule or principle that evidence obtained by improper means may not be used in a legal proceeding. It has often seemed better to let the evidence in but punish the officer who used those means to obtain it, an increasingly feasible option of the having-your-cake-and-eating-it type now that there are effective tort remedies, especially federal tort remedies, against official misconduct. The emergence of those remedies may be one of the reasons that exclusionary rules have fallen out of favor--as they have; we find today's Supreme Court saying that "suppression of evidence. . . has always been our last resort, not our first impulse."<sup>196</sup>

He then goes on not only to advocate a tort remedy, but also to address one of the fundamental criticisms of tort remedies, that the defendant is usually not an attractive plaintiff when he brings a civil action against a public official and would tend not to get a fair hearing in front of a jury:

Tort remedies are fully effective when the victim of coercion is a witness who is not himself (in this case herself) a defendant, or a criminal of any type. A criminal is not a very appealing tort plaintiff, but Tisha is not a criminal. She is not accused of being the

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<sup>196</sup> *Samuel v. Frank*. 2008. 525 F.3d 566, 570 (7<sup>th</sup> Cir. Ill.).

defendant's accomplice rather than his victim. She was only 15 when she ran away with him, and he was 32 years her senior.

A Shepard's citation demonstrates that the case was only cited thirty-five times, nineteen other cases and four law reviews, with the remainder in treatises, statutes, and court documents. None of the citations were for tort remedies suggested by Posner, but as indicated in the opinion, the idea of a tort remedy rather than relying on the exclusionary rule is no longer wishful thinking, and as Posner cites to a Supreme Court decision in *Hudson v. Michigan* (2006), the exclusionary rule had become more an exception than the rule it had been in *Mapp v. Ohio* (1961):

Suppression of evidence . . . has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," which sometimes include setting the guilty free and the dangerous at large. We have therefore been "caution [us] against expanding" it, and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." We have rejected "[i]ndiscriminate application" of the rule, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," --that is, "where its deterrence benefits outweigh its 'substantial social costs'".<sup>197</sup>

This is an interesting opinion because the Court is actually applying an economic analysis of law to a constitutional issue by weighing the deterrence benefit against the social costs. It is not simply a question of addressing a constitutional protection or legal right, but of weighing benefits versus costs. A year later, Posner addressed the question again in *United States v. Sims* (2009), and was significantly more direct in his critique of the Fourth Amendment than in any of his prior cases addressing tort remedies.

The Fourth Amendment, read literally at any rate, does not require warrants; it merely restricts them. It does not forbid searches without warrants; it merely forbids unreasonable searches. "There is nothing in the amendment's text to suggest that a warrant is required in order to make a search or seizure reasonable. All that the amendment says about warrants is that they must describe with particularity the object of the search or seizure and must be supported both by an oath or affirmation and by

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<sup>197</sup> *Hudson v. Michigan*. 2006. 547 U.S. 586, 591.

probable cause, which is understood, in the case of searches incident to criminal investigations, to mean probable cause that the search will turn up contraband or evidence of crime."... "[T]he framers of the Fourth Amendment were more fearful that the warrant would protect the police from the citizen's tort suit through operation of the doctrine of official immunity than hopeful that the warrant would protect the citizen against the police... ("the fourth amendment does not of its own force require a warrant for any search. Its text is a limitation on warrants . . . stemming from dissatisfaction with the use of warrants by the crown courts during colonial days").<sup>198</sup>

His 1980s critique of the exclusionary rule was significantly milder, and the possibility of tort remedies simply wishful thinking, but by 2009 torts were beginning to be viewed as a reasonable possibility:

A person whose rights have been violated by a search can be remitted to a suit against the police for committing a constitutional tort. Now that such suits are common and effective, the exclusionary rule is bound some day to give way to them. For the rule is too strict: illegally seized evidence essential to convicting the defendant of a grave crime might have to be suppressed, and the criminal let go to continue his career of criminality, even if the harm inflicted by the illegal search to the interests intended to be protected by the Fourth Amendment was slight in comparison to the harm to society of letting the defendant off scot free.

Concerned with such anomalies though unwilling as yet to abrogate the exclusionary rule (although it has no constitutional basis--it is a doctrine of federal common law), the Supreme Court has in the name of "inevitable discovery" created an exception to the rule for cases like this in which the harm caused by an illegal search to the values protected by the Fourth Amendment is not merely slight in relation to the social benefits of the search, but zero. It is zero because, had the police complied with the Fourth Amendment the consequences for the defendant would have been exactly the same as they were. The search would have been authorized, would have taken place, and would have been identical in scope, both as to places searched and things seized, to the search that the police did conduct. The defendant would have been no better off had the warrant complied with the Fourth Amendment.<sup>199</sup>

It is interesting to note in his opinion a common anomaly that makes citation analysis problematic, but not fatal: he cites to one of his own opinions, *United States v. Stefonek*, to support his argument. It is an acceptable practice, but it skews the results of any citation

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<sup>198</sup> *United States v. Sims*. 2009. 553 F. 3d 580, 583 (7<sup>th</sup> Cir. Ill.).

<sup>199</sup> *Ibid.*, 583-584.

analysis. A Shepard's analysis shows that the case has been cited thirty three times, four in cases, two in law reviews, and the remainder in treatises, statutes, and court documents.

In the last opinion that Posner wrote on the matter, *United States v. Williams* (2013), he is unequivocal in his views in opposition to the exclusionary rule as a remedy for an illegal search and seizure that should only be used as a last resort. Once again, quoting from the Supreme Court, he writes: "Exclusionary rules, which protect the guilty, are no longer favored. "Suppression of evidence... has always been our last resort, not our first impulse." He continues in a case against an attorney:

The reason for an exclusionary rule is not to make the defendant whole by putting him back in the position that he would have occupied had it not been for the violation. Exclusionary rules exclude improperly obtained evidence that often is highly probative of guilt.<sup>200</sup>

Here, too, he relies upon the argument, although not explicitly, that the exclusionary rule is inefficient, and the language he uses is the language of torts: "*the rule is not to make the defendant whole by putting him back in the position that he would have occupied had it not been for the violation.*" There must be damages in order for there to be a tort.

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<sup>200</sup> *United States v. Williams*, 698 F.3d 374, 383 (United States Court of Appeals for the Seventh Circuit 2013).

## D. Conclusion

Posner has been influential in spreading the idea of using private common law tort actions as an alternative to the use of the exclusionary rule to address the actions of state actors in the attainment of evidence. Beginning with his article on “Rethinking the Fourth Amendment” published in 1981, which has been cited 123 times, and his article “An Economic Analysis of Crime” published in 1985, which has been cited 370 times, which is one of the top ten Posner articles cited, Posner has been a judicial entrepreneur in applying economic principles, particularly the concept of efficiency, to reforming the exclusionary rule. Unfortunately, except for the few cases mentioned above, his trial balloon opinions to get the exclusionary rule incorporated into criminal jurisprudence as an alternative have not been successful, but four federal cases have cited to his opinions, evidence that it has been considered, particularly one case which recognizes the scholarly contribution to the literature on tort as an alternative to the exclusionary rule:

We also think it is significant that all the scholarly authority that we have found runs against Hector’s position. See Akhil Reed Amar, *The Constitution and Criminal Procedure* (1997); Douglas Laycock, *Modern American Remedies: Cases and Materials* 143 (1994); William J. Stuntz, *Warrants and Fourth Amendment Remedies* (1991); John C. Jeffries, Jr., *Damages for Constitutional Violations* (1989); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials*; ***Richard A. Posner, Rethinking the Fourth Amendment (1981).***<sup>201</sup> (Italicized and bolded for emphasis).

Published in 1981, Posner’s article, “Rethinking the Fourth Amendment,” is the wellspring from which the legal idea developed. Additionally, a simple citation analysis of the federal court decision demonstrates almost a six-fold increase in cases that mention the exclusionary rule and

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<sup>201</sup> Hector v. Watt. 2000. 235 F.3d 154, 160 (3<sup>rd</sup> Cir. Pa.).

torts since 1981.<sup>202</sup> A possible explanation for the increase is the number of opinions written during this time due to the increase in federal criminal prosecution and the use of Federal Tort Claims Act, but it may also be argued that they reflect Posner's efforts to raise the possibility of alternatives.

Posner's views on promoting tort alternatives to the exclusionary rule have become more common, but as discussed, the challenges of incorporating economic principles into the criminal law remain challenging, and Posner has been less successful in his efforts, than in antitrust. Whether the exclusionary rule is replaced by tort remedies as an alternative may have less to do with arguments for efficiency, and more to the inherent problems with the exclusionary rule and a general shift in criminal procedure, but it is evident that where Posner had been on the fringes in 1981, his arguments are significantly more mainstream today.

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<sup>202</sup> A search conducted on LexisNexis in All Federal Cases database. The first search: "tort and exclusionary rule and date bef 1/1/1980" – ninety-three results; and a second search: "tort and exclusionary rule and date aft 1/1/1981 – 598 results.

## VII. Posner and the Economics of Antitrust

### A. Introduction

*“The antitrust laws are here to stay, and the practical question is how to administer them better – more rationally, more accurately, more expeditiously, more efficiently.”*<sup>203</sup>

*“The only goal of antitrust law should be to promote efficiency in the economic sense.”*<sup>204</sup>

There are certain areas of the law that are more amenable to the application of economic principles than others, and antitrust law is one of the legal subject matters most apt to fully utilize economics in judicial decision making and analysis. Unlike criminal law, discussed in the prior chapter, antitrust law presents greater opportunity to utilize economic principles than other legal subject matters. In order to assess Posner’s use of economic principles and assess his influence upon antitrust law, a citation analysis of his antitrust publications and a quantitative case law analysis of his opinions in the area of antitrust will be conducted.

Antitrust law is a complicated area of the law to the uninitiated. Much of the legal discourse and development is not statutorily based, but rather based on common law decisions by federal judges interpreting several important antitrust statutes, including the Sherman Antitrust Act of 1890; the Clayton Act of 1914; the Federal Trade Commission Act of 1914; the Robinson-Patman Act of 1936; and, the Celler-Kefauver Act of 1950. An area of the law where federal judges have been highly influential, it is an ideal setting for their entrepreneurial instincts. Posner recognized the unique role of judges in antitrust jurisprudence, though he conceded that it

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<sup>203</sup> Richard A. Posner, *Antitrust Law, Second Edition* (Chicago: University of Chicago Press, 2001), 1.

<sup>204</sup> *Ibid.*, 2.

had been a mixed blessing. “Federal antitrust statutes . . . are quite brief,” he wrote, and “courts have spent many years interpreting, or perhaps more accurately supplying, their meaning, but the course of judicial interpretation has been so marked by contradiction and ambiguity as to leave the law in an exceedingly uncertain and fluid state.”<sup>205</sup> It was this unsatisfactory condition, so inimical to efficiency, which he sought to remedy.

Posner’s influence in changing the contemporary antitrust law paradigm, first as an academic scholar and then as a federal judge and judicial entrepreneur, has been well recognized by the courts and legal academic community through their reliance and citations to his work.<sup>206</sup> Prior to becoming a federal judge, and while on the bench, he has played a significant intellectual role in recognizing the problems existing in antitrust law, providing recommendations on how to improve the efficacy of antitrust laws through the use of economic analysis, and overhauling existing antitrust common law.

But if Posner has become perhaps the antitrust reform movement’s most prominent figure, he has also been misinterpreted by many scholars and practitioners. Posner cannot be easily categorized. Due to his advocacy for the use of law and economics in antitrust jurisprudence, he has been perceived as being ideologically in favor of market-oriented remedies for all antitrust matters and opposed to antitrust laws in principle. In truth, however, he is an interventionist, who supports a strong and effective antitrust regimen, with the goal of tailoring antitrust laws to promote economic efficiency benefitting the consumer, not simply the traditional interests of

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<sup>205</sup> *Ibid.*, 3.

<sup>206</sup> Donald J. Boudreaux, “The Second Edition of Judge Posner’s *Antitrust Law*: A Tempered Appreciation,” *The Antitrust Source*, American Bar Association (March 2002).



business. Many scholars, particularly within the law and economics movement, have argued against keeping statutory antitrust laws and have followed an anti-interventionist approach to antitrust jurisprudence, essentially crying, leave the markets alone, but Posner has argued for keeping the existing regulatory regime and proffered numerous suggestions on how to improve antitrust law that have largely been incorporated into the antitrust common law legal canon.

Posner's entrepreneurialism and explicit attempts to change antitrust law through his extrajudicial writings and through common law as a judge reflect his belief in the futility of changing antitrust laws via statutory means. He seems convinced that the path to change involves changing the minds of federal judges:

The body of antitrust doctrine is largely the product of judicial interpretation of the vague provisions of the antitrust laws and thus can be changed by the courts within the broad limits set by the statutory language and what we know of the intent behind it. What is required is judicial recognition that many of the existing judge-made rules of antitrust are inconsistent with the fundamental, and fundamentally economic, objectives of antitrust laws.<sup>207</sup>

Posner has been an effective judicial entrepreneur in the area of antitrust law, but his impact is multifaceted and has been pursued through their principal areas of legal advocacy: scholarly writings, judicial opinions, and general books. In order to evaluate the impact of his role as a judicial entrepreneur, his scholarly contributions, prior to and since joining the federal bench, must be included in the totality of his judicial entrepreneurial activities. The discourse between the bench and the academy has played a significant role in antitrust jurisprudence development over the last forty years. There is a clear line of intellectual bridging from the academy to the federal jurisprudence, and a heavy reliance on the work of legal scholars and the professors who

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<sup>207</sup> Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976), 7.

wrote the treatises the courts and practitioners rely upon today for their understanding of antitrust law. Even before he was appointed to the court of appeals, Posner as an academic at the University of Chicago in the 1970s had assumed a prominent role in this dialogue.

Much of the common law development stems from the intellectual ideas fostered by Posner and other scholars at the University of Chicago and Harvard Law School. Without Posner's success as an academic, and the prestige and respect he garnered from his writings, particularly *Antitrust Law: An Economic Perspective* (1976), a book written for attorneys and the lay public prior to joining the federal bench, it is unlikely he would have been as influential a federal judge. In the area of antitrust law, the concept of a judicial entrepreneur must reflect the totality of jurists' contributions to the jurisprudence, both on and off the bench, to fully appreciate their influence, which is the case for Posner. Looking at the totality of his academic writings and his opinions, Posner has been the consummate judicial entrepreneur in the field of antitrust jurisprudence. It may be argued that Posner first made his intellectual mark, and much of his early stature within in the legal community, derives from his early work in antitrust law.

## B. Chicago School of Antitrust Analysis

*“Of all of Chicago’s law and economics conquests, antitrust was the most complete and resounding victory.”<sup>208</sup>*

*“Intellectual “schools” tend to be “Protestant” rather than “Catholic,” meaning that there is no central creedal authority to delimit orthodoxy and heresy. This is particularly true of a “school” like Chicago, which is only loosely tied to a geographic locus, spans decades temporarily, and involves a score or more of major contributors.”<sup>209</sup>*

Antitrust law covers many discrete areas of the economic relationships between businesses and their impact on consumers. From price fixing to mergers, vertical restraints to exclusionary practices, the antitrust jurisprudence covers a tremendous swath of economic issues and business practices. Since the 1960s, there has been a significant paradigmatic shift in antitrust jurisprudence from being traditionally interventionist in antitrust matters to an anti-interventionist approach, which defers to the market to govern and resolve business relationships, unless per se clearly in violation of antitrust laws. These changes were not statutorily enacted, but through the common law courts have reinterpreted the laws, but not without the profound influence of law and economics legal theories emanating from the University of Chicago and to a lesser degree, Harvard Law School.

In order to appreciate Posner’s profound influence on law and economics, it is necessary to understand the intellectual milieu of the University of Chicago that Posner gravitated to in the 1960s and where he eventually found an intellectual home. The University of Chicago would provide some of the most significant scholarly thinkers in the area of antitrust law, including

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<sup>208</sup> Daniel A. Crane, “Chicago, Post-Chicago, and Neo-Chicago,” *University of Chicago Law Review* 76, 1911 (Fall 2009), 1911.

<sup>209</sup> *Ibid.*, 1915.

Robert Bork, George Easterbrook, and most importantly, Richard Posner, who became its most prominent proponent. Director's influence was extremely important in creating the Chicago School. Bork, one of the school's most famous, and to some, infamous protégés, commented years later on Director's influence:

A lot of us who took the antitrust course or the economics course (taught by Director) and underwent what can only be called a religious conversion. It changed our view of the entire world...<sup>210</sup>

This is a rather interesting insight because it could be argued that economics had the same influence throughout the entire legal academy over the next thirty years: economic principles were the new legal tools for better understanding how the law operated, and economic ideas could be applied to a variety of issues to provide a new and different understanding. In addition to the Chicago School, there was a competing Harvard School of thought on antitrust law, although its influence was not as significant; it offered perhaps the only competing alternative to Chicago, but its influence was waning as Chicago's influence ascended.

The Chicago School's antitrust jurisprudence stood for a number of principles: "(1) markets are robust when it comes to competition; and (2) courts are infirm when it comes to policing competition."<sup>211</sup> In 1978 Posner published a seminal article, "The Chicago School of Antitrust Analysis," in which he argued that the "distinction between" the Harvard and Chicago Schools of antitrust analysis had "greatly diminished."<sup>212</sup>

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<sup>210</sup> Teles, *The Rise of the Conservative Legal Movement*, 94.

<sup>211</sup> Crane, "Chicago, Post-Chicago, and Neo-Chicago," 1932.

<sup>212</sup> Richard A. Posner, "The Chicago School of Antitrust Analysis," *University of Pennsylvania Law Review* 127, 925 (1979), 925.

The basic tenet of the Chicago school, that problems of competition and monopoly should be analyzed using the tools of general economic theory rather than those of traditional industrial organization, has triumphed.<sup>213</sup>

Changes of mind within both the Chicago school and its principal rival, which I have called the Harvard school, have produced a steady trend toward convergence. Differences remain, but increasingly they are technical rather than ideological.<sup>214</sup>

Even though Posner was not a student, but a colleague of Director, he too, was profoundly influenced by the ideas of using economic principles in antitrust law. Posner discussed his early introduction in antitrust law in an interview in 2012:

There was very little economics in the law school curriculum, but I knew Turner. I cite-checked on the law review part of an article by Derek Bok, who later became president of Harvard University. It was an article on antitrust, and the section I cite-checked actually dealt with economic analysis. I also worked on major antitrust case for Justice Brennan when I was a law clerk, and I relied in part on Bork's article. I then went to work for the Federal Trade Commission, Justice Department, and communications task force. I was intrigued with economic issues, and by the time I started teaching I had decided that I wanted to specialize in the applications of economics to law.<sup>215</sup>

Posner was excited about the use of economics in legal analysis. Posner met Director while Posner was teaching at Stanford in 1968, and commented on the magnetism of Director, an entrepreneur of ideas in his own right:

He [Director] was... a Socrates-like figure in the sense that he wrote very little...[but had] a very penetrating style of discussion. He wouldn't let you get away with anything. Most of what people say in conversation [is] casual nonsense, and he didn't tolerate any of that. He was polite but he was very firm and a real teacher.<sup>216</sup>

Perhaps because Director was better known for his teaching than his writing, it was Posner, due to his extensive and constant scholarly output would become most associated with the

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<sup>213</sup> Ibid., 933-934.

<sup>214</sup> Ibid., 948.

<sup>215</sup> Hackney, Jr., *Legal Intellectuals in Conversation*, 48.

<sup>216</sup> Teles, *The Rise of the Conservative Legal Movement*, 95.

economic analysis of law and its influence on antitrust reform. Posner hits on a point in that aforementioned statement which is reflective of the appeal of law and economics to so many scholars – it is rigorous. Law is an intellectual endeavor and economics provides another set of tools to understand and approach legal reasoning. If the legal academy’s teaching philosophy is the Socratic Method, then the idea of an intellectual tool that requires concrete analysis will have great appeal in the classroom and in scholarship. It could be argued that this is why so many scholars are attracted to utilizing economic principles in their legal analysis – it requires a sense of intellectual discipline and rigor that is attractive to scholars, as well as providing intellectual fodder for those needing publishing ideas for tenure at law schools.

Posner would later relocate to the University of Chicago Law School in 1969, and has remained there ever since. Steven Teles, a legal scholar critical of law and economics, has recognized Posner’s influence and impact on law and economics:

While the work of Director and [Ronald] Coase helped to establish law and economics as a respectable field, it was the emergence of Richard Posner that made it an academic phenomenon of the first rank.<sup>217</sup>

Posner was an intellectual whirlwind, producing non-stop and shaking up the legal academy with his writing on economics and the law:

First and foremost, the breadth of the ambition of Posner’s major work, *Economic Analysis of Law*, signaled to the legal academy that law and economics could identify major defects in traditional approaches across the entirety of legal scholarship, thereby inducing others, especially prospective law professors, to follow his lead.<sup>218</sup>

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<sup>217</sup> *Ibid.*, 96.

