ROUNDTABLE DISCUSSION

The Antitrust Legacy of the Rehnquist-O'Connor Court*

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TAD LIPSKY: Back in 1982, then-former Attorney General Edward Levi was speaking at the investiture of Robert Bork as a judge of the United States Court of Appeals for the District of Columbia Circuit. Part of Professor Levi's address included this observation on judicial authority:

> The investiture of a judge . . . is a reminder of the unique authority and power exercised by the federal judiciary, in American government, and over so many of the affairs of life—authority and power greater and more pervasive than that possessed by courts in any other country we would regard as modern and in our tradition. Indeed, to give full recognition to judicial government, we must use a model, which is close to or at least has strong elements of, a theocracy. Learned Hand had a description of this model in his warning prediction of a rule by Platonic Guardians.

The theme of Professor Levi's address was judicial power and its abuse. He noted a comment that had been made by Lord Denning, who at that time was the "third-highest judge in England," the Master of the Rolls. Lord Denning had been addressing in the U.K. context the power of the courts and the rather "touchy subject" of whether that power might not be abused or misused from time to time. According to Professor Levi, Lord Denning "put this in the form of a question: 'But who is to guard the guards themselves?' His answer was: 'You need have no fear. The judges of England have always in the past—and always will—be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges.'"[1]

So the questions for today, as we look back down memory lane at the Rehnquist Court and the time of Justice O'Connor's service, include: Have we placed within the U.S. Supreme Court that type of powerful authority that Professor Levi compared to that of Platonic Guardians; were we wise to trust them with the authority that they had; and how did they exercise that authority in the antitrust field?

We have an outstanding panel whose qualifications to discuss these questions are so well known that I will limit myself to the briefest of introductions: Hew Pate, former Assistant Attorney General for Antitrust, who clerked for Justice Powell in his post-retirement year and then for Justice Kennedy on the Supreme Court. Bob Pitofsky, former FTC Chairman and renowned antitrust scholar, served as Dean of Georgetown Law School and now teaches antitrust law along with other subjects. Tom Kauper, a professor of antitrust law at the University of Michigan Law School and a former Assistant Attorney General for Antitrust. Professor Kauper clerked for Justice Potter Stewart on the Supreme Court, and perhaps more to the point, Tom was a Deputy Assistant Attorney General to Assistant Attorney General William H. Rehnquist, who in the early Nixon years was Assistant Attorney General in charge of the Office of Legal Counsel.

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Last but not least, FTC Commissioner Bill Kovacic has spent a good deal of time delving into the formerly secret archives of the Supreme Court Justices looking for clues along the tortuous trail of how they arrived at the momentous antitrust decisions of recent generations. To introduce the topics and help us take this look down memory lane, let me ask Commissioner Kovacic to start the discussion.

BILL KOVACIC: I first will provide a quick survey of the Supreme Court's antitrust cases during the Rehnquist/O'Connor era, then identify some key themes and developments in that period, and finish by focusing on the intellectual foundations of the Court's antitrust jurisprudence. In doing so, I will offer my own view and not necessarily those of my agency.

The principal resource for my comments consists of the papers of the Justices. I will draw heavily from the work of Andy Gavil and from many conversations I've had with Andy and Jon Baker about the significance of these papers.

Depending on how you classify individual matters, the Supreme Court issued approximately 70 antitrust decisions during the Rehnquist/O'Connor era. If we group them by categories, the largest number of cases—20 altogether—dealt with exemptions and immunities. State action constituted the main subset of the 20 exemption and immunity matters. The second largest body of cases from this era involved horizontal restraints. The *Dagher*[2] decision is the latest in a litany that begins with *Professional Engineers*[3] and includes landmarks such as *Broadcast Music*[4] and *Superior Court Trial Lawyers*.[5] The third largest category of matters has addressed standing and injury issues associated with the Court's efforts to establish screens and limits on the operation of private rights of action.[6]

Within this period there are also some striking gaps. In the 1990s the Supreme Court issued fewer antitrust decisions than in any single decade since the 1890s. It was a remarkably inactive period of Supreme Court jurisprudence in our antitrust history. Since 1975 the Court has not had a word to say about substantive merger standards. Except for some limited reflections in *Jefferson Parish*,[7] the Court has had nothing to say for decades about exclusive dealing, a topic that has received a great deal of attention in lower courts in the past ten years. You have to go back to the *Brown Shoe*[8] decision in 1966 or to *Tampa Electric*[9] in 1961 to find a Court decision that has much to say about these topics. It is a remarkable period of silence.

One of the most dramatic doctrinal themes to emerge in the Rehnquist/O'Connor era is an express retreat from per se rules and greater reliance on reasonableness standards. This pattern runs through the Court's horizontal restraints cases, the vertical nonprice cases and, in *State Oil v. Khan*,[10] treatment of maximum resale price maintenance.

The vector toward reasonable tests would have been still straighter had it not been for some overreaching by Justice Lewis Powell in *Maricopa*.[11] The Court voted in its conference in *Maricopa* to "DIG" the case—to dismiss certiorari as improvidently granted. Justice Powell proposed to Chief Justice Warren Burger that the Court give some guidance to the trial court about how to address the horizontal restraints at issue. Justice Powell's papers indicate that the Chief Justice replied: "Yes, but keep it short." Justice Powell came back with a 15-page, single-spaced document, which toured all of the Court's horizontal restraints jurisprudence and concluded that the natural path of future doctrinal development had to be toward less reliance on bright-line rules. This sent Justice John Paul Stevens into low earth orbit. Justice Stevens feared that Powell was trying to roll back *Socony*[12] itself and declared that he would resist any further erosion of per se rules in this area.

The dispute between Powell and Stevens escalated, and, rather than DIG the case, the Court chose to decide the matter on the merits. The result was a 4–3 decision that vindicated the per se rule against horizontal agreements to set maximum prices. Had it not been for the overreaching and, perhaps, anxiousness on Justice Powell's part to further cabin the use of per se rules, *Maricopa* would never have entered the U.S. Reports in 1982 as a decision on the merits.

A second key theme has been an incremental, indirect erosion of the per se rule against resale price maintenance and of the prohibitions of the Robinson-Patman Act. In *Monsanto*[13] and *Sharp*,[14] we see the Court forgoing frontal assaults on *Dr. Miles*[15] in favor of indirect attacks.[16]

Andy Gavil's ANTITRUST Magazine article on Lewis Powell's papers documents that Justice Powell was keenly aware that a direct assault on *Dr. Miles* would be counterproductive.[17] While considering *Monsanto* in 1984, Justice Powell considered whether it would be wise to use the case to do what the Court had declined to undertake in *Sylvania*,[18] which is to topple *Dr. Miles* completely. Powell recognized that Congress would have something to say about this and perceived that if the Court repudiated the per se ban against RPM, the legislature might amend the Sherman Act to embed the rule of *Dr. Miles* directly in the statutory text. Powell concluded that it was better to take the path of making the requisite vertical agreements harder to establish and thereby to limit the rule's significance indirectly.

A third noteworthy theme is the creation of standing and injury screens, starting with *Brunswick*[19] and running through a host of cases, such as *Cargill*.[20] In these decisions, the Court made it harder for private litigants to advance treble-damage claims or claims for injunctive relief.

