

2017

# Law and Economics Scholarship and Supreme Court Antitrust Jurisprudence, 1950–2010

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## Citation Details

Camden Hutchison, "Law and Economics Scholarship and Supreme Court Antitrust Jurisprudence, 1950–2010" (2016) 21 Lewis & Clark L Rev 145-209.

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LAW AND ECONOMICS SCHOLARSHIP AND  
SUPREME COURT ANTITRUST JURISPRUDENCE, 1950–2010

by  
Camden Hutchison\*

*Although law and economics has influenced nearly every area of American law, few have been as deeply and as thoroughly “economized” as antitrust. Beginning in the 1970s, antitrust law—traditionally informed by populist hostility to economic concentration—was dramatically transformed by a new and overriding focus on economic efficiency. This transformation was associated with a provocative new wave of antitrust scholarship, which claimed that economic efficiency (or “consumer welfare”) was the sole legitimate aim of antitrust policy. The U.S. Supreme Court seemingly agreed, issuing decision after decision rejecting traditional antitrust values and adopting the efficiency norm of the law and economics movement. By century’s end, the populist origins of antitrust had faded into memory, and the professional discourse of the antitrust community (scholars, practitioners, and judges) had become dominated by economic analysis.*

*Although this transformation in antitrust law has been the subject of considerable academic commentary, its causes remain poorly understood. Many scholars assume, sometimes tacitly, that the economic analysis of law and economics scholarship had a direct, educative influence on the Supreme Court. Other scholars argue that changes in the Court’s antitrust jurisprudence were merely a reflection of changes in its composition, specifically the conservative appointments of the Nixon administration. What these opposing interpretations share in common is their limited evidentiary basis—both are derived from impressionistic reviews of a select number of Supreme Court decisions, rather than systematic analysis of larger historical trends.*

*This Article moves beyond previous scholarship by presenting a comprehensive, quantitative study of every Supreme Court antitrust case from 1950 to 2010, a period including the decades before, during, and after the economic turn in antitrust. This comprehensive approach allows for*

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\* J.D., Columbia Law School; Ph.D. Candidate, University of Wisconsin–Madison. Thanks to Colleen Dunlavy, Thomas Archdeacon, Susannah Camic Tahk, Peter Carstensen, and Herbert Hovenkamp for helpful feedback on earlier drafts. I would also like to thank the Institute for Legal Studies at the University of Wisconsin Law School. Any errors are, of course, solely my own.

*more generalized conclusions regarding the real-world influence of law and economics scholarship. Based on both quantitative and qualitative evidence, this Article concludes that the Nixon appointments of the late 1960s and early 1970s were the primary cause of changes in antitrust jurisprudence, but that academic developments have infused these changes with an intellectual legitimacy they might otherwise have lacked, broadening their appeal and effectively insulating them from future changes in the composition of the Court.*

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## I. INTRODUCTION

Law and economics—the application of economic theory to legal analysis—is widely considered among the most influential developments in legal scholarship of the past half-century. And while the law and economics movement has influenced nearly every area of American law (from corporate governance to family relations, and from contracts to the Constitution), few have been as deeply and as thoroughly “economized” as antitrust. Beginning in the 1970s, antitrust law—traditionally informed by populist hostility to economic concentration—was dramatically transformed by a new and overriding focus on economic efficiency. This transformation was inspired by a provocative new wave of antitrust scholarship, which argued that economic efficiency (or “consumer welfare”) was the sole legitimate aim of antitrust policy.<sup>1</sup> Much of this scholarship criticized traditional, populist antitrust jurisprudence as ideologically biased, doctrinally incoherent, and (worst of all) harmful to the American economy.<sup>2</sup> Armed with the analytical tools of neoclassical price theory, many scholars instead advocated a market-based approach to antitrust law, skeptical of the benefits of active government intervention. During the 1970s and 1980s, the U.S. Supreme Court—arguably the most powerful institution in shaping U.S. antitrust policy—seemed to embrace this view, handing down decision after decision rejecting traditional antitrust values and adopting the efficiency norm of the law and economics movement. By century’s end, the populist origins of antitrust had faded into memory, and the professional discourse of the antitrust community (scholars, practitioners, and judges) had become dominated by economic analysis. Not coincidentally—and for better or for worse—the scope and vigor of antitrust enforcement had also significantly diminished.

Although this transformation in antitrust law has been the subject of extensive academic commentary, its causes remain poorly understood. There is broad consensus in the antitrust literature that economics has

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<sup>1</sup> This scholarship has traditionally been associated with the University of Chicago. The “Chicago School” of antitrust has included both economists (such as Aaron Director, Ward Bowman, and George Stigler) as well as economically-minded legal scholars (such as Robert Bork, Richard Posner, and Frank Easterbrook). Although the terms “Chicago School” and “law and economics” are often used interchangeably, this Article argues for a broader conception of law and economics, including scholars who might consider themselves in opposition to the Chicago perspective. It remains true, however, that Chicagoans have been among the most influential proponents of the economic approach to antitrust. The classic (and most doctrinaire) expression of the Chicago perspective is ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (The Free Press ed., 1993) (1978).

<sup>2</sup> The traditional antitrust paradigm, suspicious of a wide range of business practices, has been referred to as antitrust’s “inhospitality tradition.” See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4 (1984).

profoundly influenced the field, but little explanation as to exactly how this influence was achieved. Many scholars assume, sometimes tacitly, that the economic analysis of law and economics scholarship had a direct, educative influence on the Supreme Court.<sup>3</sup> Under this view, Supreme Court Justices were enlightened by modern economic theory, leading them to reject the populist interventionism that had characterized earlier antitrust jurisprudence. Other scholars have challenged this narrative, arguing that changes in the Court's antitrust jurisprudence primarily reflected changes in its composition, specifically the conservative appointments of the Nixon presidency (Justices Burger, Blackmun, Powell, and Rehnquist), which shifted the ideological balance of the Court.<sup>4</sup> Under this interpretation, conservative Justices were ideologically predisposed toward business-friendly antitrust decisions, for which the market-based reasoning of law and economics was simply a convenient justification. Robert Bork himself, among the Chicago School's most influential figures, attributed the change to both factors (though he characterized the Nixon appointments as the "decisive cause").<sup>5</sup> Ultimately, what these different interpretations share in common is their limited evidentiary basis—most are derived from impressionistic reviews of a select number of Supreme Court decisions, rather than systematic analysis of larger historical trends. Given the focus of existing scholarship on the doctrinal fea-

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<sup>3</sup> See, e.g., Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 944 (2014) [hereinafter Ginsburg, *Legislative Intent*]; Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 218 (2010) [hereinafter Ginsburg, *Originalism and Economic Analysis*]; William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1134 (1989) [hereinafter Kovacic, *Failed Expectations*]; William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L.J. 855, 878 (2014) [hereinafter Kovacic, *Out of Control?*]; William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1417 (1990); George L. Priest, *The Abiding Influence of the Antitrust Paradox*, 31 HARV. J.L. & PUB. POL'Y 455, 456 (2008); Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 248 (1999); E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1, 2 (1982); see also MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE 185–87 (1991) (discussing the Supreme Court's adoption of the efficiency norm in antitrust cases).

<sup>4</sup> See, e.g., Andrew Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 8; Louis Kaplow, *Antitrust, Law and Economics, and the Courts*, LAW & CONTEMP. PROBS., Autumn 1987, at 181, 215; Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 651–52 (2014).

<sup>5</sup> BORK, *supra* note 1, at x–xiv.

tures of individual cases, the broader influence of economic theory on the Supreme Court remains uncertain.

This Article moves beyond previous scholarship by presenting a comprehensive, quantitative study of *every* Supreme Court antitrust case from 1950 to 2010, a period including the decades before, during, and after the economic turn in antitrust. To conduct this study, I compiled a database of all of the Court's antitrust cases within the relevant period of interest, coding each decision and each individual Justice's vote for a number of variables relating to law and economics scholarship. Rather than focusing on the judicial language of only the most pivotal antitrust opinions, the method employed by most previous scholars, I have attempted to identify systematic relationships between specific variables (number of citations to law and economics scholarship, for example) and the Court's broader voting patterns. This approach allows for more generalized conclusions regarding the practical influence of law and economics.<sup>6</sup>

My methodology is inspired by the political science literature on the Supreme Court, much of which emphasizes quantitative analysis over the doctrinal focus of legal scholarship. My project is most directly influenced by the work of Harold Spaeth and Jeffrey Segal; like many studies of the Supreme Court, my database of antitrust cases is derived from Spaeth's much larger U.S. Supreme Court Database.<sup>7</sup> Spaeth and Segal's influence extends beyond choice of methodology, moreover, as their

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<sup>6</sup> Although most studies of changes in antitrust law have relied on traditional qualitative methods, a small number of legal scholars have approached the subject from a quantitative perspective. William Kovacic's statistical analysis of antitrust decisions in the U.S. Courts of Appeals is a particularly impressive example. William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REV.* 49, 55 (1991); see also William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, *ANTITRUST*, Spring 1993, at 8, 9 [hereinafter Kovacic, *Judicial Appointments*]. Also, Hillary Greene and Daniel Sokol have conducted a citation analysis of the influence of the Areeda-Hovenkamp antitrust treatise. Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 *IOWA L. REV.* 2039, 2040–41 (2015). The economist Vivek Ghosal has modeled the influence of the Chicago School on Department of Justice antitrust enforcement activity. Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 *J. COMPET. L. & ECON.* 733, 733–44 (2011). Finally, Douglas Ginsburg and Leah Brannon have presented quantitative data on Supreme Court antitrust cases from 1967 to 2007. Leah Brannon & Douglas Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, *COMPET. POL'Y INT'L*, Autumn 2007, at 3, 13–20.

<sup>7</sup> *The Supreme Court Database*, WASH. U. LAW, <http://supremecourtdatabase.org> (last updated July 12, 2016). This database—the most widely used in social science studies of the Supreme Court—is the foundation of Spaeth and Segal's empirical research on Supreme Court voting behavior. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* xvi–xvii (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED I* (2002) [hereinafter SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*].

theory of judicial behavior suggests a useful framework for studying antitrust. In their work, Spaeth and Segal contrast the traditional “legal” model of Supreme Court voting, in which decisions are made by objective application of legal principles to the facts of the case, with their own “attitudinal” model, in which Justices vote according to their ideological views in order to achieve subjective policy preferences.<sup>8</sup> Based on their research findings, Spaeth and Segal reject the legal model, claiming the attitudinal model better predicts observed Supreme Court voting patterns.<sup>9</sup>

In the antitrust literature, the legal and attitudinal models are paralleled by the contrasting perspectives on law and economics—one emphasizing its objective persuasiveness, the other claiming ideological bias. Although the efficiency arguments of law and economics may not be “legal” in the strictest sense,<sup>10</sup> they can nevertheless be analogized to traditional legal arguments. Under this analogy, the “legal” model would predict that antitrust cases are decided according to the persuasiveness of the parties’ economic claims. This perspective assumes that questions of economics are susceptible to objective judicial determination. The attitudinal model, on the other hand, would place little significance on the parties’ arguments, predicting instead that Justices vote per their preexisting ideological preferences. This perspective assumes that Supreme Court appointees are fundamentally partial in matters of economic policy. The differences between legal and economic reasoning mean that this is not a perfect analogy; given the prominence of economic policy considerations in many Supreme Court cases, one might even conceive of an “expertise” model in place of the more general legal model.<sup>11</sup> Whether conceived as a matter of legal reasoning or as a matter of economic expertise, however, this central distinction between knowledge and ideology is the historical problem at the heart of my study. Did law and economics provide the Court with a more sophisticated analytical framework? Or—as suggested by the attitudinal model—did it merely provide rhetorical cover for Justices’ preexisting ideological views?