<sup>218</sup> *Ibid.*

Posner's work, in short, produced positive externality for the movement, by increasing the demand for its scholarship and removing blockages to its supply.<sup>219</sup>

The Chicago School's watershed was the late 1970s,<sup>220</sup> but Posner's involvement in antitrust predates his tenure and began while a law student. Becoming one of the leading experts on antitrust law was an unexpected course for an English major. He would note on his interest in antitrust law: "By the time I went to the teaching market and I was hired by Stanford I knew I wanted to do economic analysis of law."<sup>221</sup> There were also other important antitrust scholars at the time, including the Harvard Law School's Donald Turner and Phillip Areeda, who would later publish a seminal treatise on antitrust, used to this day, which would incorporate many of the ideas of the law and economics movement.

In addition to the many scholarly articles Posner had written on antitrust law, it was the publication of his seminal book in 1976, *Antitrust Law: An Economic Perspective*, which firmly established him as the leader of the law and economics movement in the area of antitrust jurisprudence, and laid the groundwork for interpreting and changing the existing legal paradigm for understanding federal antitrust laws. Bork would publish *The Antitrust Paradox* two years later, another influential antitrust book, but it was Posner's book that was more influential.<sup>222</sup> Like the *Economics of Justice* published in 1980, *Antitrust Law* was tailored to both a scholarly and lay audience. In some respects, both books, published relatively close together, represent

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<sup>219</sup> Ibid., 97.

<sup>220</sup> Crane, "Chicago, Post-Chicago, and Neo-Chicago," 1911.

<sup>221</sup> Teles, *The Rise of the Conservative Legal Market*, 97.

<sup>222</sup> It could be argued that Bork's scholarly contributions to antitrust were eventually overshadowed by his ill-fated Supreme Court nomination and his subsequent political activism for conservative causes, but Bork does not come close to the publication volume or stature as a public intellectual of Posner.

Posner's effort to establish himself as a public intellectual in the law and to break down the barriers between the legal academy and the general public. *Antitrust Law* was also intended for lawyers, judges, and politicians, who may not fully understand the nature of antitrust law, the use of economics, and necessity for change. Posner makes his intentions clear in the beginning of the book:

It seems timely to try to place a distinctive approach to antitrust before a somewhat larger audience than the readership of the scholarly journals in which my articles on antitrust have appeared.<sup>223</sup>

This is distinctively Posner style. It is also a reflection and element of his judicial entrepreneurial efforts to change opinions through his extrajudicial writings. Posner is an entrepreneur, who wants to move his ideas beyond the academy and the courts, but the ideas are not simply intellectual; they serve a larger purpose, as he wants to change the existing antitrust policy paradigm.<sup>224</sup> Posner argues that the existing antitrust framework was rife with problems and inefficient for a changing economy:

The antitrust field is in need of a thorough rethinking of both its substantive and administrative aspects, and the essential intellectual tool for this process of rethinking, I believe – besides simple logic and common sense, which are scarce commodities in this as in most fields – is the science of economics.<sup>225</sup>

The importance of Posner's book cannot be exaggerated. Teles has not only referred to it as "epochal," but has recognized that it had "helped to move law and economics from its relatively low profile in the 1960s to its ubiquity in the 1970s and 1980s. While leading liberal legal scholars largely ignored the previous generation of law and economics scholarship, they felt

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<sup>223</sup> Posner, *Antitrust Law: An Economic Perspective*, vii.

<sup>224</sup> *Ibid.*, ix.

<sup>225</sup> *Ibid.*, 3.



compelled to respond to Posner.<sup>226</sup> Prior to his book and the work of the Chicago School, surprisingly, antitrust law jurisprudence had been largely bereft of a strong economic analytical component. Posner's suggestions for improving antitrust laws utilizing the principles and tools of economic analysis of the law were not new, but they were revolutionary, in that they argued for a paradigm shift in the way that existing antitrust laws were interpreted by courts where "allocative efficiency alone should guide antitrust policy."<sup>227</sup> The purpose of the antitrust laws was to promote economic welfare:

Economic welfare should be understood in terms of the economist's concept of efficiency; that business firms should be assumed to be rational profit maximizers, so that the issue in evaluating the antitrust significance of a particular business practice should be whether it is a means by which a rational profit maximizer can increase profits at the expense of efficiency.<sup>228</sup>

Efficiency as a guiding principle to antitrust was significant change in perspective. Within a decade, the use of economic principles was well settled and affirmed in the seminal Supreme Court case, *Matsushita v. Zenith* (1986),<sup>229</sup> where the Court recognized the role of using economic principles when deciding antitrust cases, rather than the older models of antitrust interpretation. Writing for the majority, Justice Lewis Powell observed:

It follows from these settled principles that if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.<sup>230</sup>

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<sup>226</sup> Teles, *The Rise of the Conservative Legal Movement*, 98.

<sup>227</sup> Posner, *Antitrust Law: Second Edition*, vii.

<sup>228</sup> *Ibid.*, ix.

<sup>229</sup> *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 1986. 475 U.S. 574.

<sup>230</sup> *Ibid.*, 553.

Posner cites to Matsushita as a prime example of utilizing economic analysis. The Sherman Anti-Trust Act, he writes:

was enacted in 1890, but is interpreted today as if Congress had enacted the evolving economic analysis of monopoly and competition. Today the Act means, not what its framers may have thought, but what economists and economics-minded lawyers and judges think.”<sup>231</sup>

By the time Bob Pitofsky published “*How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*” in 2008, much of the Chicago School’s economic approach to using economic analysis in antitrust law had been accepted by the leading law schools and the courts. Prior to the recent reforms, there was the interventionist approach in which the courts were assumed to play an active role in antitrust law; the anti-interventionist approach is market oriented, viewing laws and judges as inappropriate mechanisms or remedies for resolving issues of competition in the marketplace. The paradigm shift was quick, profound, and the anti-interventionist approach to antitrust law is the dominant approach to this day.

The intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today is not exclusively or predominately a single strand of Chicago School ideas. Rather, the intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix that consists of two intertwined chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the Harvard School (HS) of Phillip Areeda, Donald Turner, and Stephen Breyer.”<sup>232</sup>

Ironically, whereas Posner is considered one of the fundamental players of the Chicago School and the law and economics movement in antitrust law, he is also considered by many to

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<sup>231</sup> Richard A. Posner, “Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution,” *Case Western Reserve* 37, 179 (1987): 209.

<sup>232</sup> William E. Kovacic, “The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,” *Columbia Business Law Review* 2015, no. 2 (2007): 13-14.

be a centrist. Posner is an entrepreneur of ideas, but he is pragmatic in the philosophical sense of being concerned about the outcomes and ramifications of policy and court decisions. Writing about the history of the Chicago School, Daniel Crane wrote in the University of Chicago Law Review:

If one wants to identify a Chicago School centrist, there is not a more representative scholar than Richard Posner. Although the general trend of Posner's antitrust work has been less interventionist than the views of the previous epoch, in important ways Posner's work has supported enhanced intervention.<sup>233</sup>

Critics have argued that the Chicago School is anti-interventionist and committed to ending antitrust laws altogether, and even though Posner is a product of the Chicago School, he stands outside the Chicago School of thought regarding the courts' role: he believes in antitrust law, making him by default an interventionist in antitrust matters, and an entrepreneur. Posner's iconoclastic approach to antitrust law makes him unique, reflecting an approach that is more thoughtful and less doctrinal in the application of economic analysis of the law in antitrust matters.

### **C. Extrajudicial Publications**

In evaluating the efficacy of a judicial entrepreneur, it is necessary to look at a judge's opinions, but in respect to antitrust jurisprudence, it is also necessary to look at a judge's influence through extrajudicial writings, particularly in light of the paradigm shift in antitrust laws since the 1970s. Due to the nature of how antitrust jurisprudence develops, extrajudicial scholarly writings on antitrust matters are extremely influential in the federal courts. In addition to case law, Posner's entrepreneurial activities must be evaluated in the area of his extrajudicial

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<sup>233</sup> Crane, "Chicago, Post-Chicago, and Neo-Chicago," 1917.

publications, particularly his casebooks, treatises, numerous law review articles, and books designed to reach a broader lay audience. Prior to becoming a federal judge, Posner was a significant force in the movement not to necessarily change the statutory antitrust law, but rather the common law application of antitrust law. His entrepreneurial goals were very clear in 1976, four years before his appointment to the federal bench, when he expressed his beliefs that some of the essential elements of antitrust law required fundamental changes in the antitrust principles governing collusion, mergers, exchanges of information among competitors, restrictions on competition in the distribution of products, monopolization, boycotts, and other traditional areas of antitrust doctrine.”<sup>234</sup>

Posner has written numerous articles on antitrust, including his two of his most cited articles, “The Chicago School of Antitrust Analysis,” published in 1979 and cited 434 times, and “Market Power in Antitrust Cases” published in 1981 and cited 482 times.<sup>235</sup> As discussed in a previous chapter, citation analysis is an important tool with which to evaluate the reputation and influence of a judicial entrepreneur. A brief list of his major antitrust articles with the number of citations, according to HeinOnline, and the number of case cites from LexisNexis Federal Courts database are below.<sup>236</sup>

- 1) “Market Power in Antitrust Cases,” 94 Harv. L. Rev. 937 (1980-1981) – 482 cites, of which 43 are federal court opinions, including the Supreme Court.

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<sup>234</sup> Posner, *Antitrust Law: An Economic Perspective*, ix.

<sup>235</sup> HeinOnline search results.

<sup>236</sup> The HeinOnline results are based on a search of the “Law Journal Library” searching for(creator:((((posner, Richard)))) and sorting by “Number of Times Cited” as of 11/19/2013. For LexisNexis, either the Law Review citation or name of the article was used to search the Federal Case Law database as of 2/16/2015.

- 2) “The Chicago School of Antitrust Analysis,” 127 U. Pa. L. Rev. (1978-1979) – 434 cites, of which 3 are federal court opinions.
- 3) “Natural Monopoly and Its Regulation,” 21 Stan. L. Rev. 548 (1968-1969) – 262 cites, of which 6 are federal court opinions.
- 4) “The Next Step in the Antitrust Treatment of Restricted Distribution, Per Se Legality,” 48 U. Chi. L. Rev. (1981) – 242 cites, of which 30 are federal court opinions, including the Supreme Court.
- 5) “Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,” 75 Colum. L. Rev. 282 (1975) – cited 232 times, of which 15 are federal court opinions, including three Supreme Court opinions.
- 6) “Oligopoly and the Antitrust Laws: A Suggested Approach,” 21 Stan. L. Rev. 1562 (1968-1969) – cited 231 times, of which 14 are federal court opinions, including two Supreme Court opinions.
- 7) “The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,” 45 U. Chi. L. Rev. 1 (1977 -1978). – cited 226 times, of which 17 are federal court opinions.
- 8) “A Statistical Study of Antitrust Enforcement,” 13 J.L. & Econ. 365 (1970) – cited 173 times, of which 1 is a federal court opinion.
- 9) “Antitrust in the New Economy,” 68 Antitrust L. J. 925 (2000-2001) – cited 107 times, which has been cited in 1 federal court opinion.
- 10) “Should Indirect Purchases Have Standing to Sue under the Antitrust Laws—An Economic Analysis of the Rule of Illinois Brick,” 46 U. Chi. L. Rev. 602 (1978-1979) – cited 97 times, of which 6 are federal court opinions, including one Supreme Court opinion.
- 11) “Exclusionary Practices and the Antitrust Laws,” 41 U. Chi. L. Rev. 506 (1973-1974) – cited 71 times, of which 5 are federal court opinions.
- 12) “Contribution among Antitrust Defendants: A Legal and Economic Analysis,” 23 J. L. Econ. 331 (1980) – cited 62 times, of which 5 are federal court opinions, including two Supreme Court opinions.
- 13) “The Federal Trade Commission,” 37 U. Chi. L. Rev. 47 (1969-1970) – cited 107 times, of which 2 are federal court opinions.

- 14) "Information and Antitrust: Reflections on the Gypsum and Engineers Decisions," 67 Geo. L. J. 1187 (1978-1979) has been cited 46 times, of which 1 is a federal court opinion.
- 15) "Vertical Restraints and Antitrust Policy," 72 U. Chi. L. Rev. 229 (2005) – cited 24 times.
- 16) "Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare: A Reply to Professor Markovits," 28 Stan. L. Rev. 903 (1975-1976) – cited 23 times.
- 17) "Antitrust Policy and the Consumer Movement," 15 Antitrust Bull. 361 (1970) – cited 3 times.
- 18) "The Antitrust Decisions of the Burger Court," 47 Antitrust L. J. 819 (1978-1979) – cited 3 times.
- 19) "Antitrust in the Not-for-Profit Sector," 52 J. L. & Econ. 1 (2009) – cited 3 times.
- 20) "The Supreme Court and Antitrust Policy: A New Direction," 44 Antitrust L. J. 141 (1975) – cited 2 times.
- 21) "A Dissenting View: Do We Really Need an FTC," 3 Antitrust L. & Econ. Rev. 65 (1969-1970) – cited 2 times.
- 22) "The Decline and Fall of AT&T: A Personal Recollection," 61 Fed. Comm. L.J. 11 (2008-2009) – cited 2 times.

This is not an exhaustive list of all the articles that Posner has published on antitrust, and the figures represent a conservative reflection of his influence based on the available electronic research tools. For example, HeinOnline notes that the fifteenth article on the list above, "Vertical Restraints and Antitrust Policy," published in 2005, has only twenty-four cites, but when the cite is Shepardized on LexisNexis, there are thirty-two citations: twenty-four articles, five legal treatises, and three legal briefs. As a newer article, the influence may be captured by including other secondary sources, such as treatises, court documents, and legal briefs, but the list above does not include articles that are cited in treatises, statutes, and legal briefs. What the list demonstrates, at a minimum, is Posner's influence upon the academy and the federal courts

through the publication of his extrajudicial scholarly publications. Additionally, many of the articles were published prior to his becoming a federal judge, which raises an important element necessary for the successful judicial entrepreneur – reputation. Posner secured his reputation as an antitrust scholar before being appointed to the federal judiciary through his extrajudicial writings.

Posner’s reputation before joining the bench was so impressive that he almost played a quasi-judicial role – his views not only garnered respect, but also precedential value. This is most evident in Justice Powell’s seminal opinion in *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977)<sup>237</sup> and it dramatically changed contemporary antitrust law.<sup>238</sup> The case addressed the legal question of whether the per se rule or the rule of reason should apply to vertical restraints in the case and going forward.<sup>239</sup> The case concerned the application of vertical restraints upon sellers, franchisees, of television sets and whether the agreements restricting sales to certain locations represented a restraint of trade, but more importantly, which legal rule should be applied to determine whether the agreements were legal or not under Section 1 of the Sherman Antitrust Act. It is, as Posner says, a rather complicated case and area of the law.

Mention of the Rule of Reason requires a brief excursus into fundamental, and potentially quite confusing, antitrust terminology. It is conventional to distinguish between practices that are “per se” violation of antitrust law, such as horizontal price fixing..., and those that are tested by the Rule of Reason and therefore condemned only if found to interfere with competition unreasonably. These are not illuminating terms.<sup>240</sup>

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<sup>237</sup> *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (United States Supreme Court 1977).

<sup>238</sup> Herman Schwartz, “Rewriting Antitrust Law,” *The Nation*, October 8, 2012, 30.

<sup>239</sup> *Continental T.V. v. GTE Sylvania*, 49-50.

<sup>240</sup> Posner, *Antitrust Law: Second Edition*, 39.

But Powell and the majority relied heavily upon Posner's extrajudicial writing to support their opinion, overruling a prior Warren Court era opinion, *Schwinn*,<sup>241</sup> which stated that such arrangements were per se illegal. Posner advocated for, and Powell and the majority agreed, that a rule of reason analysis was best applied to the circumstances. Not only did the Court reject the Warren Court era's embrace of per se illegality, but it also established an efficiency argument and a pragmatic approach based on the rule of reason:

[W]e conclude that the per se rule stated in *Schwinn* must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than - as in *Schwinn* - upon formalistic line drawing."<sup>242</sup>

Posner is cited ten times in the Court's opinion, and Justice Byron White takes note of the Court's reliance on Posner by noting in his concurring opinion:

I have a further reservation about the majority's reliance on "relevant economic impact" as the test for retaining per se rules regarding vertical restraints. It is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well. Although the majority asserts that "the per se illegality of price restrictions... involves significantly different questions of analysis and policy," I suspect this purported distinction may be as difficult to justify as that of *Schwinn* under the terms of the majority's analysis. ***Thus Professor Posner, in an article cited five times by the majority***, concludes: "I believe that the law should treat price and nonprice restrictions the same and that it should make no distinction between the imposition of restrictions in a sale contract and their imposition in an agency contract." Posner, *supra*, n. 7, at 298. Indeed, the Court has already recognized that resale price maintenance may increase output by inducing "demand creating activity" by dealers (such as additional retail outlets, advertising and promotion, and product servicing) that outweighs the additional sales that would result from lower prices brought about by dealer price competition. These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their social utility and

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<sup>241</sup> United States v. Arnold, *Schwinn & Co.* 1967. 388 U.S. 365.

<sup>242</sup> *Continental T.V. v. GTE Sylvania*, 59.



economic soundness, and as a justification for judging them under the rule of reason. The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established per se rule against price restraints.<sup>243</sup>

As a postscript to this seminal case, Posner, ever the entrepreneur, solidified his reputation in,

“The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision.”

Here, he traced the evolution of his own intellectual development in both *Schwinn*, where he had been involved, and *Sylvania*, where the Court relied upon his analysis:

My interest in *Sylvania* is based not only on the fact that it is one of the most discussed antitrust decisions of recent years. I briefed and argued the *Schwinn* case for the government. Subsequently, my views on the proper treatment of restrictions in distribution under the antitrust laws took a 180-degree turn, and the article expressing my new thinking was heavily cited by the majority in *Sylvania*.<sup>244</sup>

He goes on further to recognize the influence the Chicago School had on the Court, but more particularly, on scholars, including, himself:

Wholly apart from the Court's kind words for franchise restrictions and its adoption of the free-rider concept, certain language in the opinion concerning the use of economics to guide antitrust analysis can be expected to reverberate throughout the lower federal courts. The Court said that "competitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks," and that any "departure from the rule of reason standard must be based upon demonstrable economic effect." One must not read a Supreme Court opinion like a bond indenture, but it does appear that the Court is implying that antitrust prohibitions must have an economic rationale and that the aesthetic delights of smallness and the yearning to resurrect a nation of sturdy Jeffersonian yeomen will not be permitted to decide antitrust cases. This impression is reinforced by the frequency of the Court's citations to the writings of members of the "Chicago School," like Bork and me, who argue that economic efficiency is the only goal of antitrust law.<sup>245</sup>

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<sup>243</sup> Ibid., 70.

<sup>244</sup> Richard A. Posner, “The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,” *University of Chicago Law Review* 45, 3 (1977): 2.

<sup>245</sup> Ibid., 12-13.

*Sylvania* is an interesting opinion because the majority is recognizing Posner as not only an expert in antitrust law, even though just a professor, but also tipping its hat to his reputation – this is three years before Posner joins the federal bench, but in a rather odd way, perhaps due to the common law nature of antitrust law, Posner is treated as a quasi-judicial authority. It is this case in point, which explains why Posner’s extrajudicial writings cannot be separated from his opinions as a judge, in explaining and evaluating him as a judicial entrepreneur.

In addition to producing an antitrust casebook with his colleague and fellow federal judge, Frank Easterbrook, Posner is perhaps best known for his book, *Antitrust Law: An Economic Perspective*, published first 1976, in which he set forth his issues with the existing antitrust paradigm and proposed changes to improve the common law interpretation of the antitrust laws. The book has been cited in 953 law review articles and forty-eight federal court opinions,<sup>246</sup> plus an indeterminate number of treatises and briefs. It should be noted, since the first publication of the book was in 1976, many of the law review articles, if available, only go back to 1980 online or later, so it can only be assumed that the number of citations far exceeds the results listed. The Second Edition, dropping the subtitle, *An Economic Perspective*, was published in 2001, twenty-five years after the first book, reflecting the seismic change in antitrust adjudication, in which many of his suggestions in the first edition were incorporated into antitrust law and administration, but a few important issues still remain, of which the ever entrepreneurial, Posner is unwilling to let go.

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<sup>246</sup> The LexisNexis database “US Law Reviews & Journals, Combined” was searched using the query: (Richard /2 Posner) /2 (Antitrust Law); and the case law citations were derived from searching Federal Court Cases, Combined, using the same search query.

#### **D. Posner and the Case Law**

It may be assumed that, due to the success of economic analysis being incorporated into antitrust jurisprudence, the federal dockets would be filled with antitrust cases. Quite the contrary, the courts, particularly the Supreme Court, have been anti-interventionist in antitrust matters over the last few decades. Perhaps the greatest irony is that Posner and other scholars in the 1970s were so successful in changing existing antitrust laws that fewer antitrust cases are adjudicated. The Supreme Court rarely hears antitrust cases,<sup>247</sup> and since 1995, the Supreme Court has only decided twenty-two antitrust cases. As the Supreme Court can generally pick and choose cases, its docket is a reflection of the anti-interventionist perspective and the success of economic analysis of law.

Federal appeals courts are limited to the cases presented on appeal from the lower courts within their respective circuits. As a federal court judge on the Seventh Circuit Court of Appeals, Posner is limited to addressing those matters, particularly antitrust, that have reached the court on appeal and which are assigned to him. The scope of the legal issues that may be addressed are usually limited to only those questions of law which are presented on appeal, although a judicial entrepreneur is not constrained from providing dicta, expansive reasoning, or legal trial balloons. In respect to scholarly articles, Posner may write on whatever topic in antitrust he wishes, but opinion writing is much more formal and limited, and not a forum in which judges can express their views as freely or outside the points of law raised.