The fourth theme is the Court's great ambivalence about how to treat exemptions and immunities. This ambivalence did not afflict O'Connor and Rehnquist. These Justices displayed an almost uniform and consistent inclination to reinforce key elements of the state action doctrine.

The last and, to me, the most striking theme in the Rehnquist/O'Connor era is that the most important developments in doctrine cannot be explained in terms of a conservative takeover of the Court. Many of the key adjustments

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—BILL KOVACIC

addressed above enjoyed support across the philosophical spectrum, and some shifts could not have happened if the Court's liberal coalitions had not joined the effort.

Consider some examples. Justice William Brennan authored the opinion for the Court in *Arco*,[21] *Northwest Wholesale Stationers*,[22] and *Cargill*. Justices Marshall and Brennan voted for the majority in *Sharp*. Justice Marshall, though he initially helped form what would have been a majority to affirm the court of appeals in *Matsushita*,[23] changed his vote and joined the majority that voted to overturn the Third Circuit's reversal of the trial court's grant of summary judgment for the defendants.

Trinko[24] is the most striking example of the operation of what I would call the "Chicago-Harvard double helix." There is a tendency to frame the intellectual debate about modern antitrust policy in terms of a struggle between the Chicago School and post-Chicago School. This vocabulary strikes me as uninformative and, even worse, misleading. Framing the debate in terms of a Chicago/Post-Chicago debate misses the extent to which the modern Harvard School of Phillip Areeda, Donald Turner, and Stephen Breyer has played a key role in laying the intellectual foundations for non-intervention defaults that so many modern cases have established.

The DNA of modern U.S. antitrust law and policy has two strands, one from the Chicago School and one from the Harvard School. The key figures in the Harvard School—Areeda, Turner, and Breyer—complement and reinforce perspectives often associated solely with Chicago School figures, such as Robert Bork, Richard Posner, Frank Easterbrook, and Antonin Scalia. You can see the strands at work most dramatically in *Trinko*, where the majority includes Scalia and Breyer, two administrative law and antitrust scholars who choose to defer to the judgments of sectoral regulators and who take a skeptical view about the scope and application of Section 2.

When we talk about the intellectual foundations of these developments, we should not be talking about a Chicago/post-Chicago debate view; we should be talking about the complex intertwining of the two strands of the Chicago-Harvard double helix and a literature that seeks to displace this double helix. Such a model more accurately captures what has been taking place in the Supreme Court's antitrust decisions and in the lower courts.

LIPSKY: Bill, I'd be interested in the "whys" of some of the things you've pointed out. The lack of a merger case—is that simply a function of the fact that in merger cases you often do not get a procedural setting in which to bring it up as far as the Supreme Court? Or was the Court declining opportunities to review merger cases and if so, why? And a related question: that gap in the 1990s. Do you tie that to anything doctrinal, or is that a byproduct of the elimination of automatic direct appeal?

KOVACIC: On the latter point, you see a great change if you look back through the Court's modern experience. The abandonment of the direct appeal mechanism was unmistakably an important reason that you see fewer things being queued up for decision by the Court.

One thing that one generally does not see in the papers of the Justices is a glimpse of what the Court is thinking about in the denials of certiorari. Perhaps one of the best indirect foreshadowings of what the Court might do in the future is a denial of certiorari accompanied by a dissent. Justice Rehnquist's skepticism about per se rules comes into view in his dissent from the Court's denial of certiorari in *Berkey Photo*.[25] He wanted the Court to take *Berkey* and to repudiate the Section 1 ingredient of the judgment below, which the Second Circuit sustained.

In *Digidyne*,[26] Justice Blackmun dissented from the denial of certiorari from the Ninth Circuit. When you look at Blackmun's papers on *Image Technical Services*,[27] it is clear that the views suggested in Justice Blackmun's dissent in *Digidyne* became a template for Justice Blackmun's approach to looking at *Image Technical Services*.

Beyond these limited views of the Court's decision not to take certiorari, we don't have a great deal of information from the Justices' papers about why the Court has declined to accept specific matters.

On merger policy, the interesting questions are the cases for which certiorari was not sought. For me the interesting question is what would have happened if the Justice Department had sought certiorari in *Baker Hughes*,[28] where you had arguably the starkest court of appeals decision to that point (maybe with *Syufy*[29] being another contender) that called into question key elements of the Supreme Court's jurisprudence from the 1960s. You can only imagine what kind of opinion the Court would have written had it reviewed the decision below in *Baker Hughes*. Perhaps *Baker Hughes* is the best guide we have today about what kind of merger opinion the Court would write in a merger case, given that two members of the unanimous *Baker Hughes* panel (Clarence Thomas and Ruth Ginsburg) are members of the Court.

LIPSKY: Bill, I can't resist a question about the process by which these secret papers become available. Is each Justice essentially the master of what becomes of his or her own files, or is there a standard, so that it wouldn't be open to a Justice upon the day of his retirement just to say, "Here it is, folks. It will be spread out down on the Mall. You can come look at it." The corollary question is: What do you think will be

the next significant event in terms of access to Court papers that might be revelatory about what's happening in the antitrust field?

KOVACIC: It is at the discretion of the individual Justice. Some members of the Court have been far more cautious than others about making their materials available; some completely incautious. Justice Marshall made virtually everything in his files available. By contrast, most of his colleagues have imposed stricter limits.

The most interesting future revelations may come from collections of papers that are being released over a period of a time. Some Justices have imposed a lag on the release of their papers or have stipulated that access be withheld until the death of all members of the Court who participated in the case in question. Within ten years or so, it will be possible to get a four- or five-sided view of what took place in the Court's merger decisions in the 1960s, when most of the Court's jurisprudence on this topic was established.

LIPSKY: There was certainly a very rich economics and legal literature to draw from to assist the Court during the Rehnquist years. Bob, you've been a significant contributor to that literature. Give us your thoughts on the role of the intellectual process in the Court and where you see the main strands of antitrust development during the Rehnquist/O'Connor years coming from. Is this internally driven or externally driven?

BOB PITOFSKY: I'm going to end up at a similar point to Bill Kovacic, but let me come around to it in a slightly different way. It has been a remarkable 30 or 40 years in U.S. antitrust development, in the sense of convergence between left and right, avoidance of over-aggressive/under-aggressive, antitrust enforcement. The question that I would address is: How did we get to this middle ground where, as I have said previously, the enforcement program of the Clinton FTC and DOJ really from a distance looks very similar to the enforcement policies of the first Bush FTC and DOJ?

I suggest that the leadership in seeking a sustainable middle ground did not come from the Supreme Court. The Court didn't take very many cases. The cases they took, with a few exceptions, did not initiate major innovations. Instead, it seems to me we've had this major sea change in American antitrust, largely as a result of enforcement agency discretion: the rules that were issued, the guides that have been put out by the enforcement agencies, case selection, opinion writing, the way in which cases were argued.

Just take merger policy. Merger policy today is so radically different than it was, let's say, 30 or 40 years ago. In that period, there has been only one Supreme Court case—and that case not entirely on the merits—*General Dynamics*.[30] The most important thing that happened in merger policy was the DOJ-FTC merger guidelines, the 1982 Guidelines that Bill Baxter initiated, which were reinterpreted in a useful way by Jim Rill and his group, and then reinterpreted when the Clinton Administration added an efficiency defense. Merger policy is entirely different today than it was 30 or 40 years ago, but I don't think the Supreme Court had much of anything to do with it.