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<sup>8</sup> SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 7, at 48–97. The “legal” model is, of course, the model most familiar to trained lawyers.

<sup>9</sup> *See id.* at 428–35. Spaeth and Segal also discuss a third, “rational choice” model, in which Justices engage in strategic behavior in order to achieve subjective policy preferences. *See id.* at 97. Since the rational choice model is essentially a more complex variation of the attitudinal model, this Article will limit its discussion to the legal and attitudinal models.

<sup>10</sup> Law and economics often emphasizes economic efficiency over traditional legal authority. As discussed *infra* Part III, efficiency arguments have proven highly successful in antitrust cases.

<sup>11</sup> The rise of economics as a form of (ostensibly) objective policy expertise is addressed in EISNER, *supra* note 3, at 188.

Based on my research, this Article argues that the Nixon appointments of the late 1960s and early 1970s were the primary cause of the major changes in antitrust jurisprudence, but that academic developments have infused these changes with an intellectual legitimacy they might otherwise have lacked, effectively insulating them from future changes to the partisan balance of the Court. Although the conservative decisions of the Burger Court were—I argue—driven by ideology rather than scholarship, the academic theories used to *justify* these decisions have been influential across the political spectrum. The result has been a rightward shift throughout the entire antitrust community, not only in specific policy views, but in fundamental value assumptions as well. Although this complex relationship among politics, law, and scholarship has been particularly influential in the antitrust field, similar patterns can also be observed in other economically-oriented fields of law.<sup>12</sup> The conjunction of knowledge and ideology that has characterized the history of antitrust law therefore speaks to broader developments in recent American legal history.

The conclusions of this Article are subject to certain qualifications. First, and most obviously, the antitrust decisions of the Supreme Court are only one of several sources of antitrust law—even within the judicial branch, they represent but a small fraction of the antitrust cases decided by the federal courts. The vast majority of antitrust cases are resolved by district courts and the U.S. courts of appeals, which arguably play a more important role in determining actual antitrust disputes.<sup>13</sup> In addition, antitrust trials in the district courts often feature greater economic content than Supreme Court review, as they regularly include the participation of economists as expert trial witnesses. That said, in light of the final authority of the Supreme Court and its power to shape nationwide antitrust policy—as well as the ready availability of Supreme Court briefs, oral arguments, and other supporting case materials for research—an exclusive focus on Supreme Court cases can be justified on practical grounds. Second, the aggregate data presented in this Article does not, in and of itself, convey certain of the most important changes in the Supreme Court's antitrust caseload, including the end of automatic appeals under the Expediting Act,<sup>14</sup> the reduction in government enforcement actions

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<sup>12</sup> Bankruptcy, corporate law, and securities regulation, for example.

<sup>13</sup> See Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1920 (2015). Not all antitrust cases are federal, moreover. Indeed, with the retrenchment of federal antitrust enforcement over the past 35 years, state attorneys general have assumed a larger role in antitrust prosecution.

<sup>14</sup> The Expediting Act, enacted in 1903, allowed direct appeal to the Supreme Court in civil antitrust cases in which the government was the plaintiff. Expediting Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823 (codified as amended at 15 U.S.C. § 29 (2012)). This procedure was repealed in 1974 by the Antitrust Procedures and



during the Reagan administration,<sup>15</sup> and changing patterns in the Court's certiorari process,<sup>16</sup> all of which have contributed to a significant decrease in the number of Supreme Court antitrust cases heard each year. Indeed, this decrease is so significant that comparisons between earlier and later years in the database become difficult. Finally—as discussed in greater detail in Part II—individual coding decisions often entailed subjective judgments, particularly in ambiguous or marginal cases. Although I have tried to be as transparent and consistent as possible in my coding methodology, the very nature of the data means that other researchers using the same evidence would likely code at least some cases differently.<sup>17</sup>

The remainder of this Article proceeds as follows. Part II presents quantitative findings, together with a discussion of methodology. The general conclusion of these findings is that Supreme Court antitrust decisions are largely (though not exclusively) determined by Justices' preexisting policy views. Part III presents three qualitative case studies which illustrate the general patterns discussed in Part II. For this Section of the Article, I have selected three well-known cases dating from before, during, and after the economic turn in antitrust jurisprudence: *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962), *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Together, these cases demonstrate how the very conception of antitrust has changed over the decades—not only among Justices, but among scholars and practitioners as well. Part IV concludes, discussing the relevance of these findings to the future direction of Supreme Court antitrust jurisprudence, as well as their significance to broader changes in U.S. legal-economic policy.

## II. QUANTITATIVE DATA

The influence of law and economics (particularly the Chicago School) on U.S. competition policy has been a major concern of antitrust scholarship since at least the 1980s. Scores of articles, lectures, and even

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Penalties Act, Pub. L. 93-528, 88 Stat. 1706 (codified as amended in scattered sections of 15 U.S.C.).

<sup>15</sup> For a detailed study of the reduction in government enforcement actions under the Reagan administration, including the promulgation of revised merger guidelines by the Department of Justice, see EISNER, *supra* note 3, at 184–227.

<sup>16</sup> The Court's plenary docket has significantly decreased in recent decades, for a variety of reasons. See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); Kenneth W. Starr, Essay, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006).

<sup>17</sup> All data used in this Article are available from the author upon request.

entire books have addressed the subject.<sup>18</sup> Much of this scholarship has emphasized doctrinal, “internalistic” analysis of only the most well-known antitrust cases, while some has limited its focus to only a specific area of antitrust law (e.g., price discrimination, vertical restraints, etc.).<sup>19</sup> This Article presents a much broader perspective, assessing every Supreme Court antitrust case from 1950 to 2010.

#### A. Case Selection and Coding

The population of cases included in this study consists of every Supreme Court case (1) directly involving antitrust issues, (2) decided on the merits (i.e., excluding certiorari determinations), and (3) decided between (and including) the 1950 and 2010 Court terms.<sup>20</sup> Although my primary period of interest was originally the 1970s and 1980s, the decades in which I assumed the influence of law and economics was most decisive, I included “extra” decades both before and after this period to provide historical baselines for comparison. As it turns out, the data from *after* the 1980s are in certain ways the most interesting.

The first step in constructing my database was to search for all Supreme Court cases between 1950 and 2010 that are assigned the topic “29T” (antitrust and trade regulation) in the Westlaw legal database system. This search yielded 292 cases. Of these, I excluded “pure” trade regulation cases that lacked meaningful antitrust issues. Examples of such excluded cases include FTC actions concerning commercial fraud, false advertising, and other deceptive or unfair trade practices. Excluding these cases left a remaining total of 244 antitrust cases, dating from the

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<sup>18</sup> For but a small sample, see HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008); POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW I (Antonio Cucinotta et al. eds., 2002); INGO L. O. SCHMIDT & JAN B. RITTALER, A CRITICAL EVALUATION OF THE CHICAGO SCHOOL OF ANTITRUST ANALYSIS at ix–x (1989); Brannon & Ginsburg, *supra* note 6, at 21; Ginsburg, *Legislative Intent*, *supra* note 3, at 941; Frank Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL’Y 439 (2008); Ginsburg, *Originalism and Economic Analysis*, *supra* note 3, at 217; Kaplow, *supra* note 4, at 181; Kovacic, *Failed Expectations*, *supra* note 3, at 1134; William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 17–32 (2007); Kovacic, *Judicial Appointments*, *supra* note 6, at 50; Kovacic, *Out of Control?*, *supra* note 3, at 878; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Priest, *supra* note 3, at 456; Sullivan, *supra* note 3, at 23.

<sup>19</sup> “Internalism,” a term borrowed from the history of science, refers here to the study of ideas purely in terms of their narrow intellectual context.

<sup>20</sup> The Supreme Court operates on an “October term” system, whereby cases are heard and decided beginning the first Monday in October and continuing to the following spring/summer. For purposes of this study, cases are assigned to the year in which the relevant Supreme Court term began, rather than the calendar year in which the case was decided (if different).

1950 to 2009 October terms (no antitrust cases were decided in the 2010 October term).<sup>21</sup>

After identifying the population of cases, I pulled them from the U.S. Supreme Court Database and inserted them into my own custom data file. For purposes of this study, the most important information in the U.S. Supreme Court Database was the Justice-level vote data associated with each case. These data permitted analysis of individual Justices' voting patterns in relation to case-level variables. Unfortunately, few of the case-level variables included in the U.S. Supreme Court Database were relevant to my particular research questions. I therefore coded my own set of variables based on my own analysis of the cases in the database. This required reading each and every decision, as well as the corresponding briefs of the parties and amici curiae, and assigning each case numerical values for several variables relating to law and economics scholarship. Description and analysis of these variables is provided below.

### B. *Case-Level Patterns*

This Part II.B discusses case-level patterns—i.e., patterns in the outcomes of Supreme Court cases, rather than the votes of individual Justices. These case-level patterns are not particularly surprising, as they tend to confirm many widely-held assumptions. Specifically, the data show that during the period under examination, (1) the Court became more likely to issue “market-based” antitrust decisions, (2) the Court, litigants, and amici curiae increasingly cited law and economics scholarship, and (3) antitrust cases became increasingly characterized by the presence of formal economic arguments.

#### 1. *Decision Outcomes*

Perhaps the most basic measure of ideational change in Supreme Court antitrust jurisprudence is the extent to which the Court's decisions have reflected the market logic of law and economics. To assess this change in quantitative terms, I coded each decision in the database as either “market-based” or “interventionist.” Decisions coded as “market-based” reflect a narrow economic view of antitrust, often deferring to market outcomes and emphasizing economic efficiency. Policies associated with market-based decisions include (for example) relative tolerance toward economic concentration, the rejection of per se rules<sup>22</sup>

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<sup>21</sup> At the time of writing, the latest case in the dataset was *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010), which was decided May 24, 2010 as part of the Court's 2009 term.