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<sup>247</sup> Crane, "Chicago, Post-Chicago, and Neo-Chicago," 1919.

To the lay observer, it is assumed that a court will address all legal issues at one point or another, perhaps more so at the lower court trial level, but appellate courts tend to be limited to questions of law brought on appeal, and there is not a legal opinion that addresses every point of law or fact pattern. Cases may not ideally present themselves, a challenge for the judicial entrepreneur, although courts, particularly the Supreme Court, will decide on points of law not raised earlier by the litigants on appeal. Since the Supreme Court is the court of law resort, it is in a better position to do this than the lower federal appellate courts, whose opinions are subject to appeal and judicial review.

In order to evaluate his efficacy as a judicial entrepreneur the parameters are more constrained, but there are still opportunities. Since joining the federal bench in 1980, Posner has written thousands of opinions, but in the area of antitrust, the Seventh Circuit has published 1272 opinions that mention the term antitrust, although these results narrow down to 581 opinions when the search limits the results only to those opinions that mention antitrust at least three times – not simply a reference to the term, but usually an opinion with more substantive analysis. Posner has written over two thousand opinions, 204 opinions on antitrust law spanning antitrust jurisprudence. He has written over a third of those opinions produced on his circuit indicating that his colleagues are willing to defer to his expertise.

There are two areas in which Posner has been an advocate and judicial entrepreneur in the antitrust laws: the use of economic efficiency as a tool of legal reasoning, and the idea of making tacit collusion a punishable violation of Section 1 of the Sherman Antitrust Act. Of the 1272 opinions in the 7<sup>th</sup> Circuit that mention antitrust, in one form or another, the term “efficient” is utilized 232 times. “Tacit collusion,” the subject of quite a bit of Posner’s writing and an idea

closely associated with him, is only mentioned in six opinions, although “collusion, as a form of price fixing is mentioned in sixty-two opinions. Running a search of LexisNexis All Federal Court opinions for “antitrust and tacit collusion” resulted in sixty-nine opinions. Posner is a judicial entrepreneur, but he has been more successful incorporating efficiency than tacit collusion, though he remains persistent. A qualitative case law analysis will be conducted of Posner’s antitrust opinions to evaluate his application of efficiency and tacit collusion.

### *Efficiency*

One of the central themes of law and economics, and a principle for which Posner is most associated as a judicial entrepreneur, is his advocacy for efficiency being a goal of the law and a tool in pragmatic adjudication. In the antitrust case, *Morrison v. Murray Biscuit Company* (1986), basing his comments on a long-line of precedential cases, Posner reiterates the purpose of antitrust law and the use of economic analysis of law when writing for the majority he states:

To answer a question about antitrust as about any other field of law it is always helpful and often essential to consider what the purpose of the law is. The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency. (Case citations omitted)<sup>248</sup>

An analysis of all federal cases with opinions decided in the periods between the passage of the Sherman Antitrust Act in 1890 and when Posner joined the federal bench in 1980, and the period in which Posner has sat on the bench from 1980 to 2015, indicates a substantial increase in the use of the term efficiency in antitrust cases since he joined the federal bench. The only decline is in the number of Supreme Court opinions using the term “efficiency” in antitrust matters, but this may reflect the anti-interventionist approach and declining number of antitrust cases the Supreme

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<sup>248</sup> *Morrison v. Murray Biscuit Co.* 1986. 797 F.2d 1430, 1437 (7<sup>th</sup> Cir. Ill.).

Court chooses to hear discussed previously. The following searches were conducted in the LexisNexis case opinion databases for the respective courts and dates. (Chart #2: Use of the Term Efficiency in Case Law, See page 123).

Chart No. 2 – Use of the Term Efficiency in Case Law

<b>Court</b>	<b>1890 - 1980</b>	<b>1980 - 2015</b>	<b>Increase In Use of the term: "Efficien!"</b>
<b>Federal Courts</b>	Antitrust opinions: 3000+ "Efficien! And Antitrust"	Antitrust opinions: 3000+ "Efficien! And Antitrust"	Unknown
	1817 opinions "Efficien! /s Antitrust"	Exceeds 3000 opinions "Efficien! /s Antitrust"	1183 more opinions (minimum)
	133 opinions	920 opinions	787 more opinions
<b>Supreme Court</b>	Antitrust opinions: 522 "Efficien! And Antitrust"	Antitrust opinions: 365 "Efficien! And Antitrust"	157 less opinions
	148 opinions "Efficien! /s Antitrust"	108 opinions "Efficien! /s Antitrust"	40 less opinions
	18 opinions	17 opinions	1 less opinion
<b>7th Circuit</b>	Antitrust opinions: 325 "Efficien! And Antitrust"	Antitrust opinions: 947 "Efficien! And Antitrust"	622 more opinions
	36 opinions "Efficien! /s Antitrust"	196 opinions "Efficien! /s Antitrust"	160 more opinions
	2 opinions	42 opinions	40 more opinions
<b>2nd Circuit</b>	Antitrust opinions: 470 "Efficien! And Antitrust"	Antitrust opinions: 849 "Efficien! And Antitrust"	379 more opinions
	66 opinions "Efficien! /s Antitrust"	192 opinions "Efficien! /s Antitrust"	126 more opinions
	7 opinions	30 opinions	23 more opinions

Since Posner has joined the bench, there has been a significant increase in the number of cases that utilize the term efficiency in the opinion. The first set of figures between 1890 and 1980 reflect ninety years of antitrust jurisprudence, whereas since 1980, only forty-five years and half of the first period, there is a significant jump in the use of the term. It may be debated whether there is a causal relationship between Posner's entrepreneurial activities and the increase in the term efficiency generally in antitrust opinions. It could be argued that it was the general influence of law and economics on antitrust law that is accountable for the increase in the term. For purposes of control and contrast, in comparison to the Seventh Circuit Court of Appeals, the Second Circuit's figures for antitrust opinions are also included. The comparison between the Seventh and Second Circuits is interesting because there is a difference between the two courts, with more antitrust matters in the Seventh Circuit and significantly more cases utilizing the term efficiency in the opinion. Once again, this may indicate a causal relationship between Posner's entrepreneurial activities and the influence he has had on his fellow colleagues on the bench in the Seventh Circuit. The discrepancy of cases addressing antitrust law in the Second and Seventh Circuits may reflect plaintiff's forum shopping for a court amenable to antitrust legal actions, too.

There are several cases in which Posner addresses the purpose of the antitrust laws to promote efficiency. In *Chesapeake & O. R. Co. v. United States* (1983), writing for the majority, Posner affirms, "The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field."<sup>249</sup> As mentioned before, *Morrison v. Murray Biscuit Company* (1986) stressed that point, as does *Olympia Equipment*

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<sup>249</sup>*Chesapeake & O. R. Co. v. United States*. 1983. 704 F.2d 373, 376 (7<sup>th</sup> Cir. Ill.).



*Leasing Co. v. Western Union Telephone Company* (1986), Posner makes the point again, when discussing the development of the antitrust laws:

as the emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency, it became recognized that the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. "A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits..."<sup>250</sup>

Posner has been influential in changing the perspective of judges through his writings and emphasis on economics, as with his Seventh Circuit colleague, Judge Richard Cudahy:

[T]he sole goal of antitrust is efficiency or, put another way, the maximization of total societal wealth, the question whether a sports league is a "single entity" turns on whether the actions of the league have any potential to lessen economic competition among the separately owned teams.<sup>251</sup>

The incorporation of efficiency in legal analysis in case law may be connected to Posner's work as a judicial entrepreneur and the influence of the Chicago School on antitrust law. It is taken for granted today that efficiency is a reasonable objective, but as indicated from the case law analysis, it was not as important a tool for legal reasoning in antitrust law as it has become since 1980. The incorporation of efficiency as a goal is a paradigm shift in antitrust law.

### *Tacit Collusion*

Posner's advocacy for making tacit collusion a violation of Section 1 of the Sherman Antitrust Act is important because it not only demonstrates his judicial entrepreneurialism in antitrust law, but also because tacit collusion is a perfect example of a cause of action in which to

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<sup>250</sup> *Olympia Equipment Leasing Co. v. Western Union Tel. Co.* 1986. 797 F.2d 370, 375 (7<sup>th</sup> Cir. Ill.).

<sup>251</sup> *Chicago Professional Sports Limited Partnership. v. NBA.* 1996. 95 F.3d 593, 602-603 (7<sup>th</sup> Cir. Ill.).

utilize the tools of economic analysis in the law for which he has been advocating for so many years. Tacit collusion is a form of price fixing, in which the parties do not overtly come to an agreement to fix prices, but the results of their mutual actions create a situation in which price fixing occurs. There is a meeting of the minds, even though there may not be an overt agreement. Using economic tools, collusion can be determined without any evidence of agreement. The debate over whether tacit collusion, in respect to price fixing, should be considered an antitrust violation under the Sherman Act has been a long one and of particular interest to Posner.

Posner does not claim to develop the theory of tacit collusion as a violation; he attributes the original arguments to George Stigler from the University of Chicago in the 1950s.<sup>252</sup> What makes tacit collusion important to the economic analysis of law is that it could be analyzed and explained through the economic principles of price theory. It is a perfect example of the benefits of economic analysis. Whereas explicit collusion is simply evidentiary, tacit collusion is not, but the tools of economics could be used to determine whether it had occurred.<sup>253</sup> Although true in principle, there are challenges to utilizing pricing theories in adjudication, primarily the level of economic sophistication required. The irony is that whereas the goal of utilizing tacit collusion to determine whether price fixing has occurred is pure economic analysis of law based on the economic analysis required, it is actually not a conservative approach or goal, and making tacit collusion a violation is anti-Chicago School in nature because it justifies a new interventionist approach to antitrust laws and expands the role of the judiciary. Posner explains tacit collusion:

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<sup>252</sup> Posner, “The Chicago School of Antitrust Analysis,” 933.

<sup>253</sup> *Ibid.*, 933.

Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.<sup>254</sup>

In some circumstances competing sellers might be able to coordinate their pricing without conspiring in the usual sense of the term – that is, without any overt or detectable acts of communications. This is the phenomenon that lawyers call “conscious parallelism” and some economists term “oligopolistic interdependence,” but which I prefer to call “tacit collusion” in contrast to the explicit collusion of the formal cartel or its underground counterpart.<sup>255</sup>

Posner is not interested in the “criminal-law sense” of parties colluding to fix prices; he is interested in using economics to ferret out collusion between parties that may not be explicit.

The basic reform necessary to the control of price fixing and oligopoly is to redirect the enforcement of section 1 of the Sherman Act from its present obsession with proving the fact of a conspiracy or attempt to fix prices, in the criminal-law sense of these terms, to a search for evidence, economic in character, of collusive price behavior in the market.<sup>256</sup>

If the goal of antitrust is to promote efficiency, then whether the parties intended to price fix or not becomes irrelevant, and the only concern is a measurable outcome which would indicate tacit collusion. This is similar to the idea of strict liability, which is also a model of efficiency, because the result is designed to deter certain behavior, but also to provide an efficient result without having to prove intent.

Since 1969 when Posner published his article, “Oligopoly and the Antitrust Law: A Suggested Approach,” Posner has been arguing for, and has come to personify, changing the rules on tacit collusion. In the article he is seeking an expansive role for judicial involvement

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<sup>254</sup> *Brooke Group v. Brown & Williamson Tobacco Corp.* 1993. 509 U.S. 209, 227.

<sup>255</sup> Posner, *Antitrust Law: An Economic Perspective*, 40.

<sup>256</sup> *Ibid.*, 5.

and proposes for consideration a new approach to a persistent and difficult problem of antitrust policy.

The problem is: What rules and remedies are necessary to prevent supracompetitive prices in oligopolies, markets in which a few sellers account for most of the output? The heart of the suggested approach is a questioning of the prevailing view that monopoly pricing by oligopolists, when unaccompanied by any detectable acts of collusion, constitutes an economically and legally distinct problem requiring new doctrines and new remedies for its solution.<sup>257</sup>

Although this principle has not been incorporated into antitrust jurisprudence, which requires evidence of collusion, this issue represents Posner as judicial entrepreneur. First writing on this topic in 1969, he brings it up again in 1976 in *Antitrust Law: An Economic Perspective*, and then continues to bring up the issue in the second edition of *Antitrust Law* in 2001, by noting that reform is still required:

The courts and enforcement agencies are largely helpless in dealing with forms of collusive pricing that do not generate detectable acts of agreement or communication among the colluding sellers.<sup>258</sup>

The errors of legal policy have been errors of both commission and omission. Practices are forbidden that should not be, and other practices that in fact contravene the policy of the antitrust laws are left alone.<sup>259</sup>

He continues with his arguments for the incorporation of tacit collusion:

Besides difficulties with substantive doctrine, the antitrust area has been plagued by problems of remedy and enforcement. Indeed, today those problems not only are more serious than the substantive problems but are the source of most of those problems, such

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<sup>257</sup> Richard A. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach," *Stanford Law Review* 21, 1562 (1969).

<sup>258</sup> Posner, *Antitrust Law: Second Edition*, 43.

<sup>259</sup> *Ibid.*

as the difficulty of proving tacit collusion or of estimating the total effects of a challenged merger.<sup>260</sup>

The issue of tacit collusion is important because it demonstrates two perspectives for Posner: the strengths of using economic analysis to determine price fixing, but also the limits of economics analysis of law adjudication. The failure is not so much based on the inadequacies of the principles of economic analysis of law, as on the legal practice and limited understanding of economics by lawyers and judges:

Since lawyers and judges are more comfortable with conspiracy doctrine, than price theory, the displacement of emphasis from economic consequences to the fact of conspiring is natural. But it is inconsistent with an effective antitrust policy.<sup>261</sup>

The only objection to the proposed approach that I consider substantial is the difficulty of proving collusive pricing by economic evidence, given the complex, technical, and often inconclusive character of such evidence.<sup>262</sup>

In 1976 he was hopeful that tacit collusion would be incorporated into antitrust jurisprudence, but the complexity of economic modelling would eventually undermine his efforts, and as of today, it still remains a theoretical approach that has not been embraced by the courts. He appreciates the reasons courts may be reluctant to embrace tacit collusion as a violation:

The initial cases brought under such an approach will be protracted, unwieldy, and perhaps inconclusive, but with time, economists and lawyers will refine the theoretical and empirical economics of price fixing to the point where the law against price fixing can be administered in accordance with its substantive economic objectives.<sup>263</sup>

Tacit collusion is Posner's *bête noir* and demonstrates not only his contribution to the Chicago School, but his independence of it, too. He is not anti-interventionist in antitrust

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<sup>260</sup> Ibid.

<sup>261</sup> Posner, *Antitrust Law: An Economic Perspective*, 41.

<sup>262</sup> Ibid., 75.

<sup>263</sup> Ibid., 77.

matters, and his advocacy of tacit collusion is a case in point. He is an entrepreneur who has advocated for the use of the idea and to change the antitrust paradigm with the use of economic analysis. As he notes in the first edition:

This is where I part company with many other students in antitrust policy. If the economic evidence introduced in a case warrants an inference of collusive pricing, there is neither legal nor practical justification for requiring evidence that will support the further inference that the collusion was explicit rather than tacit. Certainly from an economic standpoint it is a detail whether the collusive pricing scheme was organized and implemented in such a way as to generate evidence of actual communications.<sup>264</sup>

Another scholar noted in 2012 Posner's contribution and importance to the debate on tacit collusion:

Despite his frequent iconoclasm, Judge Posner is the most influential member of the Chicago School, and his analysis of tacit collusion is one of his most famous policy positions. It is part of the Chicago tradition because it builds on Stigler's classic analysis of collusive oligopoly to formulate both a legal standard and practical enforcement recommendations. His application of the analysis to mergers provided the groundwork for the enforcement agencies' Horizontal Merger Guidelines, which have transformed the law of Section 7 of the Clayton Act. As a proposal for interpretation and enforcement of Section 1 of the Sherman Act, however, Posner's recommendation has not succeeded.<sup>265</sup>

Posner has advocated for the incorporation of tacit collusion in much of his writings, and has recognized that other courts have not incorporated the principle. In the case of *JTC Petroleum v. Piasa Motor Fuels* (1999),<sup>266</sup> a case concerning a violation of Section 2 of the Sherman Antitrust Act in which asphalt pavers created an unspoken cartel to discourage competition in the market, Posner wrote the opinion and outlined the lack of support for treating tacit collusion among the circuits:

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<sup>264</sup> *Ibid.*, 71.

<sup>265</sup> William H. Page, "A Neo-Chicago Approach to Concerted Action," *Antitrust Law Journal* 78, 173 (2012).

<sup>266</sup> *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.* 1999. 190 F.3d 775 (7<sup>th</sup> Cir. Ill.).

The question whether purely tacit collusion, or as it is sometimes called oligopolistic interdependence, might violate the Sherman Act has been much mooted in academic circles. A number of cases treat it as open. We cannot find a case that squarely supports the theory; the Second Circuit appears to have rejected it, we threw some cold water on it. We cannot agree that it derives any support at all from the fact that section 2, unlike section 1 (which is limited to combinations, contracts, and conspiracies), does not require an agreement (unless the specific charge is conspiracy to monopolize). If oligopolistic interdependence can be described as "joint monopolization" or "attempted joint monopolization" (JTC's terms), equally it can be described as a combination or a (tacit) conspiracy.”

The most compelling objection to JTC's theory has nothing to do with the language of the Sherman Act but rather is the difficulty of formulating effective relief without transforming the district court into a regulatory agency, here for example charged with compelling producers of emulsion to sell to JTC. At all events the theory is a novel one and when a litigant wants a court to buy a novel theory it has to do more than assert it, wholly ignoring the objections that have been made to it and the cases that have questioned or rejected it.<sup>267</sup>

Even though Posner has not been successful in getting tacit collusion incorporated, his antitrust opinions which address price fixing and collusion generally, which are contrary to the goals of efficiency remain important topics for Posner. A select set of opinions are listed below, which demonstrate the precedential value of his opinion as indicated in the number of times they have been cited. Even though he has written extensively on antitrust, there are only thirteen legal opinions written by Posner that include both the issue of price fixing and collusion.

- 1) In Re: Text Messaging Antitrust Litigation (2010) – cited 142 times.
- 2) Sheridan v. Marathon Petroleum Co., LLC (2008) – cited 93 times.
- 3) Williams Electric Games, Inc. v. Garrity, (2005) – cited 206 times.
- 4) In re High Fructose Corn Syrup Antitrust Litig., (2002) – cited 460 times.
- 5) In re Brand Name Prescription Drugs Antitrust Litig., (2002) – cited 156 times.
- 6) In re Brand Name Prescription Drugs Antitrust Litig., (1999) – cited 325 times.

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<sup>267</sup> Ibid., 780-781.

- 7) Khan v. State Oil Co., (1998) – cited 17 times.
- 8) In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (1997) – cited 840 times.
- 9) Blue Cross & Blue Shield United v. Marshfield Clinic, (1995) – cited 352 times.
- 10) United States v. Heffernan, (1994) – cited 56 times.
- 11) FTC v. Elders Grain, Inc., (1989) – cited 198 times.
- 12) Hospital Corp. of America v. FTC, (1986) – cited 350 times.
- 13) General Leaseways, Inc. v. National Truck Leasing Assoc., (1984) – cited 254 times.

Using citation analysis with present tools to demonstrate influence is effective, but does not capture the full influence of a particular jurist. For example, a Single Search of the LexisNexis docketing service, Courtlink, will result in 970 documents referencing “Richard /2 Posner and antitrust,” of which 346 are legal briefs and motions to the court in support of a particular legal action requested of the courts. The content in Courtlink is different from case law opinions, and represents a relatively recent sample of court documents, but in comparison to case law opinions, it demonstrates that as much influence attends to the briefs and motions in the litigation process as the judge’s final opinions. For example, in a 2010 Brief before the First Circuit in the matter of *White v. R.M. Packer Company*, the Respondent-Appellant used Posner to support their arguments that Posner is opposed to, but ultimately concedes that the law is clear on tacit agreements:

“A merely tacit agreement is not an antitrust violation.” As even Judge Posner has reluctantly acknowledged, “an express, manifested agreement, and thus an agreement



involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act.<sup>268</sup>

In this particular matter, an opinion was published by the First Circuit, in which the opinion relied on several points raised in Posner's prior writings. The opinion does not only rely upon Posner's previous court opinions, but also his published works, in particular the Second Edition of *Antitrust*.<sup>269</sup> There is a causal chain in which, during the litigation process, parties rely upon Posner to support their legal arguments. Although not as successful in incorporating tacit collusion into antitrust jurisprudence, Posner remains a judicial entrepreneur in his continued advocacy for the incorporation of tacit collusion into the canon of antitrust law.

### **E. Conclusion**

There are numerous areas of antitrust jurisprudence that may be analyzed to evaluate the impact of Posner's influence. Since efficiency is central to economic analysis of law, it is important to address the use of efficiency as a jurisprudential goal. But it is also important to demonstrate where he has not been successful, not to negate his efforts as a judicial entrepreneur, but to demonstrate his persistent efforts to change the status quo. He may have not been successful at incorporating tacit collusion as a price fixing antitrust violation, but the idea has become synonymous with Posner. As a judicial entrepreneur for reform of the antitrust law, there are few rivals to Posner, but much of the battle for antitrust reform has been fought, and some might argue, won.