Also, there are court of appeals opinions that are tremendously important. *Microsoft*[31] didn't make a lot of new law, but it made some, and it certainly took a look at tie-in sales in a way that others had not in the past, especially in the high-tech intellectual property context. *Toys "R" Us*[32] in the Seventh Circuit clarified boycott and agreement law.

Finally, some of the leadership came from academia. The predatory pricing issue was opened up by Areeda/Turner. I don't happen to agree exactly with where they came out, but they opened the debate and many other people contributed. Raising rivals' costs by Steve Salop, Tom Krattenmaker, and their group made a difference.

Now, you ask, "How can you say that the Court had nothing to do with it? Look at this year, three Supreme Court cases decided." But this is a record year in the last 20. Also I would point out that the total vote on those three cases was 23 to 2. These were three slam-dunk cases, cleaning up mistakes that had been made long ago, or in courts of appeals.

You do have, however, one very important area where the Rehnquist Court made a difference and Bill has already referred to it. That is the decline of per se approaches and the increase in flexibility in the way we are directed to address both horizontal and vertical restraints: *BMI*, which took the edge off the per se rule against price fixing; *Northwest Stationers*, which did the same for boycotts; overruling, in *Khan*, the maximum resale price maintenance rule by eliminating a per se approach; easing off on tie-in sales in the concurring opinion in *Jefferson Parish*. Put all that together and what you have is a major change in the United States in terms of the way in which, led by the Supreme Court, the courts will give a thorough rule of reason examination to all but a very few narrow practices.

LIPSKY: Bob, is that a good thing, that the intellectual leadership in this direction came from those various sources of influence—the scholarship, the agency, the revised guidelines, and so forth? Should the Court lead? Is it a fault that they didn't?

PITOFSKY: There were some other things on their mind, and they emphasized constitutional law issues. But as Herb Hovenkamp said, I think it's unfortunate that we haven't heard from the Supreme Court on merger analysis and a few other areas. I believe that with the two new Justices you are going to see a more active competition agenda in the Supreme Court. That would be better for everybody.

LIPSKY: Tom, picking up on Bob's last comment, about the other fish that the Court was frying really, how does that

influence antitrust? Does it influence antitrust? And if so, how? And was that a good or bad thing?

TOM KAUPER: I think when you talk about other fish, one of the things that I think bolsters part of what Bob said is when you look at what cases the Court has elected to take and what they have elected to avoid.

The lack of enthusiasm for merger cases has a flip side, which is the almost exuberant way of taking vertical cases, cases I always refer to as the "clean-up cases," cleaning up the messes of the 1960s. *State Oil* and *Discon*[33] are good examples. *Northwest Wholesale Stationers* is another, as is *Fortner II*.[34] If you step back and look for a moment, you could say that there the Supreme Court took the lead. That was not entirely a response to academia. Part of what they have been doing is simply corrective.

Interestingly, before I go on to the question you put to me, one of the interesting statistics here—and I think I surprised people on the panel when I said it—is since the opinion in *General Dynamics*, we've had no merger cases, but we've had six Robinson-Patman Act cases. Since Justice Rehnquist became Chief Justice Rehnquist, we had one more Robinson-Patman case decided by the Supreme Court than the Federal Trade Commission filed in the same period of time. Now, I don't know exactly what that says, except that lawyers tend to like the Robinson-Patman Act. It looks like a law. Economists don't like it, which means it's lawyers' business. But at any rate, that's where they've put their time.

Let me go to your more immediate question. Back at the time of the Warren Court, it seemed pretty clear to me—in fact, I wrote a piece talking about it—that you could not divorce what they were doing in antitrust terms from what they were doing elsewhere. If you look at the language of cases like *Simpson v. Union Oil Company*,[35] *Klor's*,[36] *Albrecht*[37] and some of the other vertical cases, the Court speaks in terms of preserving the autonomy of small individual entrepreneurs, of making sure there was equality of opportunity for all entrepreneurs, language which you could take straight out of the civil rights opinions of that same period of time. I think that's not a coincidence.

We all know we've had a big debate over the years as to whether we want a specialized trade court of some kind or are we going to rely on generalist courts. We have opted for the latter. When you do that, you are going to be dealing with judges who decide lots of other kinds of cases, and you can't just put them in little boxes and say, "Well, here's what they did in antitrust as opposed to what they did somewhere else."

I think it's a little harder, in terms of the Rehnquist Court, to find themes like the civil rights themes of the Warren Court, but I think there are some there.

In some of the vertical cases, what we are seeing is consistent with the emphasis on property rights that the Court has made clear in a variety of other circumstances. But the whole notion that as an entrepreneur and a property owner I have the right to deal with whom I please and will make the best decisions about what in fact my property is going to be used for runs through a number of the vertical cases. Indeed, if you go back and you read Justice Holmes's opinion in *Dr. Miles*, he basically says, "This is the property of the business owner; they know better than anybody else what to do with it." In *Colgate*,[38] the Court refers to the "long recognized right of a trader" to decide with whom it will deal. No such right was ascribed in any earlier antitrust case. But such a right was long recognized as part of the bundle of rights we identify with property. The reemphasis on *Colgate* in cases like *Monsanto* is thus consistent with this same protection of property theme.

I think you see it more clearly talking about states' rights issues. The Court, going back to the *Southern Motor Carriers*[39] case, opted essentially to expand the states' rights doctrine by leaving behind any notion that you would have a defense only where conduct was coerced by the state, rejecting the contrary suggestion in *Cantor*.[40] With that, they began the expansion of a states' rights notion that seems to me quite consistent with what they've done across the board during this whole period of time in a variety of other cases. You see it in the expansion of the state action doctrine through an unwillingness to examine whether or not there was bribery, or consistency with internal state procedures, because such inquiries would unduly interfere with the states. The preemption decisions, such as *Rice*[41] and *City of Berkeley*,[42] which have been very deferential to the states, reflect these same federalism concerns. This is a persistent theme, I think, that runs through a number of those cases.

We can probably find some others, but those are the ones it seems to me are the most obvious areas where the work of the Court in other fields has impacted or reflected itself in antitrust matters.

LIPSKY: Let me throw this out, really for you, Tom, or for anybody. What you're saying almost suggests that if you look strictly at the substance of antitrust, it seems we might have a consensus, on the panel at least, that the importation of economics and the scholarship brought about a sort of leveling process, a more reasonable, better-tempered approach, departure from per se rules, and so forth. That's on the substance.

But thinking about the immunities, and particularly the federalism theme and state action immunity, I wonder, if you look at the competition mission broadly, if antitrust didn't lose on its always-unstable border what it might have gained at its center in terms of economic rationality.

KAUPER: I think you can argue that, particularly with respect to the state action doctrine. If you go back and you look at Richard Posner's piece on a suggested program for the Antitrust Division, after he gets past mergers and cartel conduct, it's pretty clear that he views state action as something which is in a sense counterproductive—that is, the notion that it is government that creates the most enduring monopoly power—and that we should be very wary about that.