<sup>22</sup> A “per se” rule is a Court-created decision rule that certain market practices are illegal per se under the antitrust laws. If a plaintiff can establish that a defendant's actions fall within the scope of a per se rule, judicial inquiry ends and the behavior is deemed conclusively illegal, regardless of any economic benefits claimed by the defendant. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and*

against practices other than horizontal restraints, and an assumption that unilateral market practices are usually efficient.<sup>23</sup> Decisions coded as “interventionist,” on the other hand, reflect more traditional antitrust values, emphasizing social and political concerns rather than economic efficiency. Interventionist themes include (again, for example) hostility toward even moderate levels of economic concentration, fundamental suspicion of aggressive market behavior, and the application of per se rules to a wide variety of market practices. Given the broad scope of these two categories, certain cases in the database could potentially be coded as both. For example, as I have defined them, the “market-based” and “interventionist” positions on horizontal price fixing are essentially the same—both would advocate per se prohibition. The two categories are not always mutually exclusive, in other words. Since the focus of my analysis is the Court’s *consistency* with market-based antitrust scholarship, decisions consistent with both categories were coded as market-based.<sup>24</sup> Certain decisions were difficult to categorize as either market-based *or* interventionist (cases involving various forms of antitrust immunity, for example). Rather than exclude these cases from the analysis, I simply did the best I could based on a close reading of the particular decision.<sup>25</sup>

The propensity of the Court to issue market-based decisions in a given term was calculated by dividing the number of market-based decisions by the total number of antitrust decisions that term (thereby normalizing for the varying number of antitrust decisions per term). The resulting percentage data for the 1950–2009 terms are shown in Figure 1 below:

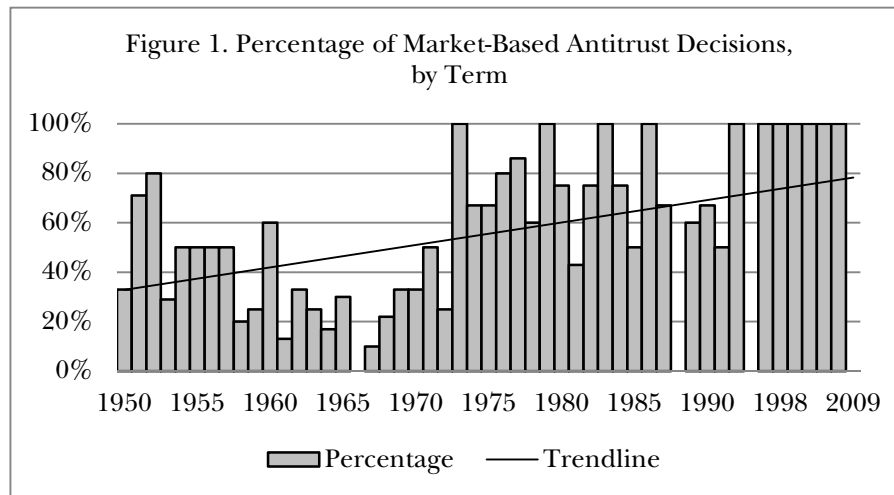
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*Market Division*, 74 YALE L.J. 775, 776–77 (1965). Per se rules can be contrasted with the more permissive antitrust “rule of reason.” *Id.* The last several decades of antitrust jurisprudence have witnessed a substantial narrowing of per se rules.

<sup>23</sup> Use of the term “market-based” is potentially ambiguous, as even the Chicago School advocates prohibiting certain market practices, most notably cartel arrangements. Moreover, “interventionist” policy was often inspired by classical economic models of perfect market competition. Despite this overlap between the two terms, I believe a “market-based”/“interventionist” binary is less ambiguous than the traditionally-used “conservative”/“liberal” binary.

<sup>24</sup> This coding rule may result in a bias toward categorizing decisions as market-based. However, it allows an unbiased measure of *change* in the Court’s decision making over time. *See infra* Figure 1.

<sup>25</sup> In the U.S. Supreme Court Database, decisions are coded under the conventional rubric of “conservative” versus “liberal.” In 73% of the cases in my database, this conservative/liberal categorization corresponds with my own market-based/interventionist categorization (i.e., a case coded as “conservative” in the U.S. Supreme Court Database is coded as “market-based” in my own database, or vice versa). The primary source of discrepancies between the two coding schemes is that decisions imposing antitrust liability for horizontal price fixing, market allocation, and other cartel-like arrangements are coded as “liberal” in the U.S. Supreme Court Database and “market-based” in my own database (under the logic that even the Chicago School advocates prohibiting inefficient horizontal restraints).



After the 1992 term, the data become intermittent, as 1992 was the last term the Court consistently decided at least one antitrust case per term.<sup>26</sup> Although the Court decided fewer antitrust cases after 1992, its likelihood of issuing a market-based decision in any given case continued to increase. Significantly, in six of the eight terms after 1992 in which the Court decided at least one antitrust case, 100% of its decisions were coded as market-based.

As these data illustrate, the general perception that Supreme Court antitrust decisions have become increasingly market-oriented is correct. Although aggregate decision data does not explain what caused this increase, the timing of the shift toward market-based antitrust decisions—most pronounced in the early 1970s—suggests that judicial appointments likely played an important role. President Nixon made his first Court appointment in 1969 (Chief Justice Burger), and the 1972 term was the first full term in which all four of Nixon's appointees (Burger, plus Blackmun, Powell, and Rehnquist) served together on the Court. So composed, the Burger Court was much more likely to issue market-based antitrust decisions than the preceding Warren Court (which was less likely to issue market-based decisions than the preceding Vinson Court), as shown in Figure 1. The role of specific Justices in the Court's antitrust decisions is discussed in greater detail in Part II.C below.

## 2. *Law and Economics Citations*

In addition to the outcomes of the cases themselves, another relevant measure of the influence of law and economics is the number of ci-

<sup>26</sup> In Figures 1–7, terms in which no antitrust cases were decided are excluded from the bar charts. The time axes are therefore more compressed for the years 1993–2009 than for 1950–1992.

tations by the Court, parties (both plaintiffs and defendants), and amici curiae in their respective case documents. Citations by the Court itself are the clearest indication of influence, but citations in party and amicus briefs are also relevant, for two reasons: First, economic arguments derived from parties' or amici's academic citations may influence the Court's decisions, even in cases where the Court does not cite the academic literature itself. Second, the amount of law and economics citations in party and amicus briefs may suggest the general "state of the law," in that it indicates what type of arguments litigants expect the Court to respond to.<sup>27</sup>

For purposes of this study, a "law and economics citation" means any citation to any book or article: (1) addressing the subject of competition law and (2) written by (a) an economist or (b) a legal scholar significantly relying on economic theory. In deciding whether to count a citation as a "law and economics citation," I did *not* draw a distinction between "conservative" (or market-based) and "liberal" (or interventionist) scholarship. Any citation to any book or article relying substantially on economic theory was counted, regardless of the political orientation or policy conclusions of the cited author.<sup>28</sup> My decision to treat all economic scholarship equally represents an attempt to determine whether economic analysis, in and of itself, is associated with particular policy conclusions,

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<sup>27</sup> A difficulty with citation analysis is controlling for changes in the total number of *all* citations over time. If judges and practitioners are simply citing more of everything, an increase in a specific type of citation may not be particularly meaningful. With respect to Supreme Court opinions, recent empirical research indicates that citations to certain types of authority (prior Supreme Court decisions and non-legal secondary sources) have increased since World War II, for a variety of reasons. Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 531–40 (2010); James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324, 333 (2007); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 500–03 (2000). On the other hand, in their study of citations to non-legal sources, Schauer and Wise also present evidence that neither the annual page output nor the average number of citations per page of reported Court opinions has significantly changed over the same time period. *See id.* at 500.

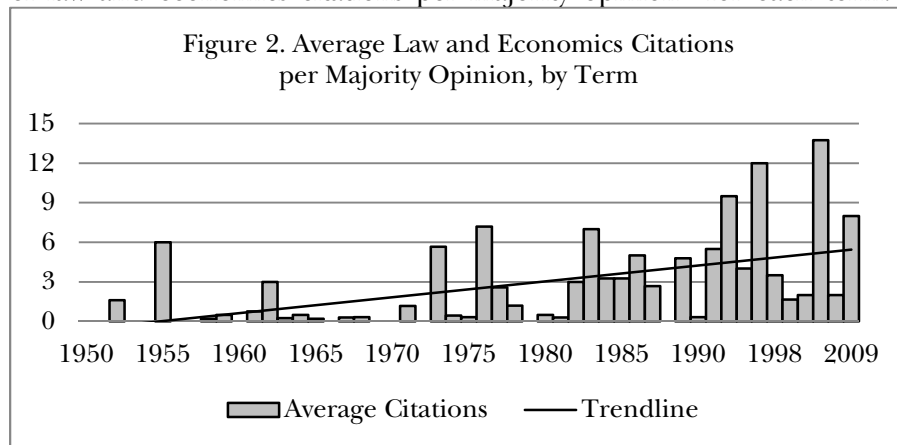
Unfortunately, due to practical constraints and a lack of relevant data, I was unable to control for possible changes in total citations. However, as the increase in law and economics citations shown in Figure 2 exceeds the increase in citations to prior Court decisions over the same period, Fowler et al., *supra*, at 333, I suspect that the increase in law and economics citations is a largely independent phenomenon. To my knowledge, no research suggests any systematic increase in total citations in party and amicus briefs.

<sup>28</sup> A citation to Joe Bain was counted the same as a citation to George Stigler, for example. As a practical matter, the majority of legal-economic citations by the Court, parties, and amici were free-market in orientation, particularly in the later years of the database.

distinct from the exogenous political leanings of particular law and economics scholars.

According to the conventional wisdom, the Chicago School was responsible for introducing economic analysis to antitrust law.<sup>29</sup> If correct, this view implies a correlation in time between the rise of the Chicago School in the 1970s and the prevalence of law and economics citations in case documents. Many commentators have challenged this conventional wisdom, however. According to these scholars, economics has *always* played an important role in antitrust law, and the novelty of the Chicago School was in the specific *type* of economics it embodied.<sup>30</sup> If the economic approach to antitrust law predates the rise of the Chicago School, as these arguments suggest, one would expect to see the absence of a correlation between the rise of the Chicago School and law and economics citations. Given these differing perspectives, the empirical question of how often and when the Court, litigants, and amici curiae have cited law and economics scholarship becomes particularly significant.

Beginning with the Court itself, Figure 2 shows the average number of law and economics citations per majority opinion<sup>31</sup> for each term:<sup>32</sup>



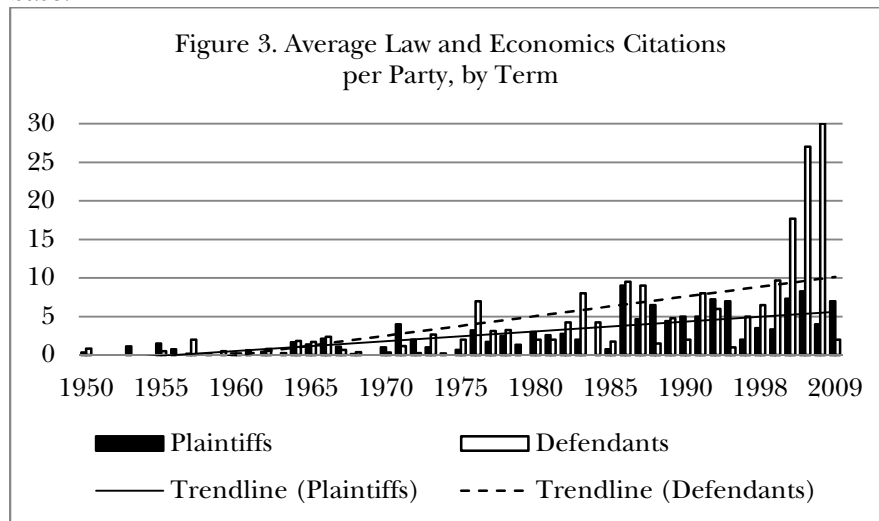
<sup>29</sup> For an example of this conventional wisdom, see Priest, *supra* note 3, at 456.

<sup>30</sup> See Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 109, 109 (2008); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 *MICH. L. REV.* 213, 217–20 (1985) [hereinafter Hovenkamp, *Antitrust After Chicago*]; Herbert Hovenkamp, *Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis*, 55 *ANTITRUST BULL.* 613, 616–17 (2010); Kaplow, *supra* note 4, at 184–87; Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 *GEO. L.J.* 1511, 1520–22 (1984). Even members of the Chicago School itself acknowledge the importance of the earlier “Harvard School” of antitrust economics. See, e.g., Posner, *supra* note 18, at 929.

<sup>31</sup> This analysis does not include concurrences or dissents, mainly due to personal time constraints.