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<sup>268</sup> *White v. R.M. Packer Co.*, 2010 U.S. 1st Cir. Briefs LEXIS 55, *Reply Brief: Appellant-Petitioner* (United States Court of Appeals for the First Circuit Source Briefs May 5, 2010).

<sup>269</sup> *White v. R.M. Packer Co.* 2011. 635 F.3d 571, 581 (1<sup>st</sup> Cir. Mass.).

Chicago's intellectual edifice is in a state of neglect. Its erstwhile paladins are largely dead, bored with the field, or complacent. Some, like Posner and Easterbrook continue to offer the occasional, infrequent antitrust intervention, but without the zeal of their earlier years. By and large, the view seems to be that what needed to be said was said and the field is by and large where it should be.<sup>270</sup>

The citation analysis and qualitative case law analysis is important to assess his efforts, successes, and failures in antitrust jurisprudence, but strategically, his efforts to advocate for his reforms in law review articles, treatises, and books written for the attorney and non-attorney alike, are important to recognize as tools of the judicial entrepreneur, particularly in the area of antitrust law, which has had an important nexus between the legal academic literature and common law development of antitrust law in court opinions. Posner has been successful in seeding the courts and introducing the principle of efficiency into antitrust jurisprudence, but he has not been completely successful, as indicated by his lack of success in tacit collusion. Tacit collusion was not his idea, but as a judicial entrepreneur, and through creative imitation, it has been one of the ideas with which he has been most associated.

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<sup>270</sup> Crane, "Chicago, Post-Chicago, and Neo-Chicago," 1930.

## VIII. Judicial Entrepreneur: Scalia and Statutory Interpretation

### A. Introduction

*“Where a mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.”* Chief Justice John Marshall<sup>271</sup>

*“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”* Judge Learned Hand<sup>272</sup>

*“Laws mean what they actually say, not what legislators intended them to say but did not write into the law’s text for anyone (and everyone so moved) to read.”* Justice Scalia<sup>273</sup>

*“[C]ontext, in the broadest sense, is the key to understanding language.”* Judge Posner<sup>274</sup>

Within the legal academy and judiciary, there are legal topics which float in and out of popular discourse and discussion. From time to time a particular legal topic becomes salient, either because a particular case has brought the issue to the public’s attention, changing jurisprudential standards or considerations, or because a judicial entrepreneur has seized upon the idea and has actively engaged the topic with the goal of disrupting the existing intellectual paradigm. The reasons some issues become popular are varied, but perhaps the most important reason is that an entrepreneur seizes upon the idea and gives it new life. One such perennial legal topic is the use of legislative history and other secondary sources as tools of statutory

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<sup>271</sup> *United States v. Fisher*. 1805. 6 U.S. (2 Cranch) 358, 386.

<sup>272</sup> *Cabell v. Markham*. 1945. 148 F.2d 737, 739 (2<sup>nd</sup> Cir. N.Y.).

<sup>273</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), vii.

<sup>274</sup> *Alliance to End Repression v. City of Chicago*. 1984. 742 F.2D 1007, 1013 (7<sup>th</sup> Cir. Ill.).

interpretation when deciding cases. Whereas Posner has become synonymous with law and economics, for almost thirty years the Supreme Court justice, Antonin Scalia, has become the most prominent opponent of the use of legislative history and secondary sources in statutory interpretation. In this, he has been successful in reawakening the dialogue on the topic, creating a paradigm shift in the use of legislative history in court opinions, particularly Supreme Court opinions.

Scalia is a judicial entrepreneur, and through his character and strategic activities, he has taken on a number of conservative legal issues with mixed success. He is well known for his social conservatism and his efforts to change the abortion and affirmative action jurisprudence on the Supreme Court, but perhaps Scalia's most important and successful efforts as a judicial entrepreneur have furthered his goal to reform and limit the use of legislative history through the use of textualism and a more formalist approach to statutory interpretation. His success has not been absolute, but more nuanced, and like Posner with law and economics, anyone utilizing or writing about statutory interpretation today must, at a minimum, give lip service to the arguments that Scalia has made against the broad use of legislative history; he has set the bar for any discussion of the topic. If he has not always succeeded in converting judges to his beliefs, he has certainly highlighted the issues and concerns that statutory interpretation raises in the judicial decision making process.

## B. Theories of Statutory Interpretation

If the chief task of courts is, in John Marshall's words, "to say what the law is," the job of statutory interpretation is central to the judge. Some legal language is too clear to dispute, like the constitutional requirement that presidents be thirty-five years of age. But legislating and drafting laws is not a precise science. Many statutes are not clear or are ambiguous, or contain contradictory provisions, or do not foresee the circumstances to which they are applied, and all this may give rise to several possible, plausible interpretations, leaving it to judges to choose among them. Greatly complicating the picture is the fact that the substantial, if unavoidable judicial discretion is inconsistent with democratic theory because the font of the law is the democratically elected legislatures, not a politically appointed and unaccountable judiciary.

There are several competing schools of thought on how to approach statutory interpretation. The prominent schools are textualism or formalism, on one side, and dynamic interpretation, pragmatism,<sup>275</sup> or purposive approach to statutory interpretation on the other,<sup>276</sup> running through all these schools is the common law precedential approach to statutory interpretation. The precedent may in the judge's view have been wrongly decided, but if it is deeply embedded, the judge will probably uphold it because he knows that people have been acting as if it were valid and it would be very disruptive (and perhaps even unjust) to radically upset things by overturning it.

Approaching statutory interpretation, the common belief is that the basis of all statutory interpretation is the "plain public meaning" rule, which "holds that in interpreting a statute you

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<sup>275</sup> Daniel A. Faber, "Do Theories of Statutory Interpretation Matter? A Case Study," *Northwestern University Law Review* 94, 1409 (Summer 2000): 1411-1412.

<sup>276</sup> Robert A. Katzmann, *Judging Statutes* (Oxford: Oxford University Press, 2014).

should begin, though maybe not end, with the word of the statute.”<sup>277</sup> In ordinary conversations, when a speaker’s meaning is unclear, we normally ask, “What do you mean?” We do not ask, “What do the words mean?”; we already know what the words mean, but somehow we suspect that they are not conveying the meaning the speaker intended. As judges, of course, cannot ask the lawmaker what he intended, traditionally they have tried to discern the intent by reading documents where lawmakers try to explain and justify their support of the law – in other words, committee hearings, floor speeches, and so on that could aid them in deciphering the intent of the legislature, that is, its purpose in mind.<sup>278</sup> This traditional approach to statutory interpretation was not without its critics, but was largely accepted as normal legal practice for judges until it began to change in the 1980s, and since that time, the loose acceptance of legislative history in judicial decision making has been on the wane.

Scalia’s approach, called textualism, seeks to understand statutes by examining the plain public meaning of the words used at the time of the statute’s adoption. The proponent of textualism and “formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of the statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened.”<sup>279</sup> Scalia, writing in a concurring opinion in 1989, three years after joining the Court, succinctly stated his views on

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<sup>277</sup> “Offered as a description of what judges do, the proposition is false. The judge rarely starts his inquiry with the words of the statute, and often, if the truth be told, he does not look at the words at all.” Richard A. Posner, “Statutory Interpretation in the Classroom and in the Courtroom,” *University of Chicago Law Review* 50, 800 (1983): 807.

<sup>278</sup> William N. Eskridge, “The New Textualism,” *UCLA Law Review* 37, 621 (April 1990): 626.

<sup>279</sup> *Ibid.*, 646.

statutory interpretation and the use of legislative history in *Green v. Bock Laundry Company* (1989):

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated -- a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.<sup>280</sup>

Scalia understands that textualism may be insufficient at times to decide a case, and is less dogmatic than he appears. Scalia notes in *A Matter of Interpretation* that he is a textualist and not a strict constructionist. To Scalia, textualism is much more complex and nuanced than many are led to believe.

I am not a strict constructionist, and no one ought to be--the better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.<sup>281</sup>

The perennial challenge for a judge is what interpretative tools and methods should be utilized when attempting to understand and decipher the meaning and construction of a statute? Judges have a host of interpretative tools and materials which they can rely upon to achieve a reasonable analysis in their judicial opinions. What Scalia is opposed to is using legislative history as one of these tools. In *Graham County Soil & Water Conservation District v. United States* (2010), Scalia writes:

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<sup>280</sup> *Green v. Bock Laundry Mach. Co.* 1989. 490 U.S. 504, 528.

<sup>281</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and The Law* (Princeton: Princeton University Press, 1997), 23.

I agree that the stray snippets of legislative history respondent, the Solicitor General, and the dissent have collected prove nothing at all about Congress's purpose... But I do not share the Court's premise that if a "legislative purpose" were "evident" from such history it would make any difference. The Constitution gives legal effect to the "Laws" Congress enacts, Art. VI, cl. 2, not the objectives its Members aimed to achieve in voting for them. If [a] text includes state and local administrative reports and audits, as the Court correctly concludes it does, then it is utterly irrelevant whether the Members of Congress intended otherwise. Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of "history" that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law. It's the law that's passed, not the intent.<sup>282</sup>

Some of the theoretical alternatives to textualism include dynamic interpretation, pragmatism, and the purposive approach. To a large extent, they all entail similar theoretical arguments, which are antithetical to strict textualism and view the use of legislative history in statutory interpretation much more broadly, but within limits. Katzmann addresses the traditional mode of statutory interpretation as the purposive approach.

The dominant mode of statutory interpretation over the past century has been one premised on the view that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose. This approach finds lineage in the sixteenth century English decision *Heydon's Case*, which summons judges to interpret statutes in a way "as shall suppress the mischief, and advance the remedy." From this perspective, legislation is the product of a deliberative and informed process. Statutes in this conception have purposes or objectives that are discernible. The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes.<sup>283</sup>

Textualists and Scalia reject the purposive approach to statutory interpretation. The textualist arguments against the purposive approach is based on the premise that it gives judges too much discretion to interpret the legislators' intent and substitute their policies and political values for those of the duly elected legislatures; the legislative process is so complex that the intent of the

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<sup>282</sup> *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*. 2010. 559 U.S. 280, 302.

<sup>283</sup> Katzmann, *Judging Statutes*, 31.



legislators, as expressed in legislative history documents, is too ambiguous or contradictory to find a coherent intent or purpose; and, when judges use this discretion they are being undemocratic by substituting their views for that of the legislature.<sup>284</sup> Katzmann recognizes the influential role Scalia has played in challenging the positivist approach to statutory interpretation:

The approach I advocate has not gone unchallenged. Indeed, within the judiciary, a sustained attack on the use of legislative history began in the 1980s, largely by Antonin Scalia, first as a D.C. Circuit judge and then as Supreme Court justice. Justice Scalia is of the view that because legislation often consists of a brew of deals, compromises, and inconsistencies, the search for coherent purpose is elusive. Thus, it is the statute's final wording that must prevail, he has argued, over "unenacted legislative intent". Textualism, as Justice Scalia has championed it, involves an assault on the dependence of any extratextual source in determining statutory meaning. Legislative history became a central target.<sup>285</sup>

As indicated by Katzmann's book, the debate led by Scalia for a textualist approach to statutory interpretation was still continuing in full force, with the two camps of statutory jurisprudence entrenched in their respective opinions, but the record demonstrates that Scalia, as a judicial entrepreneur, had succeeded in changing the tide.

One of Scalia's staunchest critics, and antagonists, is Richard Posner. Posner's critique of the textualist approach to statutory interpretation predates Scalia's appointment to the Supreme Court. In 1983, Posner published "Statutory Interpretation – in the Classroom and in the Courtroom,"<sup>286</sup> one of his most cited articles, in which he argues against the plain meaning rule

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<sup>284</sup> Ibid., 40-41.

<sup>285</sup> Ibid., 39.

<sup>286</sup> Posner, "Statutory Interpretation in the Classroom and in the Courtroom," 800.

and textualism. Here, he also recognizes that the topic of statutory interpretation has essentially lain dormant for many years,<sup>287</sup> and was ripe for the picking.

It has been almost fifty years since James Landis complained that academic lawyers did not study legislation in a scientific (i.e., rigorous, systematic) spirit, and the situation is unchanged. There are countless studies, many of high distinction, of particular statutes, but they are not guided by any overall theory of legislation, and most academic lawyers, like most judges and practicing lawyers, would consider it otiose, impractical, and pretentious to try to develop one. No one has ever done for legislation what Holmes did for the common law.<sup>288</sup>

Nor would Posner pursue the topic, either, instead focusing on issues related to law and economics and other legal and academic interests. But there was an opportunity to seize the topic and make it one's own, and Scalia, as a judicial entrepreneur, seized the opportunity. Perhaps not intentionally at first, but over time, it would become one of his highest profile judicial concerns. It is ironic that the very topic that Posner bemoaned needing addressing would be seized upon by Scalia and addressed contrary to the way in which Posner had hoped. First, through Scalia's opinions, then books, and then into a minor cottage industry of speaking on the topic, Scalia would make reforming statutory interpretation his own cause, becoming synonymous with textualism and the rejection of legislative history. In this way, as a judicial entrepreneur, he would change the jurisprudential paradigm that had existed for half a century.

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<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

### C. Scalia: Judicial Entrepreneur

As discussed, the model of a judicial entrepreneur is based on two factors: the characteristics of the entrepreneur and the strategies used by the entrepreneur. For the issue of statutory interpretation, based on the model created in the first part of the dissertation of a judicial entrepreneur, Scalia is a judicial entrepreneur regarding his efforts to reform statutory interpretation, utilize textualism, and minimize the use of legislative history. In fact, although Scalia has expressed a strong interest in such topics as abortion and affirmative action, statutory interpretation is the only legal topic that he has written extensively about outside of legal opinions, publishing two books that address the topic. Scalia has written a number of articles, for which he is probably less known than his opinions, books, and perhaps most famously his oral advocacy on and off the bench: it is safe to say that Scalia has never shied away from an opportunity to express his views on variety of topics publicly, particularly on the role of the judge and statutory interpretation.

Characteristically, Scalia represents Schumpeter's *Unternehmergeist* and has been a persistent advocate for textualism in statutory interpretation. His strong and verbose personality is well known, and he does not shy away from an opportunity to advocate for his ideas or engage someone he believes is wrong. His biographer, Joan Biskupic, makes numerous references to his energy and drive when tackling a particular issue he feels important, particularly the use of language in an opinion:

If words and small phrases mattered to Scalia, the substance of an opinion mattered even more. Lee Liberman, his student at the University at Chicago who helped found the Federalist Society, became a law clerk to him on the D.C. Circuit. She said Scalia was

“tireless in chasing down and eliminating bad dicta from his colleagues’ opinions,” referring to phrases that could potentially broaden the reach of a ruling.<sup>289</sup>

As a knowledge-based innovator, he has taken an existing jurisprudential idea, statutory interpretation, and has breathed new life into an old issue, but most importantly, he seized on the convergences of changing legal theories and grasped the opportunity to make textualism his own. He has remained actively engaged in the topic ever since he published *A Matter of Interpretation* in 1997 and *Reading Law* fifteen years later in 2012. He has not limited his entrepreneurialism to legal opinions and books, but has also given numerous speeches and lectures on the topic. Even though he is often perceived as being rigid, he has been relatively flexible in his embrace of a broader definition of textualism and rejection of the more restrictive formalistic approach; this is reflected in his own continued use of legislative history in his legal opinions. Where Scalia has been successful is by forcing judges to pause and think about using legislative history out of hand. For he invites them to appreciate the democratic challenges the use of legislative history poses, and in causing discontinuity in the existing intellectual paradigm and creating a new paradigm through the process of creative destruction.

How Scalia was able to create these changes was through a strategic approach of voicing his views on the topic in judicial opinions, the two books he has written specifically on the topic of statutory interpretation, and public speeches on the topic. Scalia’s attack on traditional statutory interpretation evolved over time, but it was his appointment to the Supreme Court that made his “critique . . . more radical and more formalist.”<sup>290</sup>

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<sup>289</sup> Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Antonin Scalia* (New York: Farrar, Straus and Giroux, 2009), 91.

<sup>290</sup> Eskridge, “The New Textualism,” 650-651.

As a knowledge-based entrepreneur, Scalia has been a judicial entrepreneur by strategically using the written word in his judicial opinions and the two books he has written on the topic, as well as the speeches he has given. Prior to joining the Supreme Court in 1986, Scalia had been on the D.C. Circuit Court of Appeals since 1982. During the four year period on this court, he wrote thirty-one opinions that mention the phrase “legislative history.”<sup>291</sup> Since his appointment to the Supreme Court, 778 opinions have been issued that mention the term “legislative history” in the opinion; 660 opinions mention the terms “text” within five words of “statute (“text /5 statute”), and Scalia has written sixty-one of the majority opinions and seventy-six dissents that mention the phrase “legislative history” in these opinions.<sup>292</sup> (There are other variations of the wording that statutory interpretation or legislative history could be used, but for the limited purpose of analysis, the search query should suffice). The decline in the use of statutory interpretation may be attributable to three factors: the declining number of cases the Court is hearing over time; the nature of the cases before the Court may not require the interpretation of a particular statute; or, Scalia has had an impact on the members of the Court to rely less upon legislative history in the analysis in their opinions.

Scalia’s earliest and most productive efforts at changing the paradigm of statutory interpretation were his judicial opinions. Scalia was first appointed to D.C. Circuit Court of Appeals, a traditional avenue for subsequent Supreme Court nominations, by President Reagan. Right from the beginning Scalia expressed a hesitancy to utilize legislative history, and the tenor

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<sup>291</sup> Research done on LexisNexis in Federal Court Cases, Combined using the Search query: “legislative history and opinionby (Scalia)”.

<sup>292</sup> Research done on LexisNexis in US Supreme Court Cases, Lawyer’s Edition database from the period of 01/01/1986 to 04/18/2015.

of his opinions and his opposition to legislative history quickly became a clear, consistent, and recognizable critique. In one of his first opinions, *United States v. Donelson* (1982), though he reluctantly utilizes legislative history, he adds in a footnote:

In interpreting the statute we would not be justified, of course, in making the legislative history correct at the expense of making the plain language of the law itself inaccurate.<sup>293</sup>

Nonetheless, in the early years, he does utilize legislative history quite frequently. In *American Federation of Government Employees v. FLRA* (1983), for example, he writes:

The text and legislative history of the Act are sufficiently clear to overcome the deference we would normally accord an agency's interpretation of its organic statute.<sup>294</sup>

It is not until 1985 that a more pronounced antagonistic view of legislative history becomes evident in the case of *FAIC Securities v. United States* (1985):

We decline the parties' invitation to depart from the plain language of these provisions by relying upon their legislative history to "clarify" their meaning. It seems sometimes to be assumed that abandonment of the "plain language rule," and increased reliance upon legislative history, should be as natural and desirable a modern development -- casting off the formalisms of earlier days -- as is the willingness of today's courts to inquire into the parties' pre-signing understanding of a contract they have concluded, despite the formerly rigid constraints of the parol evidence rule. But there is an enormous difference between the two. Legislative history is a second-best indication, not merely because it is (like the oral statements preceding a written contract) a less formal and authoritative expression of what the party intended; but because it is in addition, in most of its manifestations, not even an expression of the relevant party at all. In the case of legislation that party consists not of the witnesses testifying on the bill, or the speakers debating it, or even the committees and floor leaders reporting and presenting it; but of all the voting members of both Houses of Congress and (unless the bill has been passed over a veto) the President. The best legislative history regarding the intent of one or another of the legislative participants is at most a clue as to what the legislating "party" had in mind; the statute itself is the party's only sure expression. Only where that expression is genuinely ambiguous is the clue likely to shed more light than the text. Nothing in the

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<sup>293</sup> *United States v. Donelson*. 1982. 695 F.2d 583, 586 (D.C. Cir.).

<sup>294</sup> *Am. Federation of Government Employees, Local 2782 v. FLRA*. 1983. 702 F.2d 1183, 1188 (D.C. Cir.).

tortuous legislative history the parties have brought to our attention could possibly overcome the plain language here.<sup>295</sup>

And in the case of *Hirschey v. Federal Energy Regulatory Commission* (1985), he again addresses his dissatisfaction with legislative history:

And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription. But the authority of the committee report in the present case is even more suspect than usual. Where a committee-generated report deals with the meaning of a committee-generated text, one can at least surmise that someone selected these statutory words to convey this intended meaning. The portion of the report at issue here, however, comments upon language drafted in an earlier Congress, and reenacted, unamended so far as is relevant to the present point, in the 1985 law. We are supposed to believe that the legislative action recommended by the Committee and adopted by the Congress, in order to resolve a difficult question of interpretation that had produced a conflict in the circuits and internal disagreement within three of the five courts that had considered it, was reenactment of the same language unchanged! Such a supposition is absurd on its face; and doubly absurd since the precise section was amended in 1985 on such a point of minute detail as changing an "and" to "or."<sup>296</sup>

Still, Scalia continues to use legislative history through the remainder of his time on the D.C.