Well, I think the Court has gone in the other direction. In

the *City of Columbia*[43] case Justice Scalia found that concerns over the nature of federalism precluded an examination by federal courts into whether the alleged state action was consistent with the state's own constitution, its own internal procedures, or even whether it was the result of bribery or other forms of corruption. This of course broadens the immunity. It might seem that *Ticor*,[44] where the Court concludes that proper application of the state action doctrine requires an inquiry into what the state has actually done to supervise the conduct, even to the point of putting state officials on the witness stand, calls for a degree of interference with the states that is not consistent with other state action decisions during this period. But in its demand that where states have been given authority they must also be held accountable the Court is actually mirroring what it has said about federalism elsewhere.

But you see now in a lot of the commentary people trying to figure, "Well, can we take some of this back? Is there some way to back off of state action?" It is, I think, in some ways counterproductive.

KOVACIC: One theme that seems not to have caught the Court's attention through all of these developments is the benefit of economic integration as an aim of national policy. Perhaps this is partly a function of the way matters are briefed. The Justices' papers make clear that good briefing makes a difference. One of the best things the advocates can do is to marshal what's taking place in the academic literature, especially if trends in the literature add weight to a position being advanced in a case. Good briefing along these lines was indispensable to the results in *Image Technical Services*[45] and *Matsushita* for the successful parties.

You don't see efforts in the state action cases to persuade the Court that what had been regarded as insulated state markets have become integrated, interstate markets. If you assume that the effects of the regulatory controls at issue are truly intrastate and not interstate, then you might shrug. An idea that has not come through to the Court is the notion that economic integration today increasingly will suffer if you treat certain decisions as being entirely intrastate when they truly have significant interstate spillovers.

LIPSKY: I have a trio of questions basically along that same theme, or I would like to relate it to the same theme. Did Rehnquist like dealing with antitrust?

KAUPER: No, I don't think so. In my two years with him at the Justice Department, we talked occasionally about antitrust, simply because he knew that's what I had been teaching, and there were a few problems that came up from the Antitrust Division.

I thought Herb Hovenkamp was a little strong when he said Rehnquist disliked antitrust. I don't think I would go that far. He didn't know much about antitrust, but then again how many members of the Court do? Stevens and Breyer probably more than any others. But he was very skeptical about it. There's no question about that. I think Hew maybe can add something to that, but that was certainly my impression.

HEW PATE: I think you've got the better knowledge of the man, but in getting ready for this I tried to look at some of the numbers you get for each Justice if you added up the cases. I guess from the numbers on the Chief, you'd have to say one of the biggest themes was an abiding lack of interest in antitrust. There were approximately 50 antitrust cases decided while he was an Associate Justice, a mere 28 during the longer time he was Chief. Now, that may be misleading, because I think the decline in the number of antitrust cases tracked the decline in the number of cases generally at the Court.

But one thing about being Chief Justice is you can vote with your feet and say something about what you are personally interested in, because the Chief Justice has the opinion assignment power. The number of majority antitrust opinions authored by William H. Rehnquist is zero. Among all opinions in argued antitrust cases, there is a single opinion authored by Justice Rehnquist while he was Chief; it's a dissent in *Ticor Title*, saying that the Court hadn't gone far enough in state action. His most extensive opinion while he was an Associate Justice—a dissent in *City of Boulder*[46]—supports the same theme. When he joined state action opinions that denied the immunity they generally were unanimous, maybe indicating there was no traction there at all for his position.

I'm not sure that all this federalism is entirely to the good. But I think it has to be the right theme for the legacy of the Rehnquist Court on antitrust.

—HEW PATE

I think Tom Kauper is exactly right. If there is a Rehnquist antitrust theme, it has to be about federalism. The state action cases predominate. And then look what else happened among the few cases where he's voting for the plaintiff, *ARC America*[47] and *American Stores*,[48] which are both about letting the states have antitrust laws that differ and then letting the state antitrust enforcers make different judgments than the federal ones.

You know, I grew up, as Tad said, doing work for Justice Powell. He cared a lot about federalism, as much as the Chief did. Then, having a federal enforcement job, I lost my religion on the federalism point, and I'm not sure that all this federalism is entirely to the good. But I think it has to be the right theme for the legacy of the Rehnquist Court on antitrust.

So the idea that the U.S. Supreme Court would say: "Well, yes, free markets are great, but who needs the antitrust laws? Antitrust gets in the way of a really free free market," seems to me to be flying in the wrong direction, at least in the view of most of the countries in the world.

—Bob Pitofsky

KAUPER: Justice O'Connor didn't write much more. I mean we're talking today about the legacy of the Rehnquist and O'Connor period. The program puts the two together. But she didn't write very much either. I don't know quite what one reads into that. But if you think about it, there are *State Oil v. Khan*, and her separate opinion in *Jefferson Parish*, and not much more that comes to mind. So between those two, there's very little in terms of what is actually written.

On the other hand, if you assume, as Hew put it, he can assign where he's interested, and if you assume that means that opinions are also assigned to others because they are interested, then you see a very considerable influence by Stevens, particularly prior to 1986, an influence that seems to be reviving again.

KOVACIC: I think in Justice O'Connor's case it's probably the result of the circumstance that so much of her tenure overlapped with a period in which the Court issued so few antitrust opinions.

KAUPER: Right.

KOVACIC: If we attempt to assess her interest in the area, one theme that comes out of the Justices' papers is that O'Connor had a greater interest in the subject matter.

KAUPER: Oh, I'm sure that's true.

KOVACIC: Measured by a continuity of perspective and seriousness of analysis, Justice O'Connor's work really stands out. The most interesting files involve *Jefferson Parish*. The materials on the case account for one of the thickest folders in the Marshall papers.[49] Justice O'Connor goes back and forth with Justice Stevens over how to classify tying and how to evaluate it. When you see the spirit of Justice Stevens's memos in *Jefferson Parish*, today's developments in *Independent Ink*[50] are somewhat surprising. You would not have imagined that he would be the person who would take the historical journey through tying and be as willing as he was to adjust the treatment of patents.

Justice O'Connor's materials in the Marshall papers reveal an intensity of concern that shows up in her published opinions, such as *State Oil v. Khan*.[60] You see an unmatched depth of interest in analyzing and debating the issues.

LIPSKY: Now to shift the question just slightly from one of interest in the antitrust laws and comfort with the antitrust laws, did Chief Justice Rehnquist believe in competition; did he like the antitrust mission? And how about the other members of the Court? Is that something that has colored the development of the Court's antitrust doctrine?

KAUPER: Well, my sense from the discussions with him is he believed a great deal in competition, but he didn't think antitrust had much to do with it, that businesses would do best when they were left alone in competitive terms. Now, that's an overly broad statement, and I'm sure he would have said—indeed, I know he has said—that cartel activity, for example, is not consistent with his notion of the free enterprise system. But I think he tended to look at antitrust as regulatory and, therefore, with the same suspicion that he probably would have thought about airline or trucking regulation.

PITOFSKY: The idea that antitrust doesn't have much to do with maintaining a competitive market is remarkable. The world has moved radically in the direction of free markets and away from centralized planning, and now over 100 countries think they need an antitrust code in order to protect the move in the direction of competition. So the idea that the U.S. Supreme Court would say: "Well, yes, free markets are great, but who needs the antitrust laws? Antitrust gets in the way of a really free free market," seems to me to be flying in the wrong direction, at least in the view of most of the countries in the world.

KAUPER: I don't think I would put Rehnquist's views quite that strongly. But I do think that he tended to see it as a form of regulation which could itself interfere with free enterprise.

PITOFSKY: The view would not be unprecedented. Holmes probably felt that strongly about the counter-productive effect of antitrust. He called price cutters a bunch of knaves.