Figure 2 displays a similar pattern as Figure 1: in general, the Court cited law and economics scholarship infrequently prior to the 1970s, while law and economics citations were most common in the last two decades of the time series. Thus, the increase in market-based Court decisions seen in Figure 1 seems to have been accompanied by a similar increase in law and economics citations. Given the relative lack of citations in the first two decades of the time series, these data cast doubt on the argument that economics has always been central to antitrust law.<sup>33</sup> Although the structuralist scholarship of these earlier decades may have been influential in academic circles, it was rarely cited by the Court.

Continuing on to plaintiffs and defendants, Figure 3 shows the average combined total law and economics citations contained in (1) the initial brief, (2) the reply brief (if applicable), and (3) the supplemental brief (if applicable) of each party per case, for each term in the database:<sup>34</sup>



Again, law and economics citations increased in the 1970s and 1980s. When the data are plotted as a graph, however, this trend is overshadowed

<sup>32</sup> The average (arithmetic mean) of law and economics citations per majority opinion was calculated by summing the law and economics citations in all majority opinions in a given term, then dividing by the number of decisions that term. When summing citations, multiple citations to the same work within a single opinion were each counted as separate citations.

<sup>33</sup> See *supra* note 30 and accompanying text.

<sup>34</sup> The average (arithmetic mean) of law and economics citations per set of initial, reply, and supplemental briefs was calculated by summing the law and economics citations included in all sets of briefs in a given term, then dividing by the number of cases that term (this procedure was performed separately for plaintiffs and defendants). When summing citations, multiple citations to the same work within a single set of briefs were each counted as separate citations.



owed by the very high number of defendant citations in 2005, 2006, and 2008. Although these extreme averages are partly the result of fewer antitrust cases per term (only a single antitrust case was decided in the 2008 term, for example), they also reflect a significant increase in law and economics citations by defendants' counsel. This increase may be a strategic response to the Court's extremely high rate of market-based antitrust decisions since the early 1990s.

Finally, Figure 4 shows the average law and economics citations per amicus brief, broken down by pro-defendant and pro-plaintiff amici, for each term:<sup>35</sup>

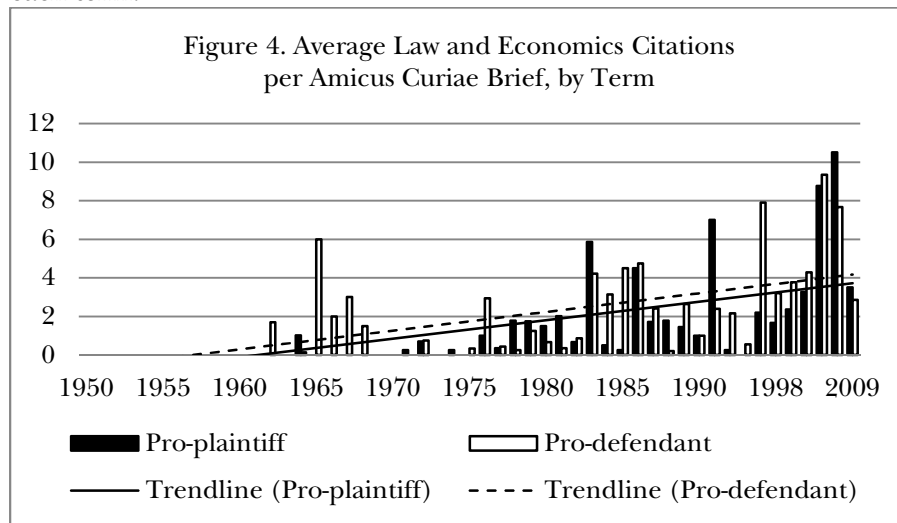


Figure 4 displays the familiar pattern of increasing law and economics citations. Averaging the number of citations per brief obscures two additional trends in amicus practice, however. First, the average number of *filings* per case increased significantly over the time series, from no filings at all during the first several years to a high of 19 in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* in 2003.<sup>36</sup> The phenomenon of increasing amicus filings is hardly unique to antitrust law—

<sup>35</sup> In keeping with the decision to only include cases decided on the merits (and therefore to exclude certiorari determinations), I only examined amicus briefs addressing the merits of the case. Filings by amici recommending or opposing certiorari are not included in Figure 4.

The average (arithmetic mean) of law and economics citations per amicus brief was calculated by summing the law and economics citations in all amicus briefs in a given term, then dividing by the total number of amicus briefs filed that term (this procedure was performed separately for pro-defendant and pro-plaintiff amici). When summing citations, multiple citations to the same work within a single brief were each counted as separate citations.

<sup>36</sup> 540 U.S. 398 (2004).

indeed, it pervades nearly every area of the Supreme Court's docket.<sup>37</sup> Given the tendency of amici to emphasize economic policy arguments in antitrust cases, however, this phenomenon has been a major source of increasing law and economics citations.<sup>38</sup> Second, aggregate data fails to highlight individual amicus briefs containing very high numbers of law and economics citations. These briefs become particularly notable in the final decade of the time series, in which many cases feature economics-heavy amicus briefs filed by business groups, policy institutes, and even rival schools of antitrust scholars. For example, several recent cases feature amicus briefs by scholars advocating stereotypical Chicago School positions, as well as briefs from scholars advocating opposing "post-Chicago" positions.<sup>39</sup> This direct participation in Supreme Court cases by legal-economic scholars is an important example of the increasing economization of the both practice and discourse of antitrust law.

Figure 2, Figure 3, and Figure 4 indicate that law and economics citations by the Court, parties, and amici curiae were relatively infrequent prior to the 1970s. Citations began to increase thereafter, accelerating in the 1990s. While the infrequency of law and economics citations during the 1950s and 1960s supports the view that economic theory was not yet central to antitrust law, the reasons for the subsequent increase in citations remain open to debate. Since this increase is roughly correlated with the academic rise of the Chicago School, increasing citations may have been a function of the Chicago School's intellectual influence. On the other hand, the increase begins in earnest only after the arrival of the Nixon appointees, suggesting that increasing citations may also have been a function of a more sympathetic, market-oriented Court. The con-

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<sup>37</sup> For discussion of the general phenomenon of increasing amicus filings, see Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 811 (2004); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000); see also Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 34 (2004).

<sup>38</sup> See *supra* Figure 4.

<sup>39</sup> The term "post-Chicago" refers to antitrust scholarship that shares the Chicago School's normative emphasis on economic efficiency, but criticizes its economic models as overly simplistic. Post-Chicago scholarship has attempted to add concepts derived from game theory, behavioral analysis, and other forms of dynamic economic modeling to antitrust law. Although post-Chicago scholarship has been influential in the academic world, it has had less impact on Supreme Court jurisprudence, where the Chicago School remains dominant. For a variety of perspectives on post-Chicago antitrust scholarship, see, for example, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 18; Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43 (2012); Hovenkamp, *Antitrust After Chicago*, *supra* note 30; Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 (2001); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147 (2012); Bruce H. Kobayashi, *Game Theory and Antitrust: A Post-Mortem*, 5 GEO. MASON L. REV. 411 (1997).

flation in time of these parallel developments makes ascribing causation particularly difficult. This difficulty is compounded, moreover, by the even greater increase in economic citations in the 1990s and 2000s, which may be attributable to consolidation of the economic approach to antitrust law or, alternatively, to an increasingly conservative Court. Relying on citation data alone, the only thing that can be said for certain is that law and economics citations have definitely increased. Understanding why requires a broader analysis of additional characteristics of the Court's antitrust cases.

### 3. *Economic Arguments*

Citations to law and economics scholarship increased over the last several decades, but were these citations necessarily tied to substantive economic arguments? Perhaps not—examining Court opinions, party and amici briefs, and other case documents reveals that Justices and counsel often use legal-economic citations as a form of “window dressing,” typically to bolster traditional legal arguments with additional (if superficial) academic support.<sup>40</sup> It is rarer to encounter substantive arguments that are genuinely based on economic theory, as opposed to the application of precedent to facts that characterizes traditional legal reasoning. Thus, the prevalence of economic arguments, and whether this prevalence has increased over time, is another important measure of the role of economics in antitrust law.

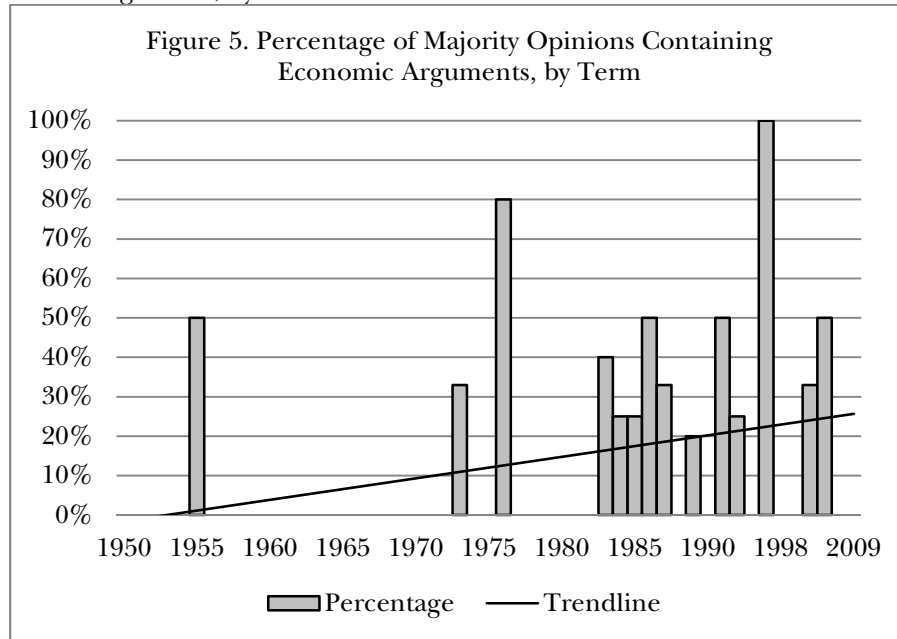
For purposes of this analysis, an opinion or brief was coded as containing an “economic argument” if it included any specific, detailed, and relatively self-contained argument that economic theory compelled a particular decision outcome. As with the citation analysis above, no distinction was drawn between “conservative” (or market-based) and “liberal” (or interventionist) economic analysis. The coding scale was strictly binary—an opinion or brief was classified as either containing an economic argument or not. As is typical in legal practice, many opinions and briefs contained multiple, independent arguments in support of a given decision outcome. If just *one* of these arguments was economic in nature, the opinion or brief was coded as containing an economic argument. On the other hand, passing references to economic scholarship (i.e., window dressing) were insufficient—to qualify, the argument must have been relatively developed. Overall, the essential distinction that I attempted to draw was between fundamentally *legal* arguments, grounded in the application of legal rules (even if buttressed by economic citations), and fun-

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<sup>40</sup> See, e.g., Brief of Respondent, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), at 19–22 (citing Frank Easterbrook and Richard Posner to argue for antitrust liability due to vertical maximum price fixing).

damentally *economic* arguments, grounded in the application of economic theory.<sup>41</sup>

Reflecting (and befitting) its nature as a legal institution, the Court's use of economic arguments has been relatively infrequent. Figure 5 shows the percentage of majority opinions containing at least one economic argument, by term:



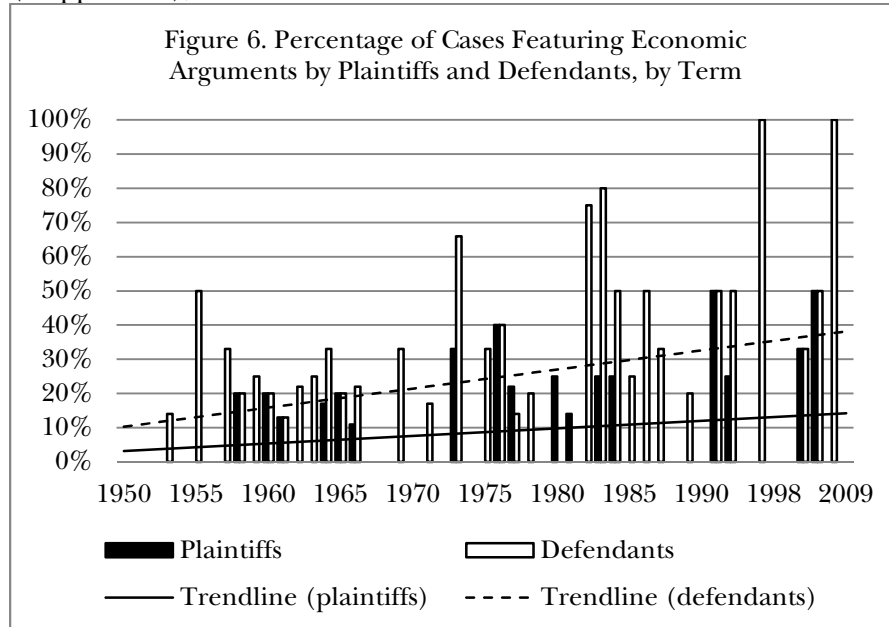
Although there is a slight upward trend over time, the Court's use of economic arguments can be best described as sporadic. One's impression after reading all the cases in the database is that many Justices have been hesitant to engage in explicitly economic arguments, preferring to justify their decisions in the traditional terms of legal precedent. Even though the Court has become increasingly likely to cite law and economics scholarship (see Figure 2), these citations often provide ancillary support for conventional, precedent-based legal arguments. At least with respect to Supreme Court opinions, antitrust appears more law than economics.<sup>42</sup>

A somewhat different picture emerges from party and amicus briefs. Beginning with the parties, Figure 6 shows the percentage of cases in

<sup>41</sup> Obviously, this was often a subjective determination. Even when using consistent criteria, it is not always easy to differentiate a "legal" from an "economic" argument. Given my aim of distinguishing between "mere" legal-economic citations and substantive economic arguments—as well as the prevalence of casual, non-substantive economic rhetoric in antitrust cases—my standard for what qualified as an economic argument was fairly strict.

<sup>42</sup> See *supra* Figure 5.

which plaintiffs and defendants presented economic arguments in their (1) initial brief, (2) reply brief (if applicable), or (3) supplemental brief (if applicable), for each term:



The party data is also sporadic, with significant variation year to year. Figure 6 clearly shows, however, that defendants have used economic arguments more often than plaintiffs. This pattern, visible in the bar graph, is even more evident from reading the briefs themselves. When read side by side, the plaintiffs' and defendants' briefs in many important antitrust cases reveal a striking contrast of differing legal strategies.

These differences are observable in some of the Court's most pivotal antitrust decisions. Beginning in the 1970s, the Court overturned or significantly weakened many of its prior holdings as to the per se illegality of a wide variety of market practices, including vertical restraints,<sup>43</sup> tying arrangements,<sup>44</sup> and exclusionary refusals to deal.<sup>45</sup> In many of these cases, plaintiffs' counsel constructed their arguments in a straightforward, tra-

<sup>43</sup> See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735–36 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

<sup>44</sup> See, e.g., *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42–43 (2006); *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27–29 (1984); *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 621–22 (1977).

<sup>45</sup> See, e.g., *Verizon Comm'n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138–40 (1998); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 297 (1985).

ditional legal fashion. These arguments often proceeded by (1) citing the relevant per se rule, as articulated in prior Court precedent, (2) applying the rule to the facts of the case, and (3) concluding that the defendant's conduct was per se illegal.<sup>46</sup> Only rarely did plaintiffs' counsel make any rigorous effort to explain why prohibition of the defendant's conduct would benefit the broader economy. Defendants' counsel, on the other hand, often took a far more economic approach, explicitly arguing that their clients' practices promoted consumer welfare.<sup>47</sup> These economic arguments invited the Court to reconsider its prior holdings, and to substitute economic theory for the judicial principle of stare decisis.

This significant disconnect between plaintiffs' and defendants' arguments speaks to the transitional nature of the period. In certain cases, the differences between the parties are so pronounced that they seem to be arguing past each other.<sup>48</sup> Since most of these cases were victories for the defendant, the dogged reliance of plaintiffs' counsel on precedent seems misguided, at least in hindsight. In fairness to plaintiffs' counsel, it is difficult to name any other area of law in which the Court has been so willing to disregard stare decisis. Who could have predicted that economic arguments would so consistently trump established Court precedent? But to invoke Justice Holmes, if "prophecies of what the courts will do in fact, and nothing more pretentious"<sup>49</sup> is what is meant by the law, then antitrust defendants may have had the benefit of better, more prophetic lawyers. Whether defendants' counsel were more adept at responding to the Court's economic concerns, or whether defendants' economic arguments were what led the Court to reexamine its prior holdings, is a question taken up in Part II.C below.

I turn now to amicus briefs, in which economic arguments have become the most prevalent. Figure 7 shows the annual percentage of cases in which at least one amicus brief supporting the plaintiff or the defendant contained an economic argument:

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<sup>46</sup> Plaintiff's brief in *Fortner* is a prime example—the brief focuses on establishing a per se tying violation under the Sherman Act, without engaging the underlying policy rationale (or lack thereof) of the per se rule. See Brief for the Respondent at 19, *Fortner*, 429 U.S. at 610 (No. 75-853), 1976 WL 194625.

<sup>47</sup> See, e.g., Brief for Respondent at 49–60, *GTE Sylvania Inc.*, 433 U.S. at 36 (No. 76-15), 1976 WL 181222.

<sup>48</sup> See, e.g., *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984); *Jefferson Parish*, 466 U.S. 2; *Fortner*, 429 U.S. 610.

<sup>49</sup> O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

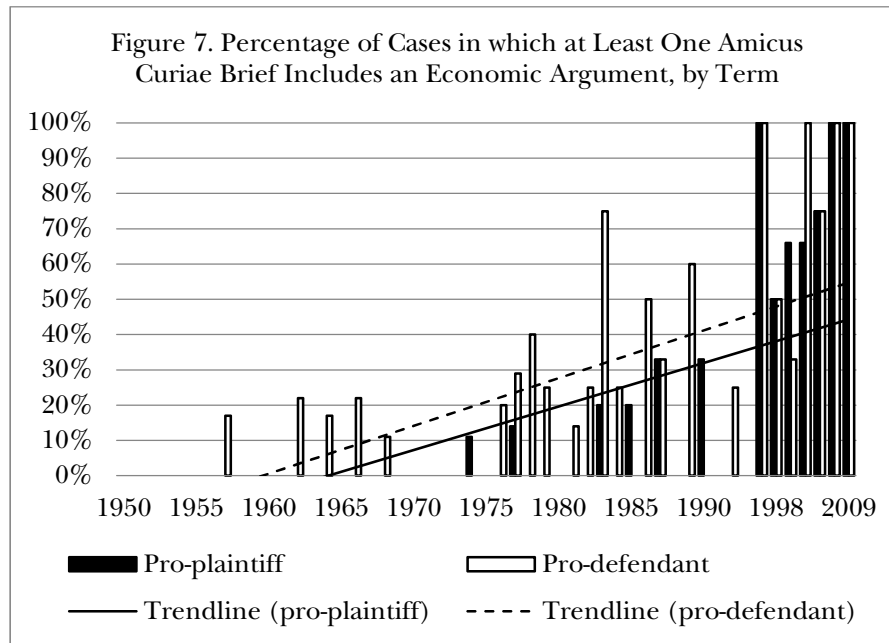


Figure 7 shows a major increase, first with respect to pro-defendant amici, and followed by pro-plaintiff amici. Much of this increase was due to increasing amicus filings per case—while there were zero amicus filings for several years during the 1950s, by the 1990s, ten or more amicus filings per antitrust case had become the norm. Simply as a matter of probability, the higher the number of amicus briefs submitted per case, the greater the likelihood that any one of them would include an economic argument. This is not to say that the level of economic sophistication of the “average” amicus brief remained unchanged, however. As discussed in Part II.B.2 above, the advent of recurrent amicus filings by business groups, policy institutes, and academic scholars meant that the overall content of amicus briefs became increasingly economic over the period. Another recurrent amicus contributing to this process was the U.S. government. Although the Department of Justice had been sporadically involved in private antitrust litigation for decades, its participation as amicus curiae significantly increased during the 1980s. Under the framework of the “Private Action Project,” a program initiated by William F. Baxter (Assistant Attorney General for antitrust under the first Reagan administration), the Department sought to use amicus filings to systematically influence the direction of antitrust law.<sup>50</sup> Under this program, Supreme Court cases in which the existing state of the law could be clarified or improved (according to the standards of the Reagan administration)

<sup>50</sup> See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 700 (1982).

were identified by the Department's Antitrust Division. Department attorneys then drafted and submitted amicus briefs advocating particular decision outcomes. Given the powerful influence of the Chicago School within the Reagan-era Antitrust Division, these briefs regularly featured highly economic, market-based policy arguments. The Department's arguments often extended beyond the immediate case at hand, explicitly requesting that the Court overturn or modify established antitrust precedents.<sup>51</sup> Together, each of these three developments—increasing numbers of amicus briefs, the increasingly economic content of individual briefs, and the increasingly aggressive economic advocacy of the U.S. government—amplified the volume of economic arguments to which the Supreme Court was repeatedly exposed.

To summarize, what do these statistical patterns tell us about changes in U.S. antitrust law? At a basic level, they provide confirmation that market-based Court decisions, law and economics citations, and the use of economic arguments have all increased since 1950. At a more granular level, they also show that parties and amici have engaged in economic arguments more often than the Court, and that defendants have historically used economic arguments more often than plaintiffs. Although the data suggest intriguing relationships between these developments and the timing of Supreme Court appointments, case-level statistics only reveal so much regarding the central issue of causality. Was the market-based shift in the Court's decisions a response to economic arguments? Or were the economic arguments of parties and amici a response to the Court's market-based decisions? Resolving this puzzle requires looking beyond the Court as a unitary institution and examining the role of individual Justices in the changing direction of antitrust jurisprudence.

### *C. Justice-Level Patterns*

The statistics presented in Part II.B above bear out the conventional wisdom—that the substance and rhetoric of antitrust law has become increasingly economic over time. The question of what caused this shift remains difficult to answer, however. The timing of the change in the Court's decisions suggests judicial appointments played an important role (see Figure 1), though without additional evidence it is difficult to say more. Only an investigation of the voting behavior of individual Jus-

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<sup>51</sup> For discussion of the Private Action Project, see EISNER, *supra* note 3, at 207–10. There is reason to believe the government has been a particularly influential amicus curiae. Among the cases in the database, the Court's ruling was consistent with the government's recommendation in 84% of cases in which the government submitted an amicus brief. If one only considers cases during the Reagan years, this figure increases to 90%. For additional discussion of the government's role and influence as amicus curiae, see generally John Thorne, *A Short Note on Government Amicus Briefs in Antitrust Cases*, 2004 A.B.A. ANTITRUST SEC. 1–3.



tics can reveal the vote-specific factors that shape the Court's aggregate decision record.