Circuit Court, noting in *Rainbow Navigation v. Department of Navy* (1986), one of his last opinions on the lower court:

This is also clear from the legislative history, which happens to be unusually reliable in the present case, since the language at issue was actually crafted on the floor of the Senate in the course of lengthy debate over three days, occupying some 46 pages of the Congressional Record.<sup>297</sup>

In another case, he clarifies his position on legislative history a bit:

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<sup>295</sup> *FAIC Secur., Inc. v. United States*. 1985. 768 F.2d 352, 361-362 (D.C. Cir.).

<sup>296</sup> *Hirschey v. Federal Energy Regulatory Com.* 1985. 777 F.2d 1, 7-8 (D.C. Cir.).

<sup>297</sup> *Rainbow Navigation, Inc. v. Department of Navy*. 1986. 783 F.2d 1072, 1077 (D.C. Cir.).

Legislative history is used to clarify the meaning of a text, not to create extra-statutory law. If it can ever be the basis for plainly departing from the text, it assuredly cannot be so when an interpretation that honors both the text and the history is available.<sup>298</sup>

But Scalia does have his limitations as to how far he will go with legislative history. Writing in *Consumers Union of U.S. v. FTC* (1986):

That limitation has absolutely no foundation in the text of the statute, and we decline to limit the plain meaning of the text by resort to bits of legislative history that describe some, but not necessarily all, of the purposes that the provision serves.<sup>299</sup>

During his term on the Court of Appeals, Scalia utilized legislative history in both his opinions and dissents, and his main critique against its use is based on the inadequacy or deficiencies of the legislative history proffered by the parties, but not legislative history per se. During his nomination hearings to the Supreme Court, Scalia, for perhaps obvious reasons, was less rigid in his responses to the Senate Committee's questions regarding his views on the use of legislative history. Scalia's exchange with Senator Chuck Grassley demonstrates the early stage of Scalia's use of legislative history:

Senator GRASSLY. In a case decided last year, *Hirschey v. FERC*, involving the Equal Access to Justice Act, you took the occasion to comment on what role legislative history and committee reports play in judicial interpretation. And I hope it is fair for me to conclude that you showed a great deal of hostility toward committee reports in that writing. You wrote in a concurring opinion, and I quote, "I think it's time for courts to become concerned about the fact that routine deference to the detail of committee reports and the predictable expansion in detail with routine deference has produced have converted a system of judicial construction into a system of committee staff prescription.' Now, that is pretty doggone strong language. Let me first ask how important is legislative history to you?

Judge SCALIA. I think it is a significant factor in interpreting a statute. I have used it in my opinions.

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<sup>298</sup> *Church of Scientology v. IRS*. 1986. 792 F.2d 153, 162 (D.C. Cir.).

<sup>299</sup> *Consumers Union of U.S., Inc. v. FTC*. 1986. 801 F.2d 417, 421 (D.C. Cir.).



Senator GRASSLEY. Well, let me ask you how come you do not repeat the usual answer that we get that, you do refer to it, if the language of the statute itself is not clear to the judges interpreting?

Judge SCALIA. Well, I guess I did not repeat that because I --

Senator GRASSLEY. It is so obvious?

Judge SCALIA. It is so obvious and --

Senator GRASSLEY. But you accept --

Judge SCALIA. One, it is so obvious and, two, because we do not normally have a lawsuit in front of us if the language of the statute is clear. Almost invariably, the language of the statute is argued to mean one thing by one side and another thing by another side. And where that is the case, legislative history --

Senator GRASSLEY. Are you going to be then turning to the legislative history that frequently, as you say that the statute is hardly ever clear?

Judge SCALIA. I will use what seems to me reliable legislative history when it is available to be used. The trouble with legislative history, Senator, is figuring out what is reliable and what is not reliable. That is the trouble with it.

Senator GRASSLEY. Well, I want to tell you as one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent. All right. You are not suggesting that for committee reports to have any meaning, that they must be actually written rather than merely approved by Members of Congress? Are you suggesting that?

Judge SCALIA. I do not want to pin myself down to a commitment to use any particular type of legislative history or not to use any particular type of legislative history. I am just saying I will not exclude it as a basis for my decisions as I have not in the past. And that it depends on what the significant legislative history is and how genuine a representation of the congressional intent it seems to be.<sup>300</sup>

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<sup>300</sup> U.S. Congress. Senate. Judiciary Committee. *Nomination of Judge Antonin Scalia Hearings Before the Committee on the Judiciary United States Senate Ninety-Ninth Congress Second Session on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States*. 99<sup>th</sup> Congress, August 5 and 6, 1986. Hearing 99-1064: 65-66.

In some respects, Scalia's response to Senator Grassley's line of inquiry expresses a good analysis of Scalia's views on statutory history. He will use it in limited circumstances, but to the extent that he will rely upon committee reports, or other documents, it becomes more questionable the farther the materials move down the chain of the legislative process.

His views would change with his opinions after being appointed to the Supreme Court in 1986. The Justice Scalia of 2015 is much more doctrinaire than the one who joined the Court nearly three decades earlier. In the early years, he uses legislative history and his critique is much more muted. It would seem that over time Scalia became more comfortable with his views on legislative history, but also, having established himself as the expert in the area with his publications, it could be argued that he has become much more assertive, particularly in lecturing colleagues on their shortcoming in the use of legislative history and statutory interpretation in general. Even his two major books on the topic are extremely different; the first published in 1997 is more like a law review publication, including comments (essays) from Laurence Tribe and Ronald Dworkin critiquing Scalia's analysis, but by 2012 he had co-written a treatise on the topic, *Reading Law*, a canon of usage, brooking no such dissent.

Scalia may not have chosen this particular topic to be a judicial entrepreneur, but it is an issue that irked him to no end, and his convictions clearly developed over time. Like all entrepreneurs, he found a topic that he could champion. It was not abortion or affirmative action, which tend to have many voices competing for attention, but through statutory interpretation, like Frankfurter's embrace of judicial restraint, Scalia had embraced an idea of judicial decision making aimed at his colleagues and not the outside world.

Statutory interpretation is not glamorous. It is not discussed by the news media, nor do citizens protest outside the Supreme Court over it, but it is fundamental to judicial decision making. In addition to advocating on legal issues, where there are many prominent voices lending their views, Scalia also chose to advocate for a rather unglamorous legal topic, statutory interpretation, where there are very few passionate voices, but an area of the law in which the legal community would have to take notice, and one in which, as a Supreme Court justice, could have tremendous influence through his opinions. As well, statutory interpretation was a natural fit for Scalia; whether one agrees with his views or not, as a self-proclaimed originalist, even a faint-hearted one, Scalia established his bona fides early as a stickler for rules of interpretation, and has only become stronger over time. The rules and methods of statutory interpretation fit within the subject matter of constitutional interpretation. It is probably safe to say, that statutory interpretation is probably not the first thing that comes to mind when one thinks of Scalia, but even though the subject matter is not glamorous, it is the area of the law where he has been a judicial entrepreneur.

In 1988 he was still indifferent to legislative history, noting in one case, “If it is at all relevant, the legislative history tends to subvert rather than support petitioner's thesis.”<sup>301</sup> But he continued to analyze the legislative history in the case without simply dismissing it out of hand. By 1993, though, Scalia relied on legislative history for some of his own opinions, he sharpened his pen in the case of *Conroy v. Aniskoff* (1993):

The Court begins its analysis with the observation: "The statutory command in § 525 is unambiguous, unequivocal, and unlimited." In my view, discussion of that point is where

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<sup>301</sup> *United Savings Association of Texas v. Timbers of Inwood Forest Assocs.* 1988. 484 U.S. 365.

the remainder of the analysis should have ended. Instead, however, the Court feels compelled to demonstrate that its holding is consonant with legislative history, including some dating back to 1917 -- a full quarter century before the provision at issue was enacted. That is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. It says to the bar that even an "unambiguous [and] unequivocal" statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the distant past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers.

The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . ." (emphasis added). But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history. And the present case nicely proves that point.

Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends. If I may pursue that metaphor: The legislative history of § 205 of the Soldiers' and Sailors' Civil Relief Act contains a variety of diverse personages, a selected few of whom -- its "friends" -- the Court has introduced to us in support of its result. But there are many other faces in the crowd, most of which, I think, are set against today's result.<sup>302</sup>

By 1993, when the Conroy opinion was written, Scalia had established his textualist views of statutory interpretation, and the number of examples of his critiques of its use could go on for pages indicating two things: As a judicial entrepreneur, he remains persistent in his goals to change the existing jurisprudential paradigm, and the very fact that the fight continues, indicates that an opposing viewpoint remains.

Scalia has been successful in persuading the Court to rely less on legislative history and to rein in liberal interpretation of statutes, and his success has been recognized. But judicial decision making is not rigid, and statutory interpretation is malleable, which is probably best exemplified by the recent Supreme Court's decision in *King v. Burwell*, which addresses the

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<sup>302</sup> *Conroy v. Aniskoff*. 1993. 507 U.S. 511, 518-519.

statutory language of the Affordable Care Act.<sup>303</sup> The six to three decision, with Chief Justice Roberts writing the majority opinion for the Court; and justice Scalia writing the dissent may not be the perfect example expressing the major schools of statutory interpretation, but it does reflect the inherent tensions as to the role of statutory interpretation that continues to this day, and that clarity does remain too often in the eye of the judicial beholder, the judge.

King v. Burwell addresses primarily the statutory language of a specific provision of the Affordable Care Act, “an Exchange established by the State under 42 U.S.C §18031,”<sup>304</sup> and whether such exchanges also fall under the federal exchange guidelines for tax purposes. The case presents the statutory interpretation question as to whether the provision should be read separately, on its own, or as part and parcel of the entire statute, reflecting its larger purpose. Writing for the majority, Chief Justice Roberts sets forth the issue in the case and how the Court utilizes statutory interpretation in this particular matter:

When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in Chevron. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable. This approach “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.

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<sup>303</sup> King v. Burwell. 2015. 135 S. Ct. 2480.

<sup>304</sup> Ibid., 2488.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. But oftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” Our duty, after all, is “to construe statutes, not isolated provisions.” (Citations omitted in above quotes).<sup>305</sup>

The majority’s opinion is anathema to Scalia’s rules of statutory interpretation, but the majority opinion may not be the best textual analysis of a statute, but rather a pragmatic response to an explosive political issue, in which the Court was expected to resolve, what the legislature could not. Scalia’s dissent, although charming for its unique barbs, which perhaps received more attention than the substantive or procedural issues addressed in the case, may be a measure of his frustration (the more barbs, the more upset the justice might be) with Roberts and Kennedy. Scalia’s reference to the majority’s “interpretative jiggery-pokery”<sup>306</sup> is entertaining, but also detracts from Scalia’s failure to address the rejection of the Chevron two-step framework<sup>307</sup> in the Robert’s opinion.<sup>308</sup> The Chevron test is a two-step process in which the Court first asks whether a statute is ambiguous, and if so, whether the agency’s interpretation of the ambiguous statute is reasonable. The two-step process “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>309</sup> Scalia does not even mention Chevron, but perhaps the greatest irony of Scalia’s dissent, which

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<sup>305</sup> Ibid., 2488-2489.

<sup>306</sup> Ibid., 2506.

<sup>307</sup> Chevron, U.S.A., Inc. v. NRDC, Inc. 1984. 467 U.S. 837, 842.

<sup>308</sup> Ibid., 2487.

<sup>309</sup> Ibid., 2488.

undermines some his arguments, is his reference to Federalist No. 78.<sup>310</sup> Referencing the Federalist Papers is always suspect because they have no legal weight, but for a judge, who dislikes the use of legislative history, to resort to the Federalist Papers raises more fundamental questions and contradictions.

In addition to his opinions, Scalia has written three books, of which two were co-authored and one is essentially an anthology of essays. His first book, *A Matter of Interpretation*, published in 1997 and based on a lecture, sets forth his arguments on statutory interpretation in forty-five pages and really resembles a law review article; the remainder of the book consists of commentary and responses by legal scholars and academics on the merits of his arguments. But by 1997, his impact on the Supreme Court's use of legislative history had been well under way. His second book, *Making Your Case*<sup>311</sup>, co-authored with Bryan Garner and published in 2008, is a treatise on how to present one's legal case before the Court, and lists Scalia's criticisms of advocates making their arguments before the Court, although he does recognize a role for legislative history. His most recent book, the subject of much heated debate between Scalia and Posner, is *Reading Law: The Interpretation of Legal Texts*, which appeared in 2012 and was also co-authored with Garner.

In *A Matter of Interpretation*, Scalia writes: "Statutory interpretation is such a broad subject that the substance of it cannot be discussed comprehensively here. It is worth examining a few aspects, however, if only to demonstrate the great confusion that prevails."<sup>312</sup> This is a

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<sup>310</sup> *Ibid.*, 2513.

<sup>311</sup> Antonin Scalia and Bryan A. Garner, *Making Your Case* (St. Paul: Thomson/West, 2008).

<sup>312</sup> Scalia, *A Matter of Interpretation*, 16.

surprising concession. If not in a book on statutory interpretation, then where does one comprehensively address the issue of statutory interpretation? Scalia has always claimed to be a “faint-hearted originalist,” and he takes the topic seriously, but not so seriously as to hamper his entrepreneurial efforts. In the book, Scalia recognizes the challenge of statutory interpretation:

In reality, . . . if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature, being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise of or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on what the legislature *meant* is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean – which is precisely how judges decide things under the common law.<sup>313</sup>

Scalia’s first book is much more general and was well received, which obviously reflects the nature of an essay based on a speech and the less rigid tone of a polemic. The book also included chapters from Ronald Dworkin and Laurence Tribe, and was written earlier in Scalia’s career, which may explain its warm reception. But it is his second book on statutory interpretation, *Reading Law*,<sup>314</sup> which is much more pedantic, rigid,<sup>314</sup> and doctrinaire. In his critical book on Scalia, *Scalia: The Court of One*, Bruce Allen Murphy addresses the importance of the book:

This was the first book of legal commentary by a sitting Supreme Court justice since Joseph Story’s seminal two-volume Commentaries on the Constitution of the United States, published in 1833. With this book, Scalia had put himself in the same category of legal theorists on the bench as two of the titans from the early nineteenth century, Story and the legendary Chief Justice John Marshall, as well as the great legal philosophers of the twentieth century, Oliver Wendell Holmes and Benjamin Cardozo. In offering a

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<sup>313</sup> Ibid., 18.

<sup>314</sup> Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West Publishing, 2012).



comprehensive theoretical contribution to the legal field, the book demonstrated Scalia's brilliance as a scholar and summed up everything he had learned in his long career. Coming when it did, this volume represented the product of the alter ego of his controversial public persona, offering the diametric opposite of his partisan outrage on the bench.<sup>315</sup>

Murphy's perspective is debatable, but what is clear is that the book does represent a supreme act of judicial entrepreneurship, equaled by few. Critics and allies alike recognize the influence that Scalia has had on statutory interpretation. The irony is that Scalia is answering the complaint that Posner had written in his 1983 article on the lack of literature addressing statutes. The book, which opens with a Foreword by then Chief Judge Frank Easterbrook, of the United States 7<sup>th</sup> Circuit Court of Appeals, another textualist and a colleague of Posner, sets forth seventy canons of interpretation of legal instruments. Scalia addresses what he sees as the root of "The Prevailing Confusion":

Is it an exaggeration to say that the field of interpretation is rife with confusion? No. Although the problem of tendentiously variable readings is age-old, the cause is not: the desire for freedom from the text, which enables judges to do what they want.<sup>316</sup>

Scalia was not the first to publish canons of construction; there had been a long history of such analysis, led most prominently by Karl Llewellyn's "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed," in which he writes, "One does not progress far into legal life without learning that there is no single right or accurate way of reading one case, or of reading a bunch of cases."<sup>317</sup> But *Reading Law* is not simply a treatise on canons, but almost a manifesto against what Scalia finds wrong with judicial decision

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<sup>315</sup> Bruce Allen Murphy, *Scalia: A Court of One* (New York: Simon & Schuster, 2014), 465-466.

<sup>316</sup> Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, 9.

<sup>317</sup> Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed," *Vanderbilt Law Review* 3, 395 (1949-1950): 395.

making. Although not the subject of this dissertation, Scalia’s formatting of the rules as canons give the impression that they’re part of a legal catechism that lawyers are expected to follow.

As in *Making Your Case*, Scalia is setting forth the principles on which he believes law should be practiced, not academically debating the merits of the respective approaches to statutory interpretation. The first canon, under the heading “Fundamental Principles,” is the “Interpretation Principle,” which declares, “Every application of a text to particular circumstances entails interpretation.” If this seems obvious and uncontroversial, the same cannot be said for the second canon, “Supremacy-of-Text Principle”: “The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” With this, Scalia firmly establishes the textualist approach of the book. He sets forth in his section, “Thirteen Falsities Exposed,” his critique of the positivist approach to statutory interpretation, which includes canon 58: “The false notion that the spirit of a statute should prevail over its letter;”<sup>318</sup> Canon 59, “The False notion that the quest in statutory interpretation is to do justice;”<sup>319</sup> Canon 60, “The False notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue;”<sup>320</sup> Canon 66, “The false notion that committee reports and floor speeches are worthwhile aids in statutory construction.”<sup>321</sup> As might be expected, Canon 66 generates one of the longest discussions, with twenty-two pages of explanation and commentary critiquing the use of statutory interpretation. This is followed by Canon 67, “The False notion that the purpose of

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<sup>318</sup> Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, 343.

<sup>319</sup> *Ibid.*, 347.

<sup>320</sup> *Ibid.*, 349.

<sup>321</sup> *Ibid.*, 369.

interpretation is to discover intent.”<sup>322</sup> The first set of falsities listed is directed at the positivists, but Scalia shamelessly adds a few falsities to support his own textualism, which in some respects, contradict the very arguments he makes. Canon 68, “The false notion that the plain language of a statute is the “best evidence” of legislative intent.”<sup>323</sup> Canon 69, “The false notion that lawyers and judges, not being historians, are unqualified to do the historical research that originalism requires.”<sup>324</sup> And Canon 70, “The false notion that the Living Constitution is an exception to the rule that legal texts must be given the meaning they bore when adopted.”<sup>325</sup>

In some respects, as a judicial entrepreneur, *Reading Law* is an attempt to establish textualist plain language as the primary rule of statutory interpretation, but at the same time it is a manifesto or jeremiad against proponents of a positivist approach to statutory interpretation. Having established textualism and diminished the use of legislative history in Supreme Court opinions years ago, it would seem that such a book may not have been necessary and may turn out to be counterproductive to his efforts in the long run. Unfortunately, even though a successful judicial entrepreneur in this area, Scalia may not know when to stop, and opened himself up to scathing criticism for the book, particularly by Posner.

Yet, as a judicial entrepreneur, Scalia has been successful in getting his ideas of statutory interpretation incorporated into judicial decision making and changing the existing paradigm, particularly on the Supreme Court. In 1999 Michael Koby assessed Scalia’s impact in his article,

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<sup>322</sup> Ibid., 391.

<sup>323</sup> Ibid., 397.

<sup>324</sup> Ibid., 399.

<sup>325</sup> Ibid., 403.

“The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique.”<sup>326</sup> In his research, relying on prior studies, Koby demonstrates that there had been an increase in the use of legislative history in opinions from 1938 to 1979, and that Scalia’s appointment to the Court represented a watershed for traditional legislative history:

Scalia has demonstrated himself to be the most consistent and acerbic critic of legislative history. He complains that when judges deviate from a steadfast approach to the "plain meaning" rule they ascribe extra-textual meanings to legislation and thereby dilute the efficacy of laws. Scalia's attack on the Court's excessive reliance on legislative history has been so successful that William Eskridge has referred to the establishment of a "new textualism" that the Court has at least partially adopted.<sup>327</sup>

Koby further demonstrates the decline in the use of statutory interpretation on the Supreme Court in the following table. (Table #1 Legislative History Citations By Year, See page 161).

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<sup>326</sup> Michael H. Koby, “The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique,” *Harvard Journal on Legislation* 36, 369 (Summer 1999).

<sup>327</sup> *Ibid.*, 379-380.

**TABLE I: LEGISLATIVE HISTORY CITATIONS BY YEAR<sup>328</sup>**

<b>Year</b>	<b>Legislative History Citations</b>	<b>Total Cases Heard</b>	<b>Cases Interpreting Statutes</b>
1980	479	156	89
1981	499	154	80
1982	444	184	77
1983	776	183	75
1984	784	184	65
1985	796	175	88
1986	415	172	72
1987	380	175	79
1988	402	167	79
1989	411	170	83
1990	253	146	70
1991	266	125	55
1992	152	127	54
1993	178	116	67
1994	169	99	52
1995	110	94	51
1996	217	90	50
1997	103	90	59
1998	79	94	49

The author concedes that there may be a number of reasons for the decline in the use of legislative history, such as a shrinking docket, but even taking other possibilities into consideration, but the decline is attributable to Scalia.