LIPSKY: I'm having a little disconnect here. Let's focus on the belief in the efficiency of competition as an economic policy—I mean forget about antitrust law for a moment. Do you think Rehnquist saw or, if he didn't see, would have been capable of seeing, how his supportive views of competition would in a sense clash with his views under federalism doctrine of a strong antitrust role for the states? Do you think he was conscious of that tension? Is there any evidence from his time on the Court that he tried to deal with that?

KAUPER: No, I don't think he was particularly conscious of

the tension. There may be some other members of the Court who were.

PATE: I don't think there has been a great deal of recognition of that point on the Court in general. Justice Scalia wrote an article in 1982 called "The Two Faces of Federalism,"[51] which suggested that if you really believe in federalism you still have to assign a federal role to things involving commerce. But that article has not been cited in any opinion that expanded federalism concepts, and the Justices don't seem to take account of the fact that expanding states' rights is going to be used as an argument to protect regulatory activity by those states. So I think the answer is no, there isn't much recognition of it.

KOVACIC: I think it goes beyond simply a state and federal matter to larger questions about institutional comparative advantage. One of the themes that Tom just mentioned in *City of Columbia*[52] involved the bribery claims surrounding the implementation of the land use regime. The plaintiffs had claimed that the results that produced the state intervention had been paid for by the defendants and that antitrust law ought to be used as a supplementary means of undoing corrupt deals. You recall Justice Scalia's observation for the majority: "Well, there are public integrity statutes to deal with that" and you don't need the overlay of antitrust oversight.

Another case that raises key issues of institutional comparative advantage is *Trinko*. Aside from the Court's treatment of the specific allegations and a result that strikes me as reasonable in the context in question, you see a broad, undocumented discussion about the relative competence of antitrust courts and regulatory bodies. The Court majority in effect says: "You've got a collateral regulatory regime that's overseeing and monitoring the conduct in question, and that's enough." That is not the position the Court took in *Otter Tail*,[53] which was issued soon after Rehnquist joined the Court and in which he issued a concurring opinion that dissented in part.

A key shift in this period has the Court taking a more flattering view of the role of public utility oversight and its efficacy, as opposed to antitrust oversight. This has powerful consequences, given the frequency with which those two systems rub up against each other.

LIPSKY: Well, two related questions to extend from that. One is: Is there any strain of tradition or legal concept that is currently popular with the Court, or even evident in the Court, that would lead the Court ever to question a legislative judgment to throw a question of how our economy should be organized into a regulatory context? Is the rule that "if a legislature places it into the regulatory context, that's the end—we don't reexamine that judgment at all?" Is there anything in U.S. Supreme Court doctrine that would permit or encourage such a reexamination?

I can't resist pointing out that in Europe we have exactly the opposite model, where there is, at least at the intellectual level, a kind of total fusion and unity between the competition rules of the European Union and the notion of economic integration, and there are serious obligations placed right in the very first critical Articles of the European Union Treaty, obligations placed on the Member States not to conduct themselves in ways that distort the "Single Market."

So, to repeat, with that background, is there any model of analysis that would lead the Supreme Court to question that when the legislature draws the border between competition and state action, there is anything to do other than lament the result? Up to now the predominant Court reaction seems to be, "When we tried to second-guess the legislature, we ended up in the *Lochner*[54] mess and we'll never repeat that again. Just look what happened in the 1930s."

PATE: Well, it's sort of interesting. If you read *Independent Ink* today, you have this opinion that just swims around every potential source—academic, the agency guidelines, and court opinions. It's a very sort of constitutional style of decision making. So maybe if there's going to be an antitrust renaissance, then the Justices on the Court who are fascinated with importing foreign law can now start citing European Commission decisions and it will come in that way.

KOVACIC: Look at how often in some of its formative opinions the Court steps forward, as it did in *Independent Ink* today, and says, "There is now a consensus. It is a clear consensus." That rhetorical approach appears in *State Oil v. Khan*, where Justice O'Connor says, "There is now a clear consensus that maximum RPM should not be subject to per se condemnation."

In *Trinko* the Court waves its hands and says, "We all know now that antitrust courts should display humility in looking at what regulatory agencies do." You can read the opinion in vain for footnotes that display the consensus. Breyer and Scalia know that the relevant literature on these points features a sharp division of opinions, yet they cite none of it. It is almost a magic wand trick to say, "The consensus now exists" without documenting, at least with some cites to the literature, the basis for that view. You start to wonder: How do we know we have attained a consensus? How do you intuit that the consensus exists?

My sense is that two forces play a role in shaping this kind of decision making. One is the way the cases are briefed. Among the briefs that have made a difference are those that worked hard to say, "Here's the literature, here's the empirical data that supports or undermines assumptions on which you've been working, and you ought to rethink those assumptions." It's clear that the advocates have a key role to play in doing that.

The second reflection involves the way one can challenge assumptions by marshaling empirical data. In the case of state action, if the Court thinks that the effects at issue typically are purely intrastate effects, the advocate ought to be seeking and

presenting empirical data that shows the effects have important interstate implications. The advocate should attempt to identify benefits from economic integration that the Court seems to be underestimating. In *State Oil v. Khan* the Court said, "When the facts change, we'll change our mind too." One way to get a reconsideration of previous assumptions is to marshal evidence that the facts have changed.

A noteworthy example of this approach, and an example underscored in Andy Gavil's work, is Donald Turner's brief for the Motor Vehicle Manufacturers in *Sylvania*. In red ink on the cover of his copy of Turner's brief, Justice Powell wrote, "This is worth reading." I suspect that one reason Justice Powell thought the brief was worth reading is that it used the literature and empirically oriented commentary to offer new look at the subject.

PITOFSKY: I have only looked at the head notes for *Independent Ink*, so I don't want to comment on it. But on *Khan* I think there are a couple of points worth noting. One is the scholarship *was* unanimous that characterizing maximum resale price maintenance as illegal per se is a bad idea. Also the amicus briefs were close to unanimous, including an amicus brief by the Clinton Administration saying that a per se rule against maximum resale price maintenance makes no sense at all.

Why would we be surprised that an intelligent group of people would look at all that, would look at the arguments pro and con, and overwhelmingly say, "Why would we want a per se rule in an area like this? To the extent that there's any argument at all in this area, it is that we may mistake maximum for minimum resale price maintenance, but we ought to be able to work that out in a rule of reason analysis." That, it seems to me, is what produces significant, virtually unanimous moves.

KAUPER: I think, to go back again to this consensus point, the enthusiasm for taking vertical cases arose out of that consensus. If I can go back to a moment ago when I talked about the Rehnquist view, I would note so you know the timeframe, that I was his Deputy from 1969–1971. What antitrust were we talking about in 1969? I would suggest that if we were to put this panel back in 1969 and say, "What do you think about antitrust as it now exists?" we would all be skeptical. So I'm not sure his view was all that different, at least at that moment. Now, what happened after that is a little different.

But finally, to go back to the state action point, I don't think there is a consensus among people outside the Court as to where we should be going with that. I don't think there is any realistic possibility that you are going to see any major change coming from this Court until some greater consensus for shifting away from where we are now develops. I don't see that coming at the immediate moment.