This Part II.C provides such an investigation: by comparing the votes of individual Justices against selected case-level variables, it seeks to determine whether Justices' voting decisions were influenced by economic arguments. As detailed below, the means of conducting this inquiry are twofold. The first method was simply to assess whether individual Justices' voting records changed over time. The second was to compare the voting records of individual Justices in (1) cases in which one or both parties made an economic argument against (2) cases in which neither party made an economic argument. My findings indicate that while the anti-trust views of certain Justices did evolve over time, economic arguments did not generally "convert" Justices from their preexisting views.

### *1. Individual Justices' Voting Over Time*

As discussed in Part II.B.1, the antitrust decisions of the Supreme Court have become increasingly market-oriented. Since Supreme Court decisions are determined by majority voting, fully understanding this increase requires tracking individual votes. From this perspective, the basic inquiry becomes whether the shift in the Court's antitrust record was due to (1) changes in the voting patterns of incumbent Justices, or (2) the replacement of incumbent Justices with more conservative appointees. The simplest method of addressing this question is determining whether individual Justices' voting patterns changed over time. Such a determination is possible with data derived from the U.S. Supreme Court Database, which includes the votes of individual Justices for every case in the collection. After coding the Court decisions in my own database as either market-based or interventionist, it was straightforward to classify individual votes according to the same schema: For market-based decisions, votes with the majority (including concurrences) were coded as market-based, while votes with the dissent(s) (if any) were coded as interventionist. Similarly, for interventionist decisions, votes with the majority (including concurrences) were coded as interventionist, while votes with the dissent(s) (if any) were coded as market-based.<sup>52</sup>

Whether these votes shifted over time speaks to the question of academic influence given the temporal increase in economic references in opinions, briefs, and other case documents. Since economic references increased after the 1960s, a corresponding increase in market-based votes on the part of a given Justice would tend to suggest that exposure to economic ideas had influenced the Justice's voting decisions. On the other

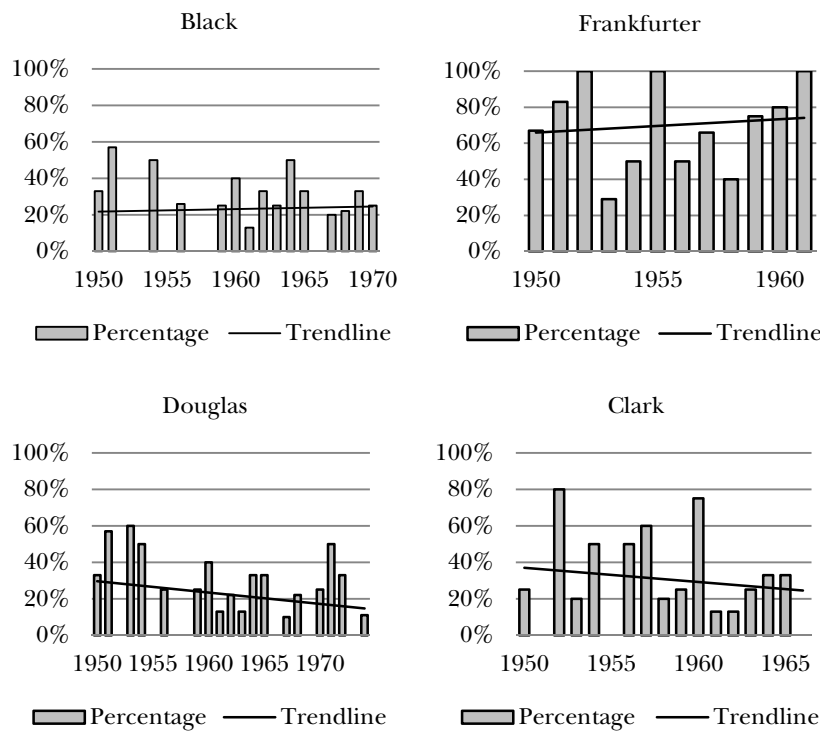
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<sup>52</sup> There are a few odd exceptions in the database. In certain cases, based on my reading of the opinions, both the majority and dissenting votes were coded the same (i.e., market-based or interventionist), or concurring votes were coded differently from the majority.

hand, if a Justice's voting remained essentially unchanged, it would tend to suggest the absence of influence.

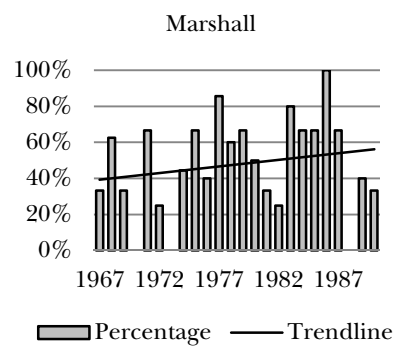
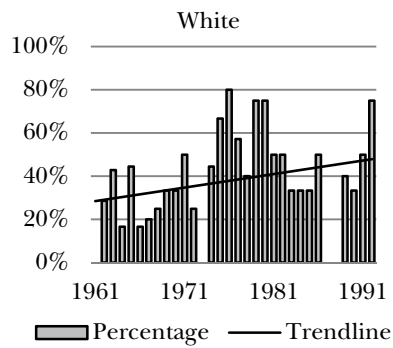
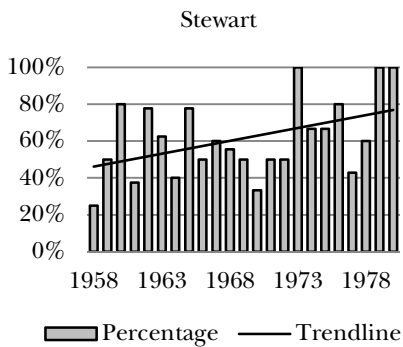
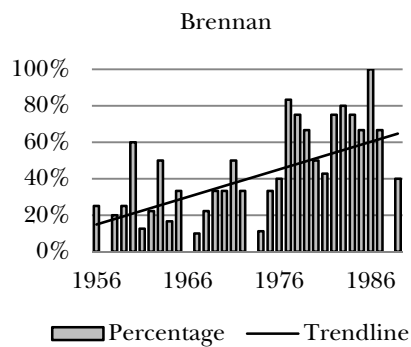
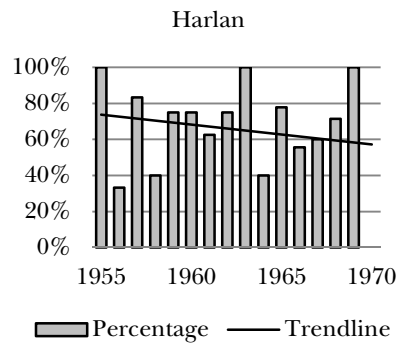
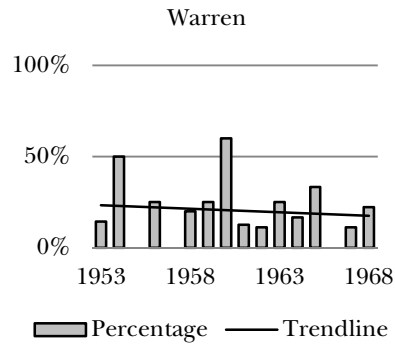
The voting data for individual Justices indicate that while certain Justices' antitrust views did evolve over time, most Justices arrived on the Court with stable, preexisting antitrust views. The data also indicate that later appointees to the Court were more market-oriented than their predecessors. To convey these patterns visually, Figure 8 shows the annual percentage of cases in which each Justice<sup>53</sup> cast market-based votes.<sup>54</sup>

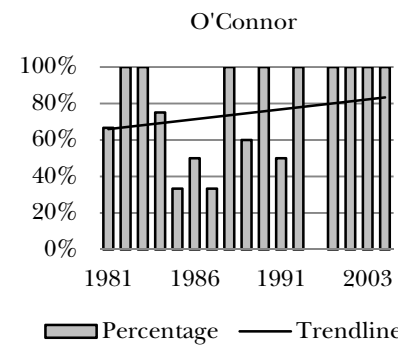
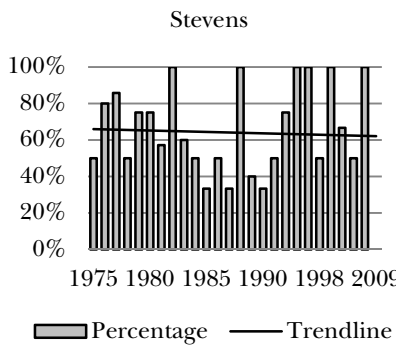
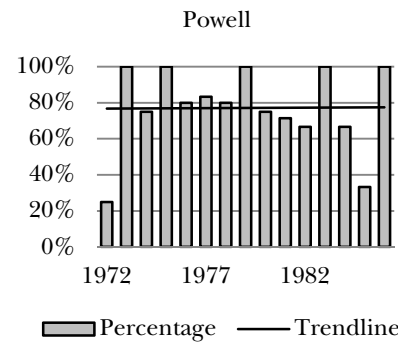
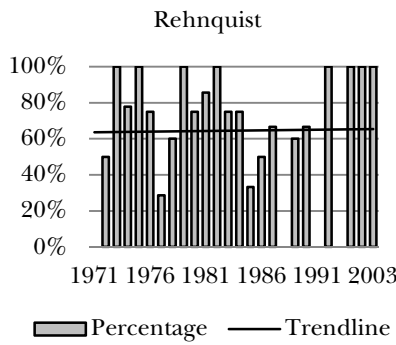
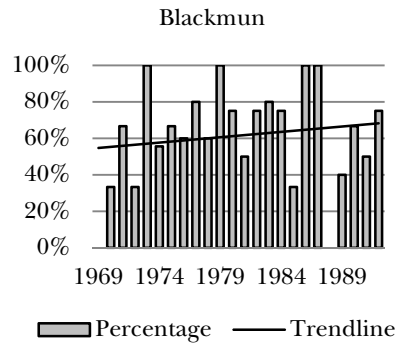
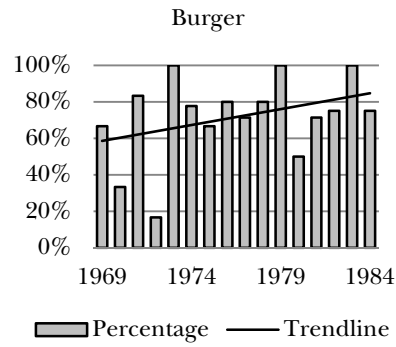
Figure 8. Antitrust Voting Records of Individual Justices Over Time

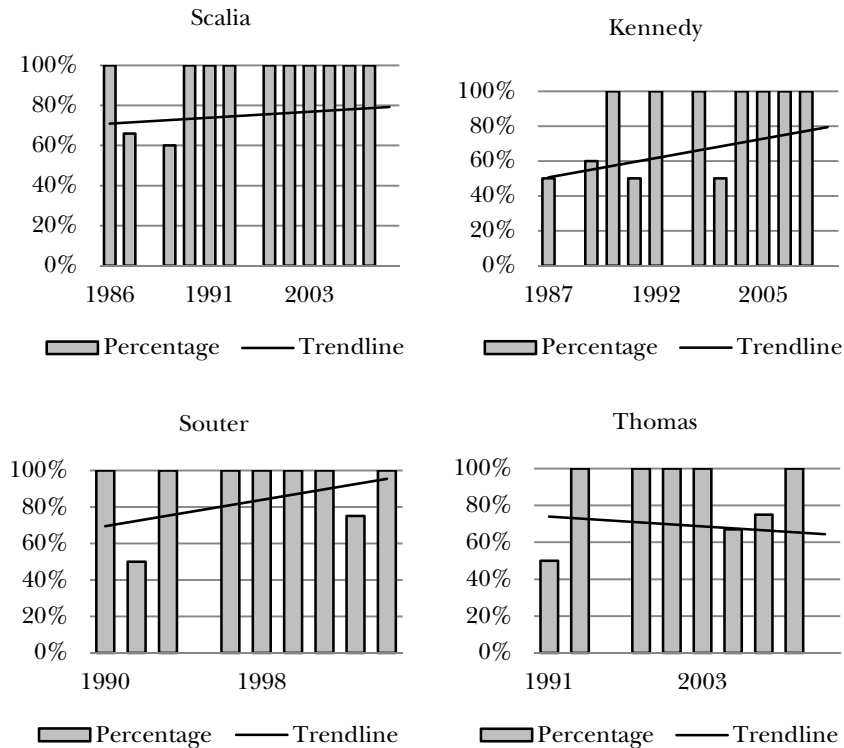


<sup>53</sup> Figure 8 includes each Justice who served for at least 10 terms between 1950 and 2010 in which at least one antitrust case was decided by the Court. This excludes Justices Reed, Jackson, Burton, Minton, Vinson, Whittaker, Goldberg, Fortas, Ginsburg, Breyer, Roberts, and Alito, who each served for less than 10 terms between 1950 and 2010 in which at least one antitrust case was decided. The timescales for each chart in Figure 8 are different, given that each Justice served for different periods of time. Voting information for terms before 1950 and after 2010 is not included in my database, and therefore not shown in Figure 8.