When all factors are taken into consideration, the figures in Table I indicate that Scalia and the critique he represents have had a significant impact on the Court's use of

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<sup>328</sup> Ibid., 385.

legislative history. Scalia's criticism has not only blunted the growth of use of legislative history, but has led to its substantial decline.<sup>329</sup>

Koby further recognizes the direct influence on individual justices, particularly Chief Justice

Rehnquist:

Justice Rehnquist presents a good example of this influence. From 1980 to 1986, Rehnquist wrote an average of 35.6 opinions per year, and cited legislative history in an average of 15.4 opinions per year. In the period following Scalia's appointment, from 1987 to 1998, he authored an average of 19.6 opinions per year and cited legislative history in only 4.8 opinions per year. Justice Stevens also followed this declining pattern. From 1980 to 1986, Stevens authored an average of 57.7 opinions per term and cited legislative history in an average of 29 opinions per year. From 1987 to 1998, he authored an average of 42.6 opinions per year and cited legislative history in only 18.4 opinions per year.<sup>330</sup>

Their conclusions are important, but limited due to the time covered:

In their 1938 to 1979 study, Carro and Brann were able to "detect a firm evolution that [went] from the almost absolute rejection of the use of legislative history in statutory interpretation to an almost absolute acceptance." From 1980 to the present, however, there has emerged a clear and unmistakable pattern of decline in the use of legislative history by the Supreme Court. While the pattern is most acute in the decisions of more conservative justices, moderate and liberal justices are also citing to legislative history less often. Clearly, the critique of Justice Scalia has made a large contribution to this trend. While it is premature to conclude that legislative history will cease to be a tool of statutory interpretation, Justice Scalia's criticism has, at a minimum, caused his fellow justices to give pause before they rely on, and cite to, legislative history.<sup>331</sup>

Unfortunately, their analysis ends in 1998. Analyzing the data since the 1998 term, using slightly different research parameters, the following chart demonstrates a continued decline in the use of legislative history. (Table #2: Legislative History Citations By Year, See page 163).

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<sup>329</sup> Ibid., 387.

<sup>330</sup> Ibid., 395.

<sup>331</sup> Quoting Jorge L. Carro and Andrew R. Brann, "The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis," *Jurimetrics Journal* 22, 294 (1982): 297-306. Koby, "The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique," 395.

**TABLE II: LEGISLATIVE HISTORY CITATIONS BY YEAR<sup>332</sup>**

<b>Term</b>	<b>Total Cases Heard</b>	<b>Cases Interpreting Statutes</b>	<b>Legislative History Cited</b>	
1999	83		38	28
2000	86		33	22
2001	88		36	24
2002	84		34	16
2003	91		32	21
2004	87		39	23
2005	90		35	19
2006	78		36	15
2007	75		41	18
2008	87		41	21
2009	82		38	24
2010	86		42	19
2011	79		31	16
2012	77		29	10
2013	79		34	13

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<sup>332</sup> Research done on LexisNexis database, Supreme Court Cases, Lawyer’s Edition. Under the column, Legislative History Cited, the search terms “legis! w/s history” was used to search for all cases that mention legislation, or its derivatives of legislation, within a sentence of the word “history”. Under the column, Cases Interpreting statutes, the search terms, “statut! w/s interpret!” was utilized. Although rudimentary, and more restrictive than the Kolby data, it is sufficient to demonstrate a continuing decline in the reliance upon legislative history in Supreme Court decisions from 1999 to the 2013 Term.

Other scholars have come to agree with Kolby's assessment. David Law and David Zaring's research published in their article, "Law Versus Ideology: The Supreme Court and the use of Legislative History,"<sup>333</sup> published in 2010, demonstrates that the justices' use of legislative history has declined in Supreme Court opinions, but also that those justices, including Scalia, who claim a textualist approach to statutory interpretation, do utilize legislative history, but to a less significant extent than the liberal justices. Using a sampling of opinions from 1953 to 2006<sup>334</sup> in their research, they found that of 151 opinions that Scalia wrote that addressed statutory interpretation, he used legislative history in twenty-eight opinions, or 18.5% of the time; and he utilized legislative history in the analysis only in thirteen opinions, or 8.6% of the total opinions criticizing the use of legislative history.<sup>335</sup> They noticed some surprising results:

It is much easier to discern a pattern among the Justices in terms of their propensity to cite legislative history. Overall, the Justices cited legislative history in just under half, or 47.9%, of their statutory interpretation opinions. As expected, more liberal Justices were, on the whole, more frequent users of legislative history than conservative ones. [S]ome criticism of the practice . . . turns out, on the whole, to be very rare. Only 1.1% of all the opinions in our data contained any language that could be deemed critical of legislative history usage, either in general or in the context of a specific case. It thus appears that such criticism is no more common on the Supreme Court than on the federal courts of appeals. The majority of the Justices in our data—eighteen out of thirty-one, to be precise—never voiced any such criticism, and of the remaining thirteen Justices, eight did so on just one occasion.<sup>336</sup>

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<sup>333</sup> David Law and David Zaring, "Law Versus Ideology: The Supreme Court and the Use of Legislative History," *William and Mary Law Review* 51, 1653 (2010).

<sup>334</sup> *Ibid.*, 1683.

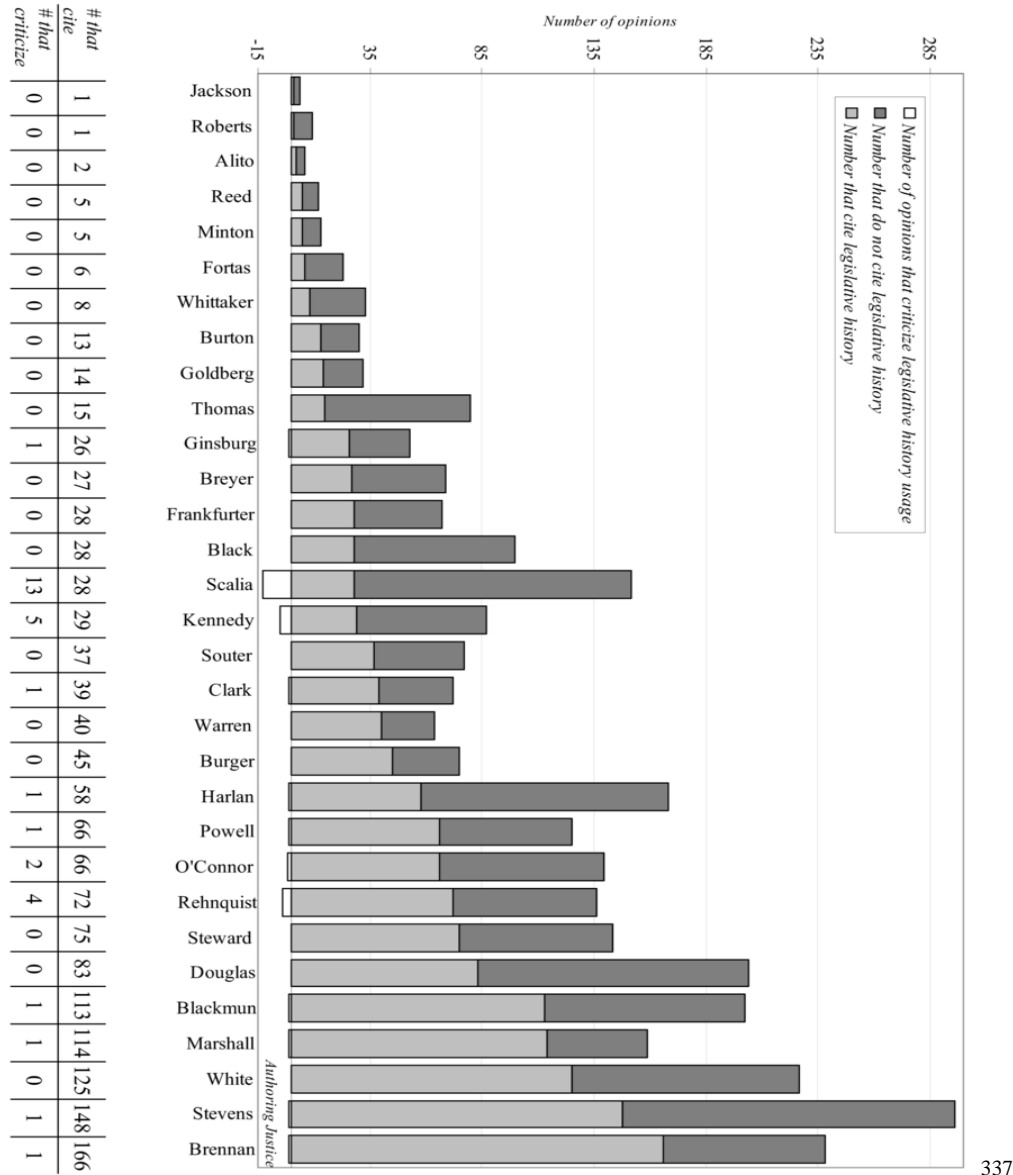
<sup>335</sup> *Ibid.*, 1710.

<sup>336</sup> *Ibid.*, 1709.



As the chart below indicates from their research, Scalia has been the most critical of the use of legislative history, but has used it as well in some of his opinions. Scalia's entrepreneurial activities have had an impact on the Court's decline in the use of legislative history.

Graph #3: Use of Legislative History By Supreme Court Justices.



<sup>337</sup> Ibid., 1712.

Though Scalia has been successful in raising colleagues' awareness about the problems inherent in using legislative history and though there has been a general decline in the use of that history, the justices continue to remain divided. A particularly fascinating case that highlights the division on the Court is *Samantar v. Yousuf*<sup>338</sup> decided in 2010, in which a unanimous Court held that under the Foreign Sovereign Immunities Act, officials from foreign governments are not immune from legal action and can be sued. All nine justices agreed with the decision, but the conservative members took issue with the use of legislative history by the majority, and for reasons that are not clear, issued their own brief exceptions to the use of legislative history. Justice Samuel Alito concurred with the decision with a brief one sentence opinion: "I join the opinion of the Court, although I think that the citations to legislative history are of little if any value here."<sup>339</sup> Justice Clarence Thomas concurred with a brief statement, too: "I join the Court's opinion except for those parts relying on the legislative history of the Foreign Sovereign Immunities Act of 1976... In my view, the Court's textual analysis is sufficient to resolve this case."<sup>340</sup> But it is Scalia who not only spends several pages discounting the Court's use of legislative history in the particular case as unnecessary, but underlines the continuing division on the Court of the use of legislative history in statutory interpretation when he writes:

The Court's introduction of legislative history serves no purpose except needlessly to inject into the opinion a mode of analysis that not all of the Justices consider valid. And it does so, to boot, in a fashion that does not isolate the superfluous legislative history in a section that those of us who disagree categorically with its use, or at least disagree with

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<sup>338</sup> *Samantar v. Yousuf*. 2010. 560 U.S. 305.

<sup>339</sup> *Ibid.*, 326.

<sup>340</sup> *Ibid.*

its superfluous use, can decline to join. I therefore do not join the opinion, and concur only in the result.<sup>341</sup>

Scalia's opinion recognizes the division in the Court, but also concedes, under certain circumstance, that legislative history is an acceptable tool for statutory interpretation for Scalia, supporting Law and Zaring's research that even the textualists on the Court will utilize legislative history in their opinions when necessary, but to a significantly lesser degree than the liberal members of the Court.

Justice Scalia, who has been outspoken in his views about the illegitimacy of certain interpretative tools, namely, legislative history, purpose, and intent, has influenced the other conservative Justices to adopt his interpretive approach. But if so, his influence has been incomplete - he has not, for example, convinced Justices Kennedy or Alito to avoid referencing statutory purpose or legislative intent.<sup>342</sup>

Scalia third book, on advocacy, *Making Your Case*, also addresses statutory interpretation, but from the viewpoint of the practitioner before the court, and offers an interesting perspective on Scalia's pragmatic understanding of statutory interpretation. Rule 25 is titled, "Be prepared to defend your interpretation by resort to legislative history." Scalia writes:

One of your authors has described legislative history as the last surviving fiction in American law. The notion that the members of a house or Congress were even aware of, much less voted in reliance on, the assorted floor statements and staff-prepared committee reports that are the staple off legislative-history analysis is – not to put too fine a point on it – absurd. Here again, however, we're advising not judges but the lawyers who appear before them. Since most judges use legislative history, unless you know what the judge or panel before which you are appearing does not do so, you must use legislative history as well. That is so, alas, even when the text of the statute seems entirely clear. You cannot rely on judicial statements that legislative history should never be consulted when the text is clear – not even when those statements come from opinions

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<sup>341</sup> *Ibid.*, 327.

<sup>342</sup> Anita Krishnakumar, "Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis," *Hastings Law Journal* 62, 221 (2010): 274-275.

of the court before which you're appearing. Clarity too often turns out to be in the eye of the judicial beholder.<sup>343</sup>

Scalia's statement in the last sentence that "clarity too often turns out to be in the eye of the judicial beholder" raises the rhetorical questions: Is Scalia also guilty of using, or not using, legislative history to his advantage? Or, more accurately, is it even possible not to avoid the inherent bias in the judicial decision making process that is statutory interpretation? This point, raised by his critics, remains unsettled.

#### **D. The Critics: Posner and Breyer**

The traditional approach to statutory interpretation does continue, and Scalia is not without his critics. It would be remiss not to note that even though both are considered conservatives, Posner and Scalia have had a long running feud and disagree on a variety of legal issues, one of which is statutory interpretation. Posner in his most recent book, *Reflections on Judging*, attacks Scalia and Garner's *Reading Law* and Scalia's brand of judicial decision making, in particular.

As Posner notes:

Justice Scalia is one of the most politically conservative Supreme Court Justices of the modern era... Yet he claims that his judicial votes are generated by an objective interpretive methodology (the only objective methodology, he claims) and that because it is objective, ideology, including his own fervent ideology, plays no role. Obviously, statutory text itself is not inherently liberal or conservative. But *textualism* is conservative. A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but does not make a smooth fit with its text. Ignoring the limitations of foresight, and also that a statute is a collective product that may leave many questions of interpretation to be answered by the courts because the enacting legislators didn't agree on the answers, the textual originalist demands that the legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. Textualism originalism is "gotcha" jurisprudence.

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<sup>343</sup> Scalia and Bryan, *Making Your Case*, 48-49.

On the Supreme Court, Justice Scalia's strongest critic, and a judicial entrepreneur for a more active use of legislative history and other ancillary documents is Justice Steven Breyer. Breyer has argued against the rigidity of Scalia's textualist approach. In his book, *Active Liberty: Interpreting our Democratic Constitution*, Breyer presents his arguments against textualism:

It contrasts a literal text-based approach with an approach that places more emphasis on statutory purpose and congressional intent. It illustrates why judges should pay primary attention to a statute's purpose in difficult cases of interpretation in which language is not clear. It shows how overemphasis on text can lead courts astray, divorcing law from life – indeed, creating law that harms those whom Congress meant to help. And it explains why a purposive approach is more consistent with the framework for a “delegated democracy” that the Constitution creates.<sup>344</sup>

Breyer's “purposive approach” is in stark contrast with Scalia's textualist approach, and may be said to represent the competing view of statutory interpretation on the Supreme Court.

Some judges, lawyers, and law teachers believe that judges, when answering this kind of question, should strongly emphasize . . . text, history, tradition, and precedent. Following this text-oriented approach, they try not to use purpose, consequences, or the legislative debates that compose the history of the statute's enactment in Congress. In my view, however, a primarily text-oriented system cannot work very well.<sup>345</sup>

But even Breyer came to recognize Scalia's influence, quite early, when he said in a lecture in 1991:

These and other criticisms are taking their toll. Judge Wald has pointed out that the Supreme Court relied on legislative history in almost every statutory case it decided in 1981. And although Justice White has recently commented that “the Court's practice of utilizing legislative history reaches well into its past, [and we] suspect that the practice will likewise reach well into the future, the Supreme Court's actual use of legislative history is in decline. By 1989, the Court decided a significant number of statutory cases (ten out of about sixty-five) without any reference to legislative history at all; and, in the

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<sup>344</sup> Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2005), 85.

<sup>345</sup> Stephen Breyer, *Making our Democracy Work: A Judge's View* (New York: Vintage Books, 2010), 89.

1990 Term, the Court decided nineteen out of about fifty-five such statutory cases without its use. Referring to legislative history to resolve even difficult cases may soon be the exception rather than the rule.<sup>346</sup>

Although I recognize the possible "rearguard" nature of my task, I should like to defend the classical practice and convince you that those who attack it ought to claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not to condemn its use altogether. They should confine their attack to the outskirts and leave the citadel at peace.<sup>347</sup>

There are numerous critics of Scalia, on both the left and the right of the jurisprudential scale, but regardless of any analytical, legal, or intellectual disagreement, Scalia has been successful in achieving his goals, not all of them, but in terms of statutory interpretation, he is the rock against which they must crash for the time being.

#### **E. Frankfurter: An Unsuccessful Judicial Entrepreneur**

*"If all this sounds to you professorial, please remember that I am a professor unashamed."*<sup>348</sup> Associate Justice, Felix Frankfurter

*"All Felix does is talk, talk, talk. He drives you crazy!"*<sup>349</sup> Chief Justice, Earl Warren

In contrast to the success of Posner and Scalia as judicial entrepreneurs, it is necessary to contrast a less than successful judicial entrepreneur, Supreme Court justice Felix Frankfurter. There are few justices appointed to the Supreme Court for whom expectations were so high and disappointment so widely felt. Frankfurter's stellar academic record, professional credentials,

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<sup>346</sup> Stephen Breyer, "The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes," *Southern California Law Review* 65, 845 (1992): 846.

<sup>347</sup> *Ibid.*, 847.

<sup>348</sup> Frankfurter to Robert H. Jackson, 29 January 1953, quoted in Bernard Schwartz, *Super Chief: Early Warren and His Supreme Court* (New York: New York University Press, 1983), 39.

<sup>349</sup> G. Edward White, *Earl Warren: A Public Life* (New York: Oxford, 1982), 179; Warren quoted in Schwartz, *Super Chief*, 25-27.

knowledge of the Supreme Court, and deep relationships with some of the leading jurists of the early 20<sup>th</sup> century, Oliver Wendell Holmes, Jr., Benjamin Cardozo, Louis Brandeis, and Learned Hand, to name a few, were thought to have prepared him to become one of the most important and influential justices in Supreme Court history. Moreover, as an advisor to President Roosevelt and a longstanding political activist, Frankfurter brought a level of practical experience to the Court that has rarely been equaled. Also, Frankfurter had a well-developed judicial philosophy that he held with evangelical fervor. Smart, experienced, ambitious, Frankfurter would seem to have the qualities required to be a successful judicial entrepreneur. Yet in this his tenure proved an unambiguous failure.

The dramatic inconsistency between the high expectations set for Frankfurter, and his disappointing tenure, raises three fundamental questions about Frankfurter's role as a judicial entrepreneur on the Court: Was he an unsuccessful judicial entrepreneur because of his personality and inability to successfully garner the support of other justices to join him to adopt his interpretation of judicial restraint? Was the judicial decision making principle of judicial restraint, for which he is best known, difficult to market once the New Deal controversy concerning the Court was safely past? Was it that he faced a collection of strong minded men, who were hard to shape? How much of his failure, in other words, may be attributed to him and how much to the context within which he found himself?

In the working model of a judicial entrepreneur created in the dissertation, there are two elements that are necessary for a judicial entrepreneur: characteristics and strategies. Frankfurter meets the criteria of having the characteristics of a judicial entrepreneur in his persistent advocacy of a specific legal idea, judicial restraint, and he assumes the risks, and rests

his professional credentials, reputation, and stature on the idea. Strategically, he utilized and advocated for the use of judicial restraint in his opinions. But it may be argued that Frankfurter's failures were not a matter of garnering support for his idea or his difficult condescending personality, but rather the advocacy of rigid interpretation of judicial restraint, during a period of tremendous change on the Court, reflected poor timing, but more importantly, he exhibited a tin ear to the changes in the Supreme Court's jurisprudence and an inability to create a more flexible definition of judicial restraint. Unlike Posner, who listens to his critics and modifies his views accordingly, Frankfurter became hostile and defensive. The remainder of this section of the dissertation will look at the three questions separately.

### *Personality*

Personality is important for a judicial entrepreneur, particularly because he sits as a member of a body of only nine members, with whom he must interact regularly. A successful entrepreneur need not be beloved, but at the minimum he must be able to avoid alienating those he would choose to influence, particularly in the area of law they intend their entrepreneurial influence. The entrepreneurial literature is filled with entrepreneurs who were extremely difficult people, but nonetheless, successful. Unlike entrepreneurs in the marketplace, a judicial entrepreneur on the Supreme Court is one of nine with an equal voice and vote, so personality may play a more important role in the success or failure of a judicial entrepreneur; he is not a boss ruling subordinates he can hire and fire like Steve Jobs or Bill Gates.

From the literature, Frankfurter's personality clearly was not helpful in developing support from other justices for his ideas, particularly with those liberal justices who would seem to be his natural allies, and he seems to have squandered whatever professional reputation he had rather



quickly amongst his brethren. Perhaps the best known effort to evaluate Frankfurter's personality is H.N. Hirsch's *The Enigma of Felix Frankfurter*, "an interpretive biography of a much-studied and highly complex man"<sup>350</sup> in which the author notes:

The central hypothesis of this study is that Frankfurter can only be understood politically if we understand him psychologically, and that we can understand him psychologically as representing a textbook case of a neurotic personality: someone whose self-image is overblown and yet, at the same time, essential to his sense of well-being.<sup>351</sup>

The author uses the neurotic personality to explain the problems Frankfurter faced on the Supreme Court, a much different environment than Frankfurter had experienced before in government service or academia:

The key aspect of Frankfurter's personality as it affected his public behavior was his attitude toward political opposition. Because his self-image was inflated, and because his psychological peace rested upon that self-image, Frankfurter could not accept serious, sustained opposition in fields he considered his domain of expertise; he reacted to his opponents with vindictive hostility. Unconsciously, such hostility was a projection of his own self-doubt.<sup>352</sup>

Whether one believes in the psychological interpretation of Frankfurter or not, his reputation for being overly ingratiating at first, and then condescending and pedantic to his colleagues if they did not agree with him, is well documented.