LIPSKY: Let me dip back a few comments ago and talk a little bit about the role of economic reasoning in the Court's decisions. We've discussed *Khan*, we've discussed *Independent Ink*, both circumstances where I think the Court was looking at an old principle, something taken from the "ghost fleet"—of old cases—well, I guess that's not really the right term, because some are still precedents that continue to have some impact on litigation. Cases like *Khan* and *Independent Ink* wouldn't arise, I suppose, if the old precedents were dead. But the style of the opinion was: "Here is a little bit of junk that we're clearing away." The consensus of the commentary is very much in favor of what they are doing.

I want you to address, for a second, the question of how far the Court will go in spinning out an economic analysis of its own. I mean suppose that a merger case got into the Supreme Court and they were trapped with a substantive review and really didn't have anything crazy to deal with. Suppose the Court was actually going to have to work through the framework of substantive merger analysis; what is the role and significance of market definition and market share; and what are they going to say about concentration and what about the various competitive effects? These are all very important and very difficult questions. Even if you talk to professional antitrust economists of goodwill and high intelligence, it's easy to get disagreement.

I perceived that *Matsushita* and *Brooke Group*[55] were both occasions when, if you were sympathetic to the principle of jury trials and the idea of the role of the expert and who decides what the facts are, you should have been very surprised to see in *Matsushita* the Court say, "We're going to take this expert opinion that says there was a predatory price-fixing conspiracy and just throw it out. It's not plausible." And similarly in *Brooke Group*, the testimony about the oligopolistic disciplinary pricing by a firm with 11 percent of the market, a market presided over by two giants. And then you get the whole *Daubert*[56] line of cases.

So the broad question is: Is the Court willing to delve into economics to a degree that is more than just putting a rubber stamp or seal of approval on the consensus that has already been generated externally, as we've suggested might be the case with some of these recent so-called clean-up decisions? Or is the Court ready to step up to the plate on economic analysis? Do they have a good lineup to take a merger case and really get into the issues—or a unilateral conduct case like *LePage's*[57] or what have you—and really take a swing at some of the most difficult issues from the perspective of economic policy and where it fits into antitrust?

KAUPER: I don't know that there's an answer to that. I get very skeptical about their ability to handle some of these kinds of issues. It's one of the reasons I was not anxious to see them take the *LePage's* case, which it seems to me had a potential for disaster.

The Court has a tendency to freewheel. You can go all the way back to the *Topco* case.[58] The government never really argued there was a per se violation, but there went the Supreme Court off on a frolic of its own.

PATE: If you look at what they have done elsewhere, it's very hard to make an argument that this Court, at least up until it has gotten two new members, is very much moved by any idea of its own limits, that there's any area where it wouldn't be willing to move in. Look at the Sentencing Guideline cases, campaign finance, really major areas. They have said, "We'll handle it. We'll not defer to the legislature and we'll take on very fundamental things." And, as you say, they do it in a freewheeling way.

PITOFSKY: I agree with that. They're not shy and they're not timid about their own abilities to take on these tough, complicated questions. So far, with the enormous decline in the number of cases they take, and all the constitutional law non-business sector issues that they've been addressing, they've stayed away from antitrust, and I hope and expect that that will not continue with this new group.

I think most people believe the FTC and DOJ Guidelines on mergers is about where American law ought to be. But as Hew pointed out to me, until the Supreme Court says "we're there too," it really is an uncertain area. I think it is very important for the Supreme Court to ratify that part of the Guidelines that they are comfortable with.

Last point. To decide a merger case, the Court doesn't have to rewrite every section of the Guidelines. They need only address the issue that determined the result in the case, the way lower courts usually do—for example, the way that the District Court addressed the issue of product markets and submarkets in *FTC v. Staples*.[59]

PATE: "Convergence" is the word that describes their role. They're not making up the ideas. But the convergence of telling scholars and everybody else what is the arena in which you can argue with each other—they do that. I mean, today, we all ran around, and Steve Calkins printed up copies of *Independent Ink*. He wouldn't have printed up a newly arriving law review article. The reason is because they get to say where the convergence is headed, but that is not because they think it up.

KOVACIC: The curiosity with the long silence on substantive merger standards—31 years since *Citizens & Southern National Bank*[60]—is: Where would the Court draw the lines today? The last time the Court drew the lines it set extraordinarily sensitive, hair-trigger thresholds, displayed acute skepticism of efficiencies in *P&G*,[61] and generally imposed breathtaking limits on horizontal and vertical mergers. What will the Court use as the focal point for adjustment in its next case? Will the Court use the federal merger guidelines to set things in about the right place by seeking to catch a six-to-five transaction, or will the Court be receptive to setting a more permissive threshold of concern? Where are they going to set the new framework, given that the prevailing Supreme Court jurisprudence is so old?

The other thing that I think comes out of the Court's papers is: When they decide to revise merger doctrine, where will they get their ideas? The framework for *Matsushita* was written by a law clerk, who happened to be a student of George Priest's and who happened to have absorbed George Priest's view on predatory pricing. His bench memo for Justice Marshall became the template for Justice Powell's opinion in *Matsushita*.

To reconstruct the dialogue, a law clerk in Powell's chambers seems to have told Marshall's clerk, "I hear you've got an interesting memo. Could I see that?" If you do the side-by-side comparison of the bench memo from the Marshall clerk and the Powell opinion, they're strikingly similar. That's where the framework came from. Who would have devised a model that predicted that, in this case, the clerks would be the means through which the Court would absorb ideas that informed the decision?

When *California Dental Association v. FTC*[62] was argued, I suspect a large number of people would have wagered that Justice Breyer would write the opinion. Few, I expect, thought that Justice Souter would write for the majority. In discussions about the Court's opinion, I can imagine Justice Breyer reminding Justice Souter that he had studied antitrust for a lifetime and that his judgment on these issues was worthy of deference.

These and other episodes suggest that it is much less easy to predict where the members of the Court will get their ideas and how they will make their decisions that one might think from a distance.

I don't think *Dagher* gives me a whole lot of confidence in the way they do this form of analysis.

—TOM KAUPER

KAUPER: I think that's right. I don't think it's a question of whether they're willing to act; it is a question of what they are going to act on and how capable they are of dealing with it. Bill already has made the point about briefing, and so on.

I must say I don't think *Dagher* gives me a whole lot of confidence in the way they do this form of analysis. The opinion itself has a lot of rather troublesome things, including a rather remarkable statement that vertical price fixing is not per se illegal. I must say that the analysis in *Dagher* is sufficiently disturbing that I wanted to know whether any other members of the Court read the opinion before it was released.

KOVACIC: Tom put his finger on a real puzzle here, because when you look at the other folders, they talk about these things. They routinely send notes to each other saying, "I don't like that footnote." Can you imagine that Justice Breyer did not put that draft in his briefcase and take it home and say, "I am going to read this one with particular interest and

care." One wonders whether he saw that parenthetical and said, "Wait a minute—that's not technically accurate." You'd expect Professor Breyer or Professor Scalia or Justice Stevens to say, "There's something wrong with this picture," and at least send the kind of note that the Justices are accustomed to sending that says, "Tweak this passage for me."

The fact that the opinion walks out the door makes you think, perhaps as Herb Hovenkamp was saying before, that this was the penultimate draft and they failed to give the final draft to the printer.