<sup>54</sup> Cases in which the particular Justice did not participate are excluded from analysis.







As seen in Figure 8, while most Justices' voting records remained relatively stable over their tenures, a few Justices' voting records became increasingly market-oriented. The clearest and most interesting example of this phenomenon is Justice Brennan. Brennan's antitrust record is particularly notable for two reasons: not only is he the Justice whose antitrust record changed the most—from very interventionist in the 1950s to relatively market-based by the 1980s—he is also widely considered one of the twentieth-century Court's most important liberals. Indeed, even as Brennan's antitrust record was moving in an increasingly market-based direction, his *overall* voting record (including all types of cases) was only becoming more and more liberal.<sup>55</sup> This divergence between Brennan's antitrust record and his record in other types of cases indicates that his antitrust views were not simply a function of his broader ideology. Given the time period of Brennan's tenure—covering the most significant changes in antitrust practice—it may also suggest his growing acceptance of parties' and amici's economic arguments.

<sup>55</sup> As measured by the commonly-used Martin-Quinn score, Brennan's overall judicial ideology became increasingly liberal over his tenure. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

As intriguing as such developments may be, any changes in the voting behavior of individual Justices are far outweighed by the greater effect of turnover in the composition of the Court. Each and every Justice appointed after Thurgood Marshall cast a higher percentage of market-based votes than the departing Justice they replaced. Over the course of successive appointments, this led to a stable majority of market-based votes in most Supreme Court antitrust cases. Significantly, this phenomenon is not merely a function of party identity. When the analysis includes every Justice in the database, it becomes clear that *all* recent appointees, both Democratic and Republican, cast greater percentages of market-based votes than nearly every Justice predating the Nixon administration.<sup>56</sup> This can be seen in Figure 9, which provides the total percentage of market-based votes cast by each Justice serving between 1950 and 2009:

Figure 9. Antitrust Voting Records of Individual Justices

Black	22.31%	White	38.3%
Reed	50%	Marshall	47.37%
Frankfurter	66.07%	Burger	70.67%
Douglas	22.3%	Blackmun	63.22%
Jackson	60%	Rehnquist	68.13%
Burton	65%	Powell	76.67%
Minton	50%	Stevens	62.65%
Vinson	55.56%	O'Connor	74.47%
Clark	30.86%	Scalia	80.56%
Warren	18.56%	Kennedy	71.88%
Harlan	64.71%	Souter	86.96%
Whittaker	71.43%	Thomas	77.27%
Brennan	34.91%	Ginsburg	68.75%
Goldberg	52.63%	Breyer	75%
Fortas	23.08%	Roberts	88.89%
Stewart	60.16%	Alito	83.33%

As Figure 9 shows, recent conservative appointees have been more likely to cast market-based votes than prior conservative appointees, while recent liberal appointees have been more likely to cast market-based votes than prior liberal appointees—as well as many prior conservative appointees! Justice Ginsburg and Justice Breyer, current members of the Court's liberal wing, have more market-oriented voting records than both Justice Harlan and Justice Stewart, historically considered antitrust conservatives.<sup>57</sup> If measured strictly in terms of antitrust decisions, the median Su-

<sup>56</sup> The single exception being Justice Whittaker, who had an unusually brief tenure on the Court and cast an unusually high percentage of market-based votes.

<sup>57</sup> See *supra* Figure 9.

preme Court Justice shifted significantly rightward since the early 1970s. This phenomenon of later Court appointees—both Democrats and Republicans—casting higher percentages of market-based votes than their immediate predecessors has been the single most important factor in the Court's changing antitrust jurisprudence.

## 2. *Economic Arguments and Individual Justices' Votes*

Unfortunately, changes in Justices' voting over time are only a crude measure of the influence of economic arguments. In effect, time is serving as a proxy for the economization of antitrust arguments, hardly a precise metric of the economic content of specific cases. Fortunately, there is a more direct means of assessing the relationship between economic arguments and individual Justices' votes: Using 2x2 contingency tables, I compare, for each Justice, the percentage of cases in which the Justice cast a market-based vote in (1) cases in which either party made at least one economic argument and (2) cases in which neither party made an economic argument. This comparison allows direct assessment of the statistical relationship between economic arguments and individual Justices' votes.

The results are fascinating. In short, the effect of the presence of economic arguments on individual Justices depends on the particular Justice's overall antitrust record: Justices who were more likely to cast market-based votes in all cases were even *more* likely to cast market-based votes in cases featuring economic arguments. Justices who were more likely to cast interventionist votes in all cases, however, were even *less* likely to cast market-based votes in cases featuring economic arguments. In other words, the presence of economic arguments in antitrust cases seems to have an amplifying effect on Justices' preexisting policy views. These results hold for nearly every Justice in the dataset.<sup>58</sup>

Figure 10 presents 2x2 contingency tables for the same Justices included in Figure 8,<sup>59</sup> reporting the Justice-specific relationships between (1) the presence or absence of at least one economic argument in the parties' briefs (whether made by the defendant, plaintiff, or both)<sup>60</sup> and (2) whether the Justice cast a market-based or interventionist vote.<sup>61</sup>

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<sup>58</sup> The exceptions being Justice Souter and (significantly) Justice Brennan. Three early Justices, Burton, Minton, and Reed, cast market-based votes in approximately 50% of total cases, but were significantly less likely to cast market-based votes in cases featuring economic arguments. This may be due to the fact that economic arguments (while rare) tended to support interventionist outcomes in the early 1950s.

<sup>59</sup> That is, Justices who served at least 10 terms between 1950 and 2010 in which at least one antitrust case was decided by the Court.

<sup>60</sup> Including the initial merits briefs, as well as reply briefs and supplemental briefs, if any.

<sup>61</sup> In social science research, contingency tables are often used to assess relationships between categorical variables. When used with sample data, they are typically accompanied by tests of statistical significance (most often the chi-square

Figure 10. Individual Justices' Votes by Presence or Absence of Economic Arguments

<b>Black</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	73.27%	26.73%	100%
<b>Economic Argument(s)</b>	100%	0%	100%
<b>Total</b>	77.69%	22.31%	100%
<b>Frankfurter</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	36.17%	63.83%	100%
<b>Economic Argument(s)</b>	22.22%	77.78%	100%
<b>Total</b>	33.93%	66.07%	100%
<b>Douglas</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	73.50%	26.50%	100%
<b>Economic Argument(s)</b>	95.83%	4.17%	100%
<b>Total</b>	77.30%	22.70%	100%
<b>Clark</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	64.62%	35.38%	100%
<b>Economic Argument(s)</b>	87.50%	12.50%	100%
<b>Total</b>	69.14%	30.86%	100%

test). For this analysis, I have not included significance tests because the data are not a sample—they encompass the entire population of individual votes within my period of interest. Significance testing is inapplicable because there is no statistical inference to be made. Whether *substantively* significant or not (a question for the reader to decide), the data speak for themselves. That said, if one *were* to perform two-tailed chi-square tests on the data in Figure 10, the results for Justice Black would be statistically significant at  $p \leq 0.01$ ; the results for Justices Douglas, Burger, and O'Connor would be statistically significant at  $p \leq 0.05$ ; and the results for Justices Harlan, Powell, Rehnquist, and Scalia would be statistically significant at  $p \leq 0.1$ .



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<b>Warren</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	78.21%	21.79%	100%
<b>Economic Argument(s)</b>	94.74%	5.26%	100%
<b>Total</b>	81.44%	18.56%	100%

<b>Harlan</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	41.18%	58.82%	100%
<b>Economic Argument(s)</b>	17.65%	82.35%	100%
<b>Total</b>	36.47%	63.53%	100%

<b>Brennan</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	67.46%	32.54%	100%
<b>Economic Argument(s)</b>	58.14%	41.86%	100%
<b>Total</b>	65.09%	34.91%	100%

<b>Stewart</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	43.75%	56.25%	100%
<b>Economic Argument(s)</b>	25.93%	74.07%	100%
<b>Total</b>	39.84%	60.16%	100%

<b>White</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	60.19%	39.81%	100%
<b>Economic Argument(s)</b>	66.67%	33.33%	100%
<b>Total</b>	61.7%	38.3%	100%

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<b>Marshall</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	52.86%	47.14%	100%
<b>Economic Argument(s)</b>	52%	48%	100%
<b>Total</b>	52.63%	47.37%	100%

<b>Burger</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	36.54%	63.46%	100%
<b>Economic Argument(s)</b>	13.04%	86.96%	100%
<b>Total</b>	29.33%	70.67%	100%

<b>Blackmun</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	43.33%	56.67%	100%
<b>Economic Argument(s)</b>	22.22%	77.78%	100%
<b>Total</b>	36.78%	63.22%	100%

<b>Rehnquist</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	39.06%	60.94%	100%
<b>Economic Argument(s)</b>	14.81%	85.19%	100%
<b>Total</b>	31.87%	68.13%	100%

<b>Powell</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	32.5%	67.5%	100%
<b>Economic Argument(s)</b>	5%	95%	100%
<b>Total</b>	23.33%	76.67%	100%

<b>Stevens</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	40%	60%	100%
<b>Economic Argument(s)</b>	32.14%	67.86%	100%
<b>Total</b>	37.35%	62.65%	100%

<b>O'Connor</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	40%	60%	100%
<b>Economic Argument(s)</b>	0%	100%	100%
<b>Total</b>	25.53%	74.47%	100%

<b>Scalia</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	28.00%	72.00%	100%
<b>Economic Argument(s)</b>	0.00%	100.00%	100%
<b>Total</b>	19.44%	80.56%	100%

<b>Kennedy</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	34.78%	65.22%	100%
<b>Economic Argument(s)</b>	11.11%	88.89%	100%
<b>Total</b>	28.13%	71.88%	100%

<b>Souter</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	6.67%	93.33%	100%
<b>Economic Argument(s)</b>	25.00%	75.00%	100%
<b>Total</b>	13.04%	86.96%	100%