Frankfurter had long ago earned a reputation for wooing every new justice with great vigor. He smothered them with flattering notes and copies of articles, books, and opinions he had written. He lavished attention on clerks, whom he viewed as his *entrée* into the other justices' chambers, focusing particularly on those who had attended Harvard Law School... It was all part of Frankfurter's never-ending campaign to win

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<sup>350</sup> H.N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981), ix.

<sup>351</sup> *Ibid.*, 5.

<sup>352</sup> *Ibid.*, 5-6.

over potential allies or acolytes who would vote with him rather than with Black, his main antagonist on the Court.<sup>353</sup>

One biographer summarized Frankfurter's personality:

At heart Frankfurter remained a law professor, an emotional intellectual gadfly who preferred to question endlessly rather than to answer. His ploys toward his ends-flattery and ridicule, cajoling, twitting and teasing colleagues, being a master of the vertical pronoun in a collegial institution and reminding his colleagues of his expertise – were self-defeating. Once he said to Black's clerks, with Hugo in earshot, "If I could just be Justice Black's law clerk for just one year, how the law would be greatly improved." Frankfurter had always personalized differences of opinion, and had transformed disagreements about tactics into controversies about the intellectual morality of himself and his opponents.<sup>354</sup>

The antagonism between Frankfurter and Black was legendary almost rising to the point of physical altercation:

At one conference Frankfurter's words got too much for Black, and he started to go after Felix physically. Tom Clark, who sat next to Frankfurter, intervened to break up any possible altercation. Black walked out of at least three Court conferences because of Frankfurter... "Felix kept on talking and talking."<sup>355</sup>

Frankfurter's antagonistic personality contrasted sharply with that of Justice William Brennan, a former student of Frankfurter's at Harvard Law School.

Brennan consciously set out to avoid being anything like him [Frankfurter]. A keen workplace politician, Brennan already knew better than to treat colleagues with the kind of disdain Frankfurter displayed. But he had learned one final lesson from his professor: the dangers of coming on too strong, particularly with new colleagues.<sup>356</sup>

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<sup>353</sup> Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (New York: Houghton, Mifflin, Harcourt, 2010), 101.

<sup>354</sup> Roger K. Newman, *Hugo Black, A Biography* (New York: Fordham University Press, 1997), 297-298.

<sup>355</sup> *Ibid.*, 485.

<sup>356</sup> Stern and Wermiel, *Justice Brennan: Liberal Champion*, 192.

Hirsch continues with his psychological analysis, which has become the accepted narrative of Frankfurter's personality and problems:

Until his appointment to the Supreme Court, Frankfurter had been able to beat his opponents and to dominate every personal and professional situation in which he found himself – the various government bureaus, in which he worked, the organizations to which he belonged, the Harvard Law School, the circle of Advisors in the Roosevelt White House. When he was appointed to the Court, Frankfurter quite naturally expected to dominate yet another situation. This expectation was buttressed by his many years as a scholar of the law and by the intimate knowledge of the Court he had acquired through two of his mentors, Holmes and Brandeis.

The Supreme Court, however, was an environment unlike the ones in which Frankfurter had triumphed; he was formally committed to sharing power with strong-willed individuals who had ideas of their own. Frankfurter could not lead the Court and, much to his surprise, found himself faced with an opposing "bloc." He was thus confronted, late in life, with a serious challenge to his self-image; he reacted in a manner affecting both his relations with his colleagues and the content of his jurisprudence.<sup>357</sup>

The deference he expected and enjoyed was altered once he joined the Court:

For 30 years, however, Frankfurter had been either an acolyte to men he recognized as great figures-Holmes, Brandeis, Stimson, and Roosevelt-or a precept or mentor to those he considered his intellectual inferiors; the master-disciple relationship was not going to work with men who saw themselves as his equals and were not beholden to him for their positions on the nation's highest court. One of the great tragedies of Frankfurter's career is that a man renowned for his talents in personal relations, who knew so well the high value the justices place on careful collegiality could so terrible misread the situation and the characters of those with whom he served.<sup>358</sup>

A judicial entrepreneur's personality is important and helpful in promoting a particular idea or developing relationships with other justices. Another justice with a rough and condescending personality, and proudly so, is best exemplified by Justice Scalia, whose dissents and scathing personal critiques of his colleagues are notorious in the legal community and the public at large.

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<sup>357</sup> Hirsch, *The Enigma of Felix Frankfurter*, 6.

<sup>358</sup> Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne Publishers, 1991), 46.

The attacks by Scalia on Justices Sandra Day O'Connor and Anthony Kennedy came early and hard, particularly over the issue of whether to overturn *Roe v. Wade* (1973) in the case of *Webster v. Reproductive Health Services* (1989), and O'Connor and Kennedy's unwillingness follow his lead to overrule *Roe*, but also other cases not related to the issue of abortion.<sup>359</sup> But it must not be forgotten, like Frankfurter's attacks on his colleagues who shared similar legal and political tendencies, Scalia lost on the issue of abortion, too. His goal has been to overturn *Roe v. Wade*, and when provided with the opportunity and votes, his conservative colleagues, did not follow the course of action he wished. This, too, happened to Frankfurter. So, what is the difference between Frankfurter and Scalia? Perhaps, in the long run, there will be no real difference between the two. Both attacked their colleagues personally, and where Frankfurter confined himself to doing so privately, Scalia has gone so far as to attack his colleagues publicly in his opinions. Even though Scalia was successful in promoting a reevaluation of the use of statutory interpretation, many of the conservative causes he championed have only shown mixed results, and many of the successes cannot even be directly attributable to him, but more to a general change in the make-up of the Court.

It could also be argued that perhaps Frankfurter's pedantic slicing style was less tolerable than Scalia's verbal cudgels that defined their differences, particularly over emotionally charged issues such as abortion. As one author has noted about Frankfurter:

Frankfurter's intellectual arrogance, combined with a nastiness some of his students had seen years earlier, led him to alienate nearly all his colleagues at one time or another. He would flatter them so long as they agreed with him, but at the first sign of independent

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<sup>359</sup> Murphy, *Scalia: A Court of One*, 177-184.

thought he would explode. During his tenure on the bench, no one – with the possible exception of Robert Jackson – escaped his scorn.<sup>360</sup>

The history of the Court is filled with stories of justices with diametrically opposing judicial philosophies, who maintain cordial relationships. Scalia, for example, is known for his fondness for the Court’s leading liberal, Ruth Bader Ginsberg. Biskupic writes of the time Ginsburg was introduced to Scalia in the 1970s and their enduring friendship:

“I was fascinated by him because he was so intelligent and amusing,” Ginsburg said. “You could still resist his position, but you had to like him.” Ginsburg, a former women’s rights advocate, was an unlikely chum to Scalia. Yet a deep friendship developed. Once he was appointed to the D.C. Circuit, two years after her 1980 appointment, Ginsburg and Scalia began celebrating New Year’s Eve together with a formal dinner for themselves and their spouses. Scalia attributed the friendship with Ginsburg to their shared backgrounds as law professors. They read each other’s opinions with a scholarly eye and offered writing suggestions. Scalia treated Ginsburg like a faculty colleague and years later described her as “an intelligent woman and a nice woman and a considerate woman – all the qualities you like in a person.”<sup>361</sup>

But unlike Scalia, it would seem that Frankfurter’s personality was a little more difficult and went beyond the philosophical differences in interpreting the law:

Frankfurter, for all that he could be charming, solicitous, witty, and outgoing, was also duplicitous and conniving, and these characteristics triggered confrontation.<sup>362</sup>

Frankfurter probably did know more about the Court than anyone, but his condescension to colleagues who did not share his views and arrogance alienated almost all the justice on the

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<sup>360</sup> Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties*, 62 – 63.

<sup>361</sup> Biskupic, *American Original: The Life and Constitution of Supreme Court Antonin Scalia*, 89.

<sup>362</sup> Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties*, 62.

Court at one point or another.<sup>363</sup> A biographer of Black, noting on the issues between Jackson and Black, and in turn, the rest of the Court:

Behind Jackson's provocations, as behind most intrigue on the Court, was Frankfurter. By 1943-44 he had run out justices to convert. His manner had deeply repulsed Douglas and Murphy, much more than their substantive disagreements. Rutledge, the newest justice, was already meeting with them and Black to plot strategy. Stone and Reed went their own ways, the former always trying to persuade someone on the merits, the latter always available, smiling and annoying no one. Only Jackson and Roberts, were left, and Frankfurter never passed up an opportunity to tell them the worst about Black. No one else on the Court went out of his way to make trouble with colleagues... But Frankfurter always had been a divisive force. No group that he joined would be happy, Judge Learned Hand once told Douglas. When an interviewer said how good Felix was at making friends, Hand replied. "Yes, and enemies."<sup>364</sup>

More importantly, except for his attacks on O'Connor and Kennedy, Scalia has directed most of his wrath against the liberals on the bench, not his conservative colleagues. Scalia's attacks on the conservatives have been that they have not gone far enough in the direction he would like to go. Frankfurter, on the other hand, was attempting to rein in many of his liberal colleagues and was out of step with the movements on the Court, where Scalia has been riding a conservative wave on the Court, but more importantly, Frankfurter had disdain for his colleagues. It may be splitting hairs attempting to make such personality distinctions, but whereas Scalia is difficult, as expressed in his opinions, Frankfurter, it would seem from the literature, was insufferable.

Another element of the judicial entrepreneurs' characteristics and strategies, are their public persona and their efforts to persuade the general public as to their ideas. Successful judicial entrepreneurs leverages their reputation and stature as judges to promote their ideas. Addressing

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<sup>363</sup> Ibid.

<sup>364</sup> Newman, *Hugo Black: A Biography*, 322.

the general public increases the stature of the judicial entrepreneur and their views find a more general audience. And some might argue, Posner and Scalia both play to their respective audiences in their opinions, writings, and speeches. American culture is unique in that it is a legal culture and citizens are not only amenable to, but also interested in the law. Our televisions are filled with reality shows on judges and crime. The Supreme Court's decisions make headline news. Most people probably could only name a few Supreme Court justices, but Scalia is one of them. And Posner stands apart for being one of the few judges who has not sat on the Supreme Court with public name recognition. Scalia and Posner's public recognition is not accidental because judicial entrepreneurs burnish their public reputation, too.

This, too, may explain part of Frankfurter's failure as a judicial entrepreneur. He was well known for his time because of his government service but unlike Scalia or Posner, he did not leverage his public persona to the degree that they have done. In some respects, his public persona is more akin to Justice Stephen Breyer; he too publishes books on the law for the general public, but remains much less well known to the general public than his colleague Scalia, and perhaps even, Posner. It might be argued that there are more opportunities for contemporary judicial entrepreneurs to reach the general reading public. As well, Posner and Scalia may view themselves more than just judicial entrepreneurs, but also as public intellectuals. The law changes society and society changes the law. Appealing to the general public is another strategy of the judicial entrepreneur to promote their ideas on the law.

### *Judicial Restraint and Apportionment*

Even though Frankfurter and Scalia may have shared similar tendencies to denigrate their fellow justices, they both came to be associated with the advocacy of major legal themes during

their tenure on the bench. Where Scalia has been most associated with refining and limiting statutory interpretation in judicial decision making, Frankfurter is known for deferring to legislative decisions through the judicial decision making process of judicial restraint.

Frankfurter was particularly influenced by James Bradley Thayer's 1893 *Harvard Law Review* article, "The Origins and Scope of the American Doctrine of Constitutional Law,"<sup>365</sup> in which he sets forth his views as to when it is appropriate for a court to exercise judicial review of acts of the legislature. For Thayer, and subsequently Frankfurter, the acts of the legislature should always stand unless there was a clear constitutional mistake by the legislature, not simply a probable mistake, in order for the court to review and overturn a legislative act. Thayer writes:

It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, - so clear that it is not open to rational question. This is the standard of duty which the courts bring legislative Acts; that is the test which they apply, - not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it.<sup>366</sup>

Underlying Thayer's arguments is the counter-majoritarian difficulty of an unelected court reviewing the acts of the legislature. The legislative body should be preeminent, and the courts should defer to the act of the legislature.

The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate.<sup>367</sup>

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<sup>365</sup> James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, 129 (1893).

<sup>366</sup> *Ibid.*, 144.

<sup>367</sup> *Ibid.*, 136.



Frankfurter's embrace of Thayer's judicial restraint was consistent and over time inflexible. Frankfurter failed to recognize the changes on the Court and the jurisprudential questions the Court had to address. Posner, writing on judicial restraint noted, summed up Frankfurter's fundamental problem:

Frankfurter advocated Thayerism with a noisy passion unequaled by any other Thayerian. His emotionality caused him difficulties in getting along with his fellow Justices and overcoming his visceral reactions in many cases.<sup>368</sup>

There were other justices who followed Thayer, too, such as Brandeis and Holmes, but they did not follow his idea as literally as Frankfurter.<sup>369</sup> In some respects, as compared to law and economics, which is a relatively novel legal concept, judicial restraint and statutory interpretation are rather perennial legal issues that are quite similar in nature because they both address the role of the legislature vis-a-vis the Court. Both are perennial legal issues which play a similar role in judicial decision making. Statutory interpretation plays a significant role, and Scalia has had some modicum of success, as a judicial entrepreneur getting the Court to reevaluate its use of statutory interpretation, and judicial restraint, particularly the variant espoused by Frankfurter, goes to the fundamental nature of being a judge.

It may be argued that Frankfurter's failure as a judicial entrepreneur largely rests on his record as advocate of the theory of judicial restraint, his refusal to modify his ideas to reflect evolving legal jurisprudence, and the changing role of the Court and its members. The Court Frankfurter joined was different, and a theory of judicial self-restraint applicable to economic legislation that had come before the Court during the Roosevelt administration, seemed to some

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<sup>368</sup> Richard A. Posner, "The Rise and Fall of Judicial Restraint," *California Law Review* 100, 519 (June 2012): 530.

<sup>369</sup> Hirsch, *The Enigma of Felix Frankfurter*, 129.

justices problematic for issues concerning civil liberties and interpreting the Bill of Rights that would arise during and after the war. Frankfurter ignored Justice Harlan Fiske Stone's famous footnote number 4 in *US v. Carolene Products* (1938)<sup>370</sup> that there should be a differentiation between legislative review for economic issues and those that fall within the Bill of Rights, refusing to acknowledge the direction the Court was moving.

To further add to Frankfurter's alienation from the liberal bloc's jurisprudence on the Court, his antagonism of his colleagues was famous and ultimately counter-productive:

Frankfurter had an unfortunate habit of personalizing disagreements on the Court in a melodramatic fashion. He viewed Black and Douglas – and any new justices who might agree with them – as members of an enemy camp. During most of the 1940s, Black and Douglas could rely on two allies – Frank Murphy and Wiley Rutledge – as they pressed to apply the Bill of Rights to the states and took liberal positions in civil liberties cases. But the bloc shrank when Murphy and Rutledge died unexpectedly within two months of each other in 1949. Their more conservative successors, Minton and Clark, shifted the Court's balance toward Frankfurter's camp.

The balance began to shift back again toward the liberal bloc with the arrival of Warren as Chief Justice.<sup>371</sup>

The conflict and inflexibility of Frankfurter's idea of judicial restraint are best exemplified in two famous flag salute cases, *Minersville School District v. Gobitis* (1940)<sup>372</sup> and *West Virginia State Board of Education v. Barnette* (1943).<sup>373</sup> Frankfurter wrote the majority opinion in *Gobitis*, but three years later, would have to write the dissenting opinion in essentially the same case. The overturning of *Gobitis* so soon after its decision is one of the most significant and high profile rejections of Frankfurter's theory on judicial restraint and must have come as a

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<sup>370</sup> *United States v. Carolene Products Co.* 1938. 304 U.S. 144, 153.

<sup>371</sup> Stern and Wermiel, *Justice Brennan: Liberal Champion*, 102.

<sup>372</sup> *Minersville School District v. Gobitis.* 1940. 310 U.S. 586.

<sup>373</sup> *West Virginia State Board of Education v. Barnette.* 1943. 319 U.S. 624.

tremendous blow to his ego. The transition over those three years are a watershed for Frankfurter on the Court, but also his opinions in those cases, particularly his dissent, are the most succinct expression of his idea of judicial restraint, a theme that he would continue to advocate throughout his time on the Court. The two cases also reflect a changing sentiment regarding civil liberties on the Court that clashed with Frankfurter's ideas of judicial restraint.

*Minersville School District v. Gobitis* concerned a child from a despised religious sect, the Jehovah's Witnesses, who on religious grounds refused to salute the flag in school as required by state law. The Court decided, eight to one, against Gobitis, with Frankfurter, newly appointed to the Court, writing for the majority. Frankfurter believed with Thayer that if a state could offer a rational basis for a law – an admittedly low hurdle – the Court should uphold the law. Democratically elected lawmakers were entitled to the benefit of the doubt. Here, Frankfurter decided that the state's interest in fostering good citizenship constituted a rational basis for the requirement.

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that ". . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. . . . it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression."<sup>374</sup>

Frankfurter argues for judicial restraint and deference to the legislature, when he writes in the *Minersville* opinion:

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<sup>374</sup> *Minersville School District v. Gobitis*. 1940. 310 U.S. 586, 596.

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.<sup>375</sup>

However, within three years and during the depths of a world war, the Court would reverse course on *Gobitis*, one of the quickest and most famous reversals by the Court in its history. There were a number of reasons for the Court's reversal, including changes in the Court's composition and changing views on civil liberties in light of war time atrocities, both foreign and domestic, although, the Court would uphold the internment of Americans of Japanese descent a year later.<sup>376</sup>

The Court overturned *Gobitis* in the *Barnette* ruling in 1943. *Barnette's* facts are fundamentally the same as *Gobitis*. Writing for the majority, Justice Robert Jackson, normally Frankfurter's ally, distinguishes between judicial deference owed ordinary laws and deference owed laws that appear to conflict with the First Amendment.

Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this

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<sup>375</sup> *Ibid.*, 600.

<sup>376</sup> *Korematsu v. United States*. 1944. 323 U.S. 214.

case.<sup>377</sup>

Jackson then rebuts Frankfurter's argument head on, when he writes:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>378</sup>

Frankfurter wrote the dissent, but rather than a practiced recital of the arguments supporting judicial restraint that he had written in *Gobitis*, it is much more direct and comprehensive and personal. The question before Frankfurter is not the First Amendment rights of the Jehovah Witnesses; it is the proper role of the Court in reviewing acts of the legislature. He begins with a personal plea that is a departure from his normal dispassionate academic tone:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause

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<sup>377</sup> *West Virginia State Board of Education v. Barnette*. 1943. 319 U.S. 624, 639.

<sup>378</sup> *Ibid.*, 642.

gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.<sup>379</sup>

He continues with his disquisition on the subject of judicial restraint:

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."<sup>380</sup>

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.<sup>381</sup>

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.<sup>382</sup>

Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?<sup>383</sup>

This is no dry, technical matter. It cuts deep into one's conception of the democratic

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<sup>379</sup> Ibid., 646 – 647.

<sup>380</sup> Ibid., 647.

<sup>381</sup> Ibid., 649.

<sup>382</sup> Ibid., 650.

<sup>383</sup> Ibid., 651.

process -- it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures... If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate.<sup>384</sup>

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.<sup>385</sup>

Frankfurter never says why it is rational to force a student to say something she does not believe, but rather focuses almost exclusively on the principle of judicial restraint. The above are just excerpts from his dissent, but it provides an interesting contrast to his minimal reference to judicial restraint in the majority opinion in *Gobitis* and demonstrates his exasperated efforts to instruct his colleagues on his principles of judicial restraint. Judicial restraint goes to the fundamental role of judges, and as the Court became more activist in respect to civil liberties in overturning laws promulgated by the legislature, Frankfurter's ideas were less timely and not well received.

The great irony is that, had the timing of *Gobitis* been slightly different, the outcome in the decision may have been different. Stone's dissent in *Gobitis* would have been the majority opinion.

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<sup>384</sup> *Ibid.*, 651-652.

<sup>385</sup> *Ibid.*, 654.

Stone circulated a powerful dissent on the day before the conference at which Frankfurter's opinion was approved. Black did not know about Stone's plans. A majority of the Court, he later said, might have bolted from Frankfurter's opinion after reading Stone's dissent – as the rush of work at the term's close prevented the justices' looking at the dissent until after the opinion came down – but Black, Douglas, and Murphy found Frankfurter's argument so moving they had assured him they would support him and were loath to break their word. Immediately, "we knew we were wrong," Black told an obituary writer in 1967, "but we didn't have time to change our opinions. We met around the swimming pool at Murphy's hotel and decided to do so as soon as we could." At once they notified Stone that they would stand with him at the first opportunity.<sup>386</sup>

Support for the Frankfurter opinion in *Gobitis* may also be explained in terms of the context in which it was written, impending war, and explain why it could be so quickly overturned.