LIPSKY: It's time to get into the home stretch. I want to transition to comments that I hope Hew will make. We've had a lot of profound changes in the composition of the Court just recently. The passing of Chief Justice Rehnquist now takes the stewardship of the Court from the hands of someone who, I gather we regard it as undeniable, didn't really like taking up antitrust—he didn't seek opportunities to deal with it, he didn't steer the Court toward issues in the antitrust field. Now we have a new Chief Justice and we've got a very different-looking composition of the Court, without Rehnquist and O'Connor, but now with Roberts and Alito.

I offered Hew the opportunity to be the forward-looking part of this mostly backward-looking panel. Hew, if I can ask you, where are we going with this new membership and this new era beginning now?

PATE: Well, I don't know if there is going to be more interest. There has definitely been a shift.

Take a look at the numbers I've put together at the bottom of this chart on the pro-plaintiff vote compared to the pro-defendant vote of the Justices on antitrust cases during the Rehnquist era. If you just put a circle around the number that is higher, it almost makes a little graph in the decline of support for plaintiffs over the years, as these Justices have shifted. Stevens holds the highest number in terms of support for

Voting Agreement in Antitrust Cases During Rehnquist Era†

	Douglas	Brennan	Stewart	White	Marshall	Burger	Blackmun	Rehnquist
Douglas	X	78 (7/9)	60 (6/10)	50 (5/10)	67 (6/9)	30 (3/10)	40 (4/11)	30 (3/10)
Brennan	78 (7/9)	X	59 (16/27)	68 (38/56)	98 (52/53)	65 (31/48)	78 (42/54)	60 (34/57)
Stewart	60 (6/10)	59 (16/27)	X	71 (22/31)	59 (17/29)	68 (21/31)	68 (21/31)	81 (21/31)
White	50 (5/10)	68 (38/56)	59 (17/29)	X	75 (43/57)	65 (34/52)	81 (52/64)	61 (44/72)
Marshall	67 (6/9)	98 (52/53)	55 (17/31)	75 (43/57)	X	71 (34/48)	80 (44/55)	60 (35/58)
Burger	30 (3/10)	65 (31/48)	68 (21/31)	65 (34/52)	71 (34/48)	X	76 (37/49)	77 (40/52)
Blackmun	40 (4/11)	78 (42/54)	68 (21/31)	81 (52/64)	80 (44/55)	76 (37/49)	X	66 (43/65)
Rehnquist	30 (3/10)	60 (34/57)	81 (21/31)	61 (44/72)	60 (35/58)	77 (40/52)	66 (43/65)	X
Powell	43 (3/7)	71 (32/45)	74 (20/27)	68 (34/50)	79 (34/43)	85 (40/47)	76 (34/45)	81 (38/47)
Stevens	X	71 (34/48)	65 (13/20)	80 (47/59)	69 (33/48)	61 (25/41)	64 (38/59)	61 (41/67)
O'Connor	X	68 (21/31)	X	49 (19/39)	75 (21/28)	100 (19/19)	56 (22/39)	86 (36/42)
Scalia	X	80 (8/10)	X	50 (9/18)	67 (8/12)	X	61 (11/18)	78 (21/27)
Kennedy	X	67 (6/9)	X	53 (9/17)	55 (6/11)	X	59 (10/17)	80 (20/25)
Souter	X	X	X	63 (5/8)	0 (0/2)	X	75 (6/8)	88 (14/16)
Thomas	X	X	X	33 (2/6)	X	X	33 (2/6)	86 (12/14)
Ginsburg	X	X	X	X	X	X	X	88 (7/8)
Breyer	X	X	X	X	X	X	X	75 (6/8)

Voting for Plaintiff/Defendant in Civil Antitrust Cases During Renhquist Era†

	Douglas	Brennan	Stewart	White	Marshall	Burger	Blackmun	Rehnquist
Plaintiff	60 (6/10)	59 (33/56)	37 (11/30)	59 (39/66)	60 (34/57)	39 (20/51)	55 (35/64)	29 (22/75)
Defendant	40 (4/10)	41 (23/56)	63 (19/30)	41 (27/66)	40 (23/57)	61 (31/51)	45 (29/64)	71 (53/75)

Methodology Chart 1 (Agreement): This chart measures voting agreement in antitrust cases on a binary basis, i.e., whether two Justices agreed in the judgment of the Court. If a Justice concurred or concurred in the judgment, he or she is treated as agreeing with the Justices in the majority on the judgment. If a Justice concurred in part and dissented in part or just dissented, he or she is treated as not agreeing with the judgment of the Court and thus those in the majority. The percentage given equals the number of times two Justices agreed/the number of times two Justices had the opportunity to agree. The chart is dissimilar to the voting matrix developed by the *Harvard Law Review*, which is not done on a binary basis. The cases considered for purposes of this analysis had at least one holding respecting an antitrust statute, including the Sherman Act, Clayton Act, and Robinson-Patman Act.

plaintiffs. Kennedy is evenly balanced. But the pattern is pretty clear.

As to interest, I don't know. You can say that Breyer and Scalia are more interested in antitrust. Maybe so. I had the privilege of being on a panel with Justice Scalia where one of the subjects was going to be *Trinko*. I was involved in *Trinko*, and so I thought this was just the greatest thing that had ever happened and how wonderful it was going to be. He opened the panel by asking whether we couldn't find a more interesting case to talk about. So interest is a matter of degree.

But Justice Scalia and Breyer have more interest certainly than the Chief and some others. Maybe there will be a general increase in the number of business cases taken. Certainly that would be consistent with some of Chief Justice Roberts's career as an advocate in the Court and the type of cases he had.

As to where they will be on antitrust, it is sort of interesting. Chief Justice Roberts as a lawyer ended up being an advocate for plaintiffs in monopolization cases very frequently. He represented the plaintiffs in, of all things, the *Independent Service Organizations* case, *CSU v. Xerox*,[63] *Intel v. Intergraph*,[64] and several others. So you might say, "Gee, maybe there's a possibility he will be more plaintiff-friendly." He was in the *Microsoft*[65] case for the plaintiffs, but really on the judicial misconduct issue more than others.

On the other hand, I went back and I looked at an article that he had put out in 1994 on the question: "Do we have a conservative Supreme Court?"[66] I think this quote, which I'll just read, may give you an indication of his level of attention to and knowledge of antitrust issues. The feel of it may tell you something. This was written in 1994, right after *Kodak*.[67] He says:

> In the antitrust area, the Court seems to regain its equilibrium after the dizzying *Kodak* decision of two Terms ago. That decision surprised most observers by upholding a predatory pricing verdict based on dubious if not implausible economic theory. In the 1992–93 Term, in three deci-