The war also may explain things. Remember that *Gobitis* was handed down just months after the Fall of France in World War II, perhaps unduly sensitizing the Court to the patriotism that likely would be called up soon to sustain America's entry into the war. Indeed, within the Court, Frankfurter's opinion was called the "Fall of France" opinion. In a letter to Justice Stone on May 27, 1940, Frankfurter suggested that the war had affected his position. Wartime circumstances, Frankfurter wrote, required the Court to make the delicate "adjustment between legislatively allowable pursuit of national security and the right to stand on individual idiosyncrasies."<sup>387</sup>

Another example of Frankfurter's inability to appreciate timing and his entrepreneurial failure was in the area of legislative reapportionment, or more appropriately, malapportionment. Prior to *Baker v. Carr* (1961)<sup>388</sup> and *Reynolds v. Sims* (1964),<sup>389</sup> the Court had refrained from addressing the legal question of malapportionment of legislative districts because such issues were considered political questions best left to the respective legislatures to address, not the Court. In the case of *Colegrove v. Green* (1946), Frankfurter warned about courts venturing into

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<sup>386</sup> Newman, *Hugo Black: A Biography*, 284.

<sup>387</sup> Jeffrey S. Sutton, "Barnette, Frankfurter, and Judicial Review," *Marquette Lawyer* (Fall 2012): 18.

<sup>388</sup> *Baker v. Carr*. 1962. 369 U.S. 186.

<sup>389</sup> *Reynolds v. Sims*. 1964. 377 U.S. 533.



the political thicket by taking on political questions of apportionment. Writing for the majority in *Colegrove*, Frankfurter noted in his opinion:

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.<sup>390</sup>

Black wrote for a dissent in *Colegrove*, but Frankfurter's majority opinion would stand for fifteen years, until it was overruled, although not directly in *Baker v. Carr* and put to rest in *Reynolds v. Sims*. Once again, Frankfurter, chose judicial restraint, but this would be one of his last major dissents; having suffered a stroke in 1962, he was forced to resign from the Court that year.<sup>391</sup> The fundamental problem of malapportionment is that redress cannot be effectuated through the legislative process, because it is the malapportioned legislature that is required to change itself, and with a vested interest in maintaining the status quo, it is unlikely to ever do so. Frankfurter's unwillingness to appreciate the inability of the democratic process to resolve legislative malapportionment issues necessitated the Court's intervention into what had formerly been considered political questions, but the political question had become a legal issue to those given standing.

As in *Barnette*, Frankfurter was willing to adhere to a theory of judicial restraint at the price of ignoring the practical implications of the Court's decisions. But there is another element to the cases addressed above: Frankfurter's unwillingness to admit that he simply may have been wrong in a prior decision. *Gobitis* and *Cosgrove* were significant opinions for Frankfurter, and

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<sup>390</sup> *Colegrove v. Green*. 1946. 328 U.S. 549, 552.

<sup>391</sup> Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties*, 173.

to admit that they had been wrongly decided would be a confession of fallibility; for someone who considered himself to be intellectually infallible in their understanding of the law, it may have been easier psychologically to attack his detractors' intellectual rigor, rather than admit error.

Frankfurter's timing was off – he was the right Supreme Court justice, but on the Court at the wrong period in its history. In response to the reactionary temperament of the Supreme Court in the early part of the Roosevelt administration, it is understandable that Frankfurter would be an advocate for judicial restraint because the Court had overturned a number of New Deal economic statutes. Frankfurter's judicial restraint advocated for deference to the federal and state legislatures, but now economic regulation was superseded by civil liberties, and he remained unwilling to change or temper his views on judicial restraint:

The tragedy of Mr. Justice Frankfurter is that he became a prisoner of an idea – judicial restraint – and failed to distinguish between the regulation of economic and property rights and limitations upon individual liberties.<sup>392</sup>

The changes on the Court were reflected in the ever increasing division among the justices in their opinions. C. Herman Pritchett, a scholar of the Roosevelt Court, noted the divisions over civil liberties on the Court at the time:

Civil liberties problems have given the Roosevelt Court one of its most controversial group of cases. Some 34 nonunanimous decisions have been recorded in the field between 1939 and 1947, with 12 of them yielding 5 to 4 or 4 to 3 splits.<sup>393</sup>

Justice Frankfurter's own explanation of his votes has been almost entirely in terms of the respect which he believes that courts must give to legislative judgments.<sup>394</sup>

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<sup>392</sup> Ibid., 58.

<sup>393</sup> C. Herman Pritchett, *The Roosevelt Court, A Study in Judicial Politics and Values 1937 – 1947* (Chicago: Quadrangle Paperback, 1969), 129-130.

Frankfurter failed to recognize these changes:

The Roosevelt Court has accepted this philosophy so far as general economic and social regulations are concerned, but in Bill of Rights cases it has contended that the Court must subject legislative action to more rigorous tests, or, as Chief Justice Stone put it, to a “more searching judicial inquiry.”<sup>395</sup>

With an already divided Court, the chance of garnering a consensus on the principle of judicial restraint was unlikely to be successful. Frankfurter’s interpretation of Thayer’s judicial restraint is not a radical, nor an obscure, legal idea. Judicial restraint is a perennial topic of judicial decision making, but Frankfurter’s advocacy and timing were historically off. The shift from *Gobitis* to *Barnette* reflects a profound change in the Court’s role in deciding legislative questions, which continue to impact civil liberties to this day.

Contemporary history focuses on Frankfurter’s personality, which may reflect the success of Hirsch’s book, *The Enigma of Felix Frankfurter*, and personality may have a significant impact on a judicial entrepreneur’s success, but it is not a determinative quality. It would seem that the reason that Frankfurter’s failed as a judicial entrepreneur in the advocacy of judicial restraint is probably more attributable to the timing of the idea, and his inability to adjust his principle of judicial restraint to the needs of the evolving civil liberties revolution that was taking place on the Court. Regarding the malapportionment cases, they demonstrate his rigidity and unwillingness to change. The subject matter of the cases did not require the absolutist approach that he took, particularly since the other justices were willing to consider the matter a justiciable issue. Even had Frankfurter had a more pleasant disposition, his interpretation of judicial restraint would not have found a receptive audience on a changing Court.

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<sup>394</sup> Ibid., 132.

<sup>395</sup> Ibid., 133.

## F. Conclusion

Frankfurter was clearly an unsuccessful judicial entrepreneur in advocating for judicial restraint and deference to the legislative process. Has Scalia been a successful judicial entrepreneur in getting the Court to rein in the expansive use of statutory interpretation? The answer would have to be a qualified, yes. Regardless of what one may feel or think about Justice Scalia personally or his jurisprudential philosophy, in terms of changing judges' perceptions and attitudes towards using legislative history in statutory interpretation, he has been quite successful. John Manning, a professor at Harvard, commented:

One could not properly take stock of Justice Scalia's judicial career thus far without considering how deeply his approach to statutory analysis has affected the way in which we, as lawyers, talk and think about the problem of statutory construction.<sup>396</sup>

At a minimum, judges must give lip service to textualism when reading statutes and regulations, and should they choose to use legislative history or ancillary documents to support their interpretations, they may have to qualify such use. Scalia may have been less successful in fostering legal changes in abortion, affirmative action, or other substantive legal issues important to conservatives, but his impact on statutory interpretation, an issue that potentially affects all substantive concerns, is beyond dispute. It could be argued that a judicial entrepreneur, to be successful, must limit his advocacy to one or two issues that he can focus his attention on. In Scalia's case, he chose statutory interpretation, but in some respects, it chose him, too, and that choice was only reaffirmed with the passage of time, as he became more and more associated with the issue. He picked an opportunity, seized it, and persistently advocated for it, with the understanding that it would give him the most traction professionally.

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<sup>396</sup> John A. Manning, "Comment: Justice Scalia and the Legislative Process," *New York University Annual Survey of American Law* 62, 33 (2006): 33.

## X. Dissertation Conclusion

At present, popular literature abounds with books applying economic principles to social, political, and legal questions. The best seller, *Freakonomics*, for example, which offers economic perspectives to questions that most would not consider related to economics; *Nudge* and *Sway* expound on the advances in behavioral economics, disposing of the notion of a rational decision maker and replacing it with models that are much more complex and sometimes not at all rational. This budding literature did not appear *ex nihilo* from the firmament, but reflects the influence of scholars over the last sixty years, going back to Gary Becker in the social sciences and Richard Posner in the law, who radically approached social and legal issues and questions utilizing the tools of economics to better understand traditionally non-market area problems and possible solutions. Where their work at first may have been considered part of a conservative, neo-liberal movement, its influence has become much broader than this suggests; and in the law, Posner not only made economic analysis of law respectable, but elevated it to part of the legal canon as a necessary tool for addressing legal questions in American jurisprudence.

The purpose of this dissertation is to analyze the role of Posner as a judicial entrepreneur and to assess his influence and success in persuading the legal academy and judiciary to incorporate economic principles into the judicial decision making process in market and non-market areas of the law. More broadly, the dissertation aims to reveal aspects of judicial entrepreneurship that have so far escaped scholarly notice. The research indicates that, yes, Posner has been influential in persuading others in both the legal academy and the courts of the importance and utility of using economic tools when assessing the law, with the caveat that his influence still remains

stronger in traditional market-oriented areas of the law, such as antitrust, and less so in traditionally non-market areas of the law, such as criminal.

Through the research methods of qualitative case law analysis and the new quantitative research methods of citation analysis, the dissertation makes claims about his influence that are not merely anecdotal. These tools are not without their bias and limitations, but they do provide a good starting point for further research, and offer inferential evidence of influence. The dissertation contributes to the research in the area of judicial politics and judicial-decision making in two respects: it provides a new comprehensive model for a judicial entrepreneur, and it provides evidence of the influence of the legal movement, law and economics, on American jurisprudence. The dissertation also provides scholarly opportunity for further research, for the framework of the dissertation can be applied to other judicial entrepreneurs and legal movements to evaluate their influence.

After reviewing the market and non-market literature on entrepreneurialism, a new comprehensive model of a judicial entrepreneur was created in order to evaluate Posner as a judicial entrepreneur. To evaluate his efficacy as a judicial entrepreneur, a multi-stage research approach was taken, utilizing qualitative, quantitative, and comparative case study research methods. First, a quantitative research method analyzed the legal publication and case law citations, which demonstrated influence upon not only the scholarly literature, but also judicial opinions in which Posner has been cited. By empirically analyzing the citations to Posner's law review articles and his federal case law opinions with the use of computer programs, his substantial impact on the scholarly literature and judicial-decision making could be quantified and measured. To further test the influence of his ideas on economic analysis and the law in

particular legal subject matter areas, and to compare and contrast traditionally non-market areas of the law to traditionally market areas of the law, a qualitative case law analysis was conducted of Posner's opinions as a federal judge. Analyzing his opinions in respect to the economic concept of efficiency, as applied to the exclusionary rule in criminal law, suggest that they have exerted modest influence. On the other hand, a qualitative case law analysis of his antitrust opinions, suggests substantial influence. Both of these results were expected.

To further evaluate Posner as a judicial entrepreneur, and to shed light on some of the characteristics that contributed to this success, the dissertation examines two other justices through comparative case studies who embraced the role of entrepreneur, Antonin Scalia and Felix Frankfurter. In the area of statutory interpretation, Scalia has been a successful judicial entrepreneur, especially in his opposition to the use of legislative history. Frankfurter, however, who came to the Court with considerable practical political and legal experience, had little success in pressing for the adoption of judicial restraint.

#### *Case Study Analysis – Comparative Cases of Judicial Entrepreneurs*

The use of comparative case studies to compare and contrast similarly situated subjects has its strengths and weaknesses, but overall it remains helpful in evaluating the new model for a judicial entrepreneur and lends insight into ways in which the model might be improved, and to raise additional questions for further research. Having developed a more comprehensive model of the judicial entrepreneur to better understand and evaluate the activities of judges. There also are a number of lessons that may be drawn from the individual case studies of Posner, Scalia, and Frankfurter that can be extrapolated to generate a broader understanding of judicial entrepreneurs in general and for future analysis. As discussed, the model for the judicial

entrepreneur may be broken down into two major areas: The characteristics of the judicial entrepreneur and the strategies utilized by the judicial entrepreneur to advocate for his or her legal idea.

The dissertation sets forth a model of the characteristics of the judicial entrepreneurs in which they possess an entrepreneurial spirit, or as Schumpeter termed it, the *Unternehmergeist*, in which the judicial entrepreneur persistently advocated for specific legal ideas and principles not utilized or underutilized. The entrepreneur is a knowledge-based innovator, who actively and persistently promotes his ideas over time. He is persistent and driven, in order to withstand criticism and continue to advocate for his ideas, and is willing to utilize his professional stature, reputation, and interpersonal relationships to see that the legal idea he advocates come to fruition. One of the findings is that, to some degree, the characteristics of the judicial entrepreneur and the strategies they use in their advocacy go hand in hand. The entrepreneurial spirit of the judicial entrepreneur finds expression in the written strategic advocacy of the judge, on and off the court.

The case studies demonstrate that Posner, Scalia, and Frankfurter were all judicial entrepreneurs, to varying degrees, with Posner being the most successful judicial entrepreneur, Scalia a little less successful, and Frankfurter, a failure as a judicial entrepreneur. The case study analysis of all three judicial entrepreneurs found that both Posner and Scalia both exhibited the requisite characteristics of the judicial entrepreneur by not only advocating for their ideas in their legal opinions, which is expected of all judges, but also strategically through the publication of extra-judicial articles and treatises, over a long period of time, advocating for changes to the existing jurisprudential status quo in specific legal areas. For the two judges, their commitment



to extra-judicial writings were not limited to the occasional article or book, but instead constituted a continuously concerted and dogged effort, over many years, expounding and advocating for their ideas on law and economics and statutory interpretation, respectively, in extra-judicial publications. This is a fundamental quality of a judicial entrepreneur, which differentiates a regular judge from a judicial entrepreneur. Unlike a judge, who could be considered a mere advocate of legal idea who justifies their legal reasoning in legal opinions, for Posner and Scalia, the forum of opinion writing was insufficient to their goals and they used their status as judges to advocate for changes through extra-judicial writings – they worked to reach a larger audience. Each possessed the characteristics of being knowledge based innovators, who seized on legal ideas, and persistently advocated for, engaged with critics, and challenged the jurisprudential status quo.

In contrast to the case studies of Posner and Scalia, the case study of Frankfurter revealed some interesting contrasts; in particular, Frankfurter did not take the steps that Posner and Scalia did to reach a wider audience or to advocate for his ideas on judicial restraint. He limited his advocacy to the context of his opinions. He did not utilize his legal stature and status as a Supreme Court justice to persuade a larger audience of his legal theory of judicial restraint. He did have extra-judicial writings, but his publications were more general and historical and were not written for the purpose of advocating for his interpretation of judicial restraint. It would seem from the research, which may reflect his personality and a character flaw he possessed, that he may have felt his opinions should simply speak for themselves. A successful judicial entrepreneur does not simply rely upon his opinions. Rather than continuing to develop a theory of judicial restraint through extra-judicial writings, he relied upon the status quo of a theory of

judicial restraint that had existed for over fifty years, but a theory which did not evolve with the changing needs of the time.

This is an important distinguishing quality between simply being a judge, who in the normal course of his duties writes opinions, and that of a judicial entrepreneur, who chooses to use his position as a platform for extra-judicial writings and advocacy. The opinion is designed to persuade other judges as to the legal reasoning behind the judgment, and can persuade other judges immediately and over time, but due to tradition, factual, and jurisdictional constraints, a legal opinion has inherent limitations. The extra-judicial writings are not limited by these constraints. A key finding is that a judicial entrepreneur, as a knowledge-based innovator, must go beyond simply writing opinions to reach a larger audience. The extra-judicial writings are the strategic tool which a judicial entrepreneur uses to persuade a larger audience. Both Posner and Scalia utilized their professional stature and reputation to advocate for changes to the status quo over a long period of time, and in contrast, Frankfurter did not. This finding raises some interesting questions. All three judges had been legal academics at one point, raising questions for future research: What role does a history of academic involvement play in the development of judicial entrepreneurs? Is the judicial entrepreneur a contemporary phenomenon reflecting the changes to the legal academy and discourse? Are judges being motivated by primary law, legal opinions, or by secondary sources more frequently today?

Another finding of the dissertation lends evidence to the idea that the judicial entrepreneurs need not be well liked to be successful. They must have stature and status within the legal community and must be persistent advocates for a special legal idea or principle traditionally not utilized or underutilized, but more importantly, for the success of the judicial entrepreneur, the

legal idea they are espousing must be timely and salient. This finding was best exemplified in the case studies of Scalia and Frankfurter. Both of them had or have well recognized difficult personalities, and at varying times alienated members of the Court with their less than disguised disdain for their colleagues' intellectual qualities, but one has been a relatively successful entrepreneur, Scalia, in the area of statutory interpretation, and Frankfurter, was not. Both attempted to change their colleagues' views on judicial decision making practices, but Scalia was more successful. This may lend support to the idea that the messenger's personality, in terms of likability, may be less important than the message they are trying to convey. This may seem trivial, but it bolsters the claim that the legal idea being advocated must have a receptive audience and that ideas matter.

Of the three primary legal ideas discuss in the dissertation, economic analysis of the law, statutory interpretation, and judicial restraint, economic analysis of the law may be considered the least developed of the three, but due to Posner's advocacy, the most successful legal idea of the last forty years. Ideas matter, but to bring economic analysis of the law to the forefront, a skilled judicial entrepreneur was required. Scalia has received a more receptive audience to his advocacy of reining in the use of legislative history, but Frankfurter's interpretation of judicial restraint was no longer timely, and therefore he lacked a receptive audience; and he was rigid, and attempted to maintain the status quo while the Court was changing direction.

#### *Quantitative Analysis – Citation Analysis*

The development and use of quantitative citation analysis through computer programs to measure influence is a relatively recently developed analytical tools. It, too, is not without its strengths and weaknesses, but it is useful for analyzing large amounts of citation data to evaluate

trends and measure influence. It is a good inferential tool that is gaining more traction. Particularly in our common law system, citations are fundamental to support legal arguments in legal opinions, law review articles, and treatises, so the measure of their frequency is important to measure trends and infer influence. The citation analysis conducted in the dissertation for law review articles supports the argument that Posner's advocacy for the use of economic analysis of law, in the legal academy has been very influential. As a judicial entrepreneur, his extra-judicial writings exceed any and all judges sitting on the federal courts today. This was expected, but the level of influence was surprising. Further research will be required to determine the long term trends of citations to Posner's extra-judicial writings, but for the purposes of the dissertation, the influence that Posner exerted at the early stages of the economic analysis of law movement is clear.

In respects to the legal opinions citing to Posner's federal case law opinions, influence upon the jurisprudence may be inferred, but not to the same degree of accuracy that can be evidenced in the citation analysis through law reviews, treatises, and other extra-judicial publications. This is one of the weaknesses of quantitative case law analysis when applied to opinions: influence may be inferred, but without as clear a connection as the secondary sources. To compensate for the deficiencies in this methodology for case law opinions, an additional qualitative case law analysis methodology was required to be conducted to assist in determining possible influence. There is evidence of Posner's influence on case law opinions through both his extra-judicial writings and legal opinions, but the influence is much more nuanced and subjective. As expected, he has been cited for numerous extra-judicial publications and opinions that address the use of economic analysis of law in the case law, but primarily in the traditional market oriented areas of law, such as antitrust, and less so in non-market areas of the law.

### *Qualitative Analysis – Case Law Analysis*

Case law opinions are complex and are not easily evaluated by quantitative case law analysis, except in term frequency analysis, in which the substance of an opinion is analyzed by the frequency of relevant terms appearing in the opinion. Due to the nuanced structure of case law opinions, it was necessary to conduct a qualitative case law analysis to infer influence. The cases had to be read and analyzed to appreciate trends, connections, and infer influence. The analysis of Posner's opinions that utilize the economic concepts of efficiency in criminal procedure cases that address the exclusionary rule, demonstrate that Posner's use and influence of economic analysis in non-market areas of the law, particularly criminal, was underutilized. This is an important finding because one of the hallmarks of Posner's advocacy for economic analysis of law has been the incorporation of economics in traditionally considered non-market areas of the law, such as criminal law. This was expected.

In contrast, the qualitative case law analysis of Posner's opinions addressing economic principles in antitrust law, in respect to tacit collusion as an antitrust violation, demonstrated significant influence. This, too, was expected. As a judicial entrepreneur, one of Posner's goals has been the application of economic principles to both traditionally market and non-market areas of the law, particularly the common law, and the qualitative case law analysis demonstrates that even though there has been an incorporation of economic principles of efficiency, Posner has been less successful in incorporating economic principles into criminal law than in antitrust.

Through the research methods utilized in the dissertation, it may be inferred that Posner has been a successful judicial entrepreneur, who has had a significant impact on the dissemination of economic principles in the analysis of legal issues in both the legal academy and in the federal

judiciary. The empirical quantitative, qualitative, and comparative case study methods utilized in this dissertation are not without their faults, but combined they do provide a comprehensive portrait in which influence may be inferred. The development of a new comprehensive model for the judicial entrepreneur, combined with the empirical tool of citation analysis, qualitative analysis of case law opinions, and comparative case study analysis of other justices, provides the foundational framework for future research in helping to better understand judicial entrepreneurs and their influence on jurisprudence.

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