Powell	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
43 (3/7)	X	X	X	X	X	X	X	X
71 (32/45)	71 (34/48)	68 (21/31)	80 (8/10)	67 (6/9)	X	X	X	X
74 (20/27)	65 (13/20)	X	X	X	X	X	X	X
68 (34/50)	80 (47/59)	49 (19/39)	50 (9/18)	53 (9/17)	63 (5/8)	33 (2/6)	X	X
79 (34/43)	69 (33/48)	75 (21/28)	67 (8/12)	55 (6/11)	0 (0/2)	X	X	X
85 (40/47)	61 (25/41)	100 (19/19)	X	X	X	X	X	X
76 (34/45)	64 (38/59)	56 (22/39)	61 (11/18)	59 (10/17)	75 (6/8)	33 (2/6)	X	X
81 (38/47)	61 (41/67)	86 (36/42)	78 (21/27)	80 (20/25)	88 (14/16)	86 (12/14)	88 (7/8)	75 (6/8)
X	63 (25/40)	80 (16/20)	X	X	X	X	X	X
63 (25/40)	X	62 (26/42)	64 (16/25)	64 (16/25)	69 (11/16)	57 (8/14)	75 (6/8)	63 (5/8)
80 (16/20)	62 (26/42)	X	83 (19/23)	64 (16/25)	69 (11/16)	79 (11/14)	63 (5/8)	63 (5/8)
X	64 (16/25)	83 (19/23)	X	84 (21/25)	88 (14/16)	86 (12/14)	88 (7/8)	75 (6/8)
X	64 (16/25)	64 (16/25)	84 (21/25)	X	75 (12/16)	71 (10/14)	88 (7/8)	75 (6/8)
X	69 (11/16)	69 (11/16)	88 (14/16)	75 (12/16)	X	79 (11/14)	88 (7/8)	75 (6/8)
X	57 (8/14)	79 (11/14)	86 (12/14)	71 (10/14)	79 (11/14)	X	88 (7/8)	88 (7/8)
X	75 (6/8)	63 (5/8)	88 (7/8)	88 (7/8)	88 (7/8)	88 (7/8)	X	75 (6/8)
X	63 (5/8)	63 (5/8)	75 (6/8)	75 (6/8)	88 (7/8)	88 (7/8)	75 (6/8)	X

Powell	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
37 (17/46)	62 (39/63)	24 (10/41)	40 (10/25)	48 (11/23)	27 (4/15)	8 (1/13)	33 (2/6)	12.5 (1/8)
63 (29/46)	38 (24/63)	76 (31/41)	60 (15/25)	52 (12/23)	73 (11/15)	92 (12/13)	67 (4/6)	87.5 (7/8)

Methodology Chart 2 (Plaintiff/Defendant): This chart measures the number of times a particular Justice voted for the plaintiff or defendant in an antitrust case. The Court's decisions were classified as for the plaintiff or for the defendant depending on whether the disposition of the majority favored the plaintiff (the party filing the antitrust claim, even if it was a cross-claim) or the defendant (the party defending against the antitrust claim). Then, those Justices in the majority, concurring, or concurring in the judgment were classified as agreeing with the Court and thus voting in favor of the party the Court favored. The Justices concurring in part and dissenting in part and dissenting were classified as disagreeing with the Court and voting for the opposite party. The cases considered for purposes of this analysis had at least one holding respecting an antitrust statute, including the Sherman Act, Clayton Act, and Robinson-Patman Act, except *United States v. United States Gypsum Co.* (1978), and *Hartford Fire Insurance Co. v. California* (1993), were not factored into this analysis.

† Prepared by R. Hewitt Pate and Ryan A. Shores, members of Hunton & Williams Competition Practice Group.

sions the Court returned to a regime in which the objective economic realities of the marketplace take precedence over fuzzy economic theorizing or the conspiracy theories of plaintiffs' lawyers. This is bad news for professors and lawyers, good news for business.

I leave to you what the tenor of that article reveals.

As for Judge Alito, now Justice Alito, in terms of cases we've been talking about, he was on the original panel opinion in *LePage's v. 3M*, was in dissent in the en banc case there. I don't know what this tells you, but to bring it full circle, one trivia question might be: What other Justice currently sitting on the Court dissented in *Ticor Title*? That would be now Justice Alito while he was on the Third Circuit.[68]

So I'll stop with that.

LIPSKY: Unless any of the other panelists have a burning desire to make a final comment, let me just express the hope that, like most good rock music groups, their best work tends to come around again. So for those of you who are still watching the cable channels after "The Daily Show" and the "Colbert Report," in addition to the ads for the Ginsu Knives and the various miracle air purifiers, maybe we'll see a CD of "White Marble Memories: The Rehnquist/O'Connor Court and Their Antitrust Output." ■

[1] Edward H. Levi, Talk Given at the Investiture of Robert Bork (Feb. 19, 1982) (copy on file with Mr. Lipsky).

[2] Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006).

[3] National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

[4] Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

[5] FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).

[6] *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); *see also* Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Supreme Court* 79 ST. JOHN'S L. REV. 553 (2005) (reviewing *Illinois Brick* in light of papers of Justices Marshall and Powell).

[7] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[8] FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

[9] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[10] State Oil Co. v. Khan, 522 U.S. 3 (1997).

[11] Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982). *See also* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY, *Sidebar 2-2:* Maricopa *as Seen Through the Marshall and Powell Papers*, 114–15 (2002).

[12] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[13] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[14] Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

[15] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[16] *See also* GAVIL, KOVACIC & BAKER, *supra* note 11, at 370–73.

[17] Andrew I. Gavil, *A First Look at the Powell Papers:* Sylvania *and the Process of Change in the Supreme Court*, 17 ANTITRUST, Fall 2002, at 8.

[18] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[19] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[20] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).

[21] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

[22] Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985).

[23] Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574 (1986). *See also* GAVIL, KOVACIC & BAKER, *supra* note 11, *Sidebar 3-3:* Matsushita—*Perspectives from the Marshall Papers*, 266–67.

[24] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[25] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (Rehnquist, J. and Powell, J., dissenting).

[26] Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) (White, J. and Blackmun, J., dissenting).

[27] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[28] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

[29] United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990).

[30] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[31] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[32] Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

[33] NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[34] United States Steel Corp. v. Fortner Enters., 429 U.S. 610 (1977).

[35] Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964).

[36] Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959).

[37] Albrecht v. Herald Co., 390 U.S. 145 (1968).

[38] United States v. Colgate & Co., 250 U.S. 300 (1919).

[39] Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48 (1985).

[40] Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

[41] Rice v. Norman Williams Co., 458 U.S. 654 (1982).

[42] Fisher v. City of Berkeley, 475 U.S. 260 (1986).

[43] City of Columbia v. Omni Outdoor Adver., 499 U.S. 365 (1991).

[44] FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

[45] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[46] Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

[47] California v. ARC America Corp., 490 U.S. 93 (1989).

[48] California v. American Stores, 495 U.S. 271 (1990).

[49] *See also* GAVIL, KOVACIC & BAKER, *supra* note 11, *Sidebar 7-1: The Per Se Rule, the Rule of Reason and Tying—A View from the Marshall Papers* 707–08; William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, 42 ANTITRUST BULL. 93 (1997).

[50] Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006).

[51] Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL. 19 (1982).

[52] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991).

[53] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[54] Lochner v. New York, 198 U.S. (1905).

[55] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[56] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

[57] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

[58] United States v. Topco Assocs., 405 U.S. 596 (1972).

[59] FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[60] United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86 (1975).

[61] United States v. Procter & Gamble Co., 386 U.S. 568 (1967).

[62] California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

[63] *In re* Independent Serv. Orgs. Antitrust Litig. (CSU LLC v. Xerox Corp.), 203 F.3d 1322 (Fed. Cir. 2000).

[64] Intergraph Corp. v. Intel Corp., 253 F.3d 695 (Fed. Cir. 2001).

[65] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

[66] Symposium: Do We Have a Conservative Supreme Court?, 1994 PUB. INT. L. REV. 104.

[67] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[68] Ticor Title Co. v. FTC, 998 F.2d 1129 (3d Cir. 1993).