<b>Thomas</b>			
	<b>Interventionist Vote</b>	<b>Market-Based Vote</b>	<b>Grand Total</b>
<b>No Economic Argument</b>	35.71%	64.29%	100%
<b>Economic Argument(s)</b>	0.00%	100.00%	100%
<b>Total</b>	22.73%	77.27%	100%

As these tables show, the direction of the effect of economic arguments on a particular Justice's voting decisions has been dependent on the Justice's overall antitrust record.<sup>62</sup> Justice Powell, for example (one of the most conservative Justices in economic cases), cast a market-based vote in 67.5% of cases that did not feature economic arguments, but in 95% of cases that did feature economic arguments. For Justices with interventionist voting records, economic arguments had the opposite effect. Justice Warren, for example, cast a market-based vote in 21.79% of cases that did not feature economic arguments, but in only 5.26% of cases that did feature economic arguments. This phenomenon is also seen in the lack of effect on Justices in the center: Justice Marshall, with the most centrist record in Figure 10, appears to have been unaffected by economic arguments either way. Marshall cast a market-based vote in 47.37% of all cases, and cast almost the same percentage of market-based votes in cases that did and did not feature economic arguments. With Marshall, there seem to have been no preexisting convictions for economic arguments to challenge or reinforce.<sup>63</sup>

Brennan is among the very few Justices whose record is inconsistent with this pattern. While Brennan cast a market-based vote in 35.91% of

<sup>62</sup> There is also an alternative interpretation of the data in Figure 10. Not all antitrust cases are equal in terms of the relevance of economic analysis to their decision, as some antitrust cases turn on technical legal issues with minimal economic implications. It is therefore possible that the presence of economic arguments in the parties' briefs is a proxy for the economic nature of the underlying case. Under this interpretation, the Justices' voting patterns in Figure 10 were influenced by the nature of the cases themselves, rather than by the manner in which they were argued by the parties.

While the nature of the cases may be a lurking variable in Figure 10, I doubt it is the primary explanation. Since the distribution of antitrust cases with highly economic implications has assumedly remained stable over time, but the frequency of economic arguments has significantly increased, it seems unlikely that economic arguments are a close proxy for underlying case content.

<sup>63</sup> This is consistent with perceptions of Marshall as an antitrust moderate who made voting decisions on a non-ideological, case-by-case basis. Given Marshall's background, interest, and expertise in constitutional law, some commentators have portrayed him as comparatively disinterested in antitrust law, and thus particularly open to the influence of his law clerks and fellow Justices. See, e.g., William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, 42 ANTITRUST BULL. 93, 108–11 (1997).

all antitrust cases in which he voted, he cast a market-based vote in 41.86% of cases featuring economic arguments and only 32.54% of cases that did not feature economic arguments.<sup>64</sup> As discussed in Part II.C.1, Brennan is also the Justice whose antitrust record changed most over time, becoming increasingly market-oriented even as his overall record became increasingly liberal. If many Justices have joined the Court with relatively fixed antitrust views, Brennan may be the exception that proves the rule: a Justice whose perspective on antitrust was reshaped, post-appointment, by developments in academic scholarship.

#### *D. Summary and Interpretation*

Examining both case-level patterns and the voting records of individual Justices reveals the market-based shift in antitrust jurisprudence was not the result of a single cause. As with many historical developments, it was shaped by multiple, complementary factors. That said, the most immediate and most important of these factors was turnover on the Court. The Nixon appointments, in particular, had a clear effect on the Court's decision making. Once established on the Court, the Nixon appointees constituted a stable pro-defendant voting bloc, and were able to secure many pivotal antitrust decisions by garnering the support of their moderate colleagues.<sup>65</sup> While these Republican Justices tended to be highly receptive to economic arguments,<sup>66</sup> their receptiveness appears to have been due to political attitudes formed earlier in their careers, rather than to any post-appointment economic enlightenment. With the possible exception of Justice Burger (whose market-based voting increased somewhat), each of these Justices' antitrust voting records remained stable over time,<sup>67</sup> even as the content of party and amicus briefs became increasingly economic.<sup>68</sup> At the same time, incumbent Justices holding interventionist views were generally unswayed by economic appeals.<sup>69</sup> In terms of individual votes, it appears that preexisting political attitudes have been more important than economic arguments.

The Court's embrace of market-based economics cannot be explained purely in political terms, however. As discussed in Part II.C.1 above, certain liberal Justices of the older generation (most notably Justice Brennan) became more likely to support market-based decisions over the span of their tenures. This did not correspond with any rightward shift in their overall voting records (in the case of Brennan, quite the opposite). Even more significant were the market-based antitrust

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<sup>64</sup> See *supra* Figures 9 & 10.

<sup>65</sup> See *supra* Figure 8.

<sup>66</sup> See *supra* Figure 10.

<sup>67</sup> See *supra* Figure 8.

<sup>68</sup> See *supra* Figures 2–7.

<sup>69</sup> See *supra* Figure 10.

views of newly-appointed Justices: By the 1990s, the market-based approach to antitrust law had transcended partisan divisions, characterizing the Court's liberal wing as well as its conservatives.<sup>70</sup> Indeed, nearly every member of the current Court—Democrats as well as Republicans—would be considered an antitrust conservative by the standards of the prior era.<sup>71</sup> This development, more than any other, accounts for the current direction of antitrust law.

This fundamental shift in judicial attitudes is difficult to explain. Fully answering the question of why recent Justices, both liberal and conservative, have accepted the market-based approach to antitrust law would require examining the broader influence of economic thought on American legal culture. Such an ambitious inquiry is—unfortunately—beyond the scope of this Article. A qualitative analysis of major antitrust cases can demonstrate how this transformation progressed, however. The following Part III presents such an analysis in view of the statistical trends discussed above, examining three major cases from three distinct phases in postwar antitrust law.

### III. CASE STUDIES

As the years have passed, the number of law and economics citations by the Court, litigants, and amici curiae has significantly increased, arguments are more frequently cast in specifically economic terms, and the Court has become increasingly accepting of the policy conclusions of law and economics.<sup>72</sup> Although statistical data provides a useful view of a legal field in transformation, it fails to convey the full flavor of these changes, which can only be drawn from reading the individual cases: the gradual yet inexorable shift in the assumptions, rhetoric, and argumentative strategies of nearly all legal actors involved. In order to convey these qualitative changes, this Part III presents a closer analysis of three landmark antitrust cases, each drawn from a distinct period in postwar antitrust law: *Brown Shoe* (1962), decided during the height of the Supreme Court's in-

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<sup>70</sup> See *supra* Figure 8.

<sup>71</sup> See *supra* Figure 9. The only potential exception is Justice Kagan, the newest member of the Court, who has been involved in too few antitrust cases for an accurate assessment of her views. Even Justice Sotomayor has established a record as a moderate in business cases (based largely on her tenure on the Second Circuit), comfortable with the use of economic theory, particularly in antitrust cases. See Dana M. Muir et al., *Justice Sotomayor on the Supreme Court: A Boon for Business?*, 4 VA. L. BUS. REV. 187, 198–99 (2009). At the time of this writing, little can be said of the future replacement for the late Justice Scalia, one of the Court's most consistent antitrust conservatives.

<sup>72</sup> See *supra* Figures 2–7 (showing the increase in law and economics citations); Figure 6 (showing the percentage of cases in which plaintiffs and defendants presented economic arguments); Figure 5 (showing the percentage of majority opinions containing at least one economic argument).

terventionism, *Sylvania* (1977), signaling the transition to market-based antitrust jurisprudence, and *Brooke Group* (1993), representing the current economic paradigm.

Each of these cases is famous (or infamous, depending on one's perspective) for establishing legal precedents and policy assumptions that would influence antitrust law years to follow. Rather than focusing on their doctrinal significance—ground well covered by prior scholars—the analysis below provides a more descriptive, “externalistic” account of these cases' decisions, including the legal strategies of the various parties, the decision-making process of the Court, and broader changes in the historical context that may have influenced their respective outcomes. Viewing these cases as representative examples of the trends identified in Part II can help to illuminate abstract statistics that might otherwise lack immediate impact.

#### A. *Brown Shoe Co. v. United States—Equalitarianism Versus Efficiency*

Of the three cases selected for review, *Brown Shoe* represents the “inhospitality” era of traditional, interventionist antitrust. As such, it also has the least remaining legal force. A long-standing target of criticism by legal and economic scholars,<sup>73</sup> its central holding has been largely abandoned, though never formally overruled.<sup>74</sup> *Brown Shoe* endured as controlling precedent for decades following its decision, however, and remains controversial today.<sup>75</sup> In the words of Robert Bork (writing in 1978): “It is not merely a bad case, it is also a trend setter—as if the poems of E. A. Guest had determined the course of modern literature.”<sup>76</sup>

*Brown Shoe* involved a merger challenged by the U.S. government under amended Section 7 of the Clayton Act, the primary federal anti-

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<sup>73</sup> See, e.g., DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 245–46 (1982); BORK, *supra* note 1, at 198–216; Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 455–57 (1965); Thomas E. Kauper, *The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 328–29 (1968); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 302–12 (1975).

<sup>74</sup> *Brown Shoe*'s legal significance was weakened by a series of pro-defendant Clayton Act decisions in the 1970s, and by the Department of Justice's hands-off merger enforcement policies in the 1980s. With little likelihood of strong government enforcement, the anti-merger provisions of Clayton Act Section 7 (the specific statute under which the *Brown Shoe* case was brought) have faded in importance. For a discussion of *Brown Shoe*'s legacy, see Robert A. Skitol & Kenneth M. Vorrasi, *The Remarkable 50-Year Legacy of Brown Shoe Co. v. United States*, ANTITRUST, Spring 2012, at 47. For a discussion of merger enforcement policy under the Reagan administration, see EISNER, *supra* note 3, at 195–97.

<sup>75</sup> Skitol and Vorrasi, *supra* note 74, at 47.

<sup>76</sup> BORK, *supra* note 1, at 210.

merger statute.<sup>77</sup> In 1955, Brown Shoe Company, Inc., a large, integrated shoe manufacturer, had acquired by merger G. R. Kinney Company, Inc., a nationwide shoe retailer. Five years prior, under the Celler-Kefauver Antimerger Act of 1950, Congress had expanded the Clayton Act to cover asset acquisitions as well as stock acquisitions, an amendment intended to bring mergers under the act's purview.<sup>78</sup> The government challenged the Brown-Kinney merger pursuant to this amendment, claiming its effect "may be substantially to lessen competition, or to tend to create a monopoly" in the shoe industry, the relevant legal standard under the Clayton Act.<sup>79</sup> On appeal, the Supreme Court ruled for the government, despite the facts that the combined, nationwide market share of Brown and Kinney was only 4.4% of national shoe manufacturing<sup>80</sup> and only 2.3% of national retail sales<sup>81</sup>—hardly monopoly levels. The decision has since been pilloried as an excessive restraint on mergers and acquisitions, which explicitly protected less competitive firms from larger, more cost-efficient rivals.<sup>82</sup> What many of these criticisms fail to acknowledge is that *Brown Shoe* was consistent with the antitrust thinking of its time, and that it faithfully implemented Congress's agenda in passing the Celler-Kefauver amendments.

### 1. *The Court's Opinion*

The social and political concerns animating the *Brown Shoe* decision are far removed from the narrow economic criteria that dominate anti-trust today. The logic of the Court's opinion, authored by Chief Justice Warren,<sup>83</sup> focused on preserving the decentralized structure of the American shoe industry—characterized by a large number of small, independent manufacturers and retailers—from the incipient threat of powerful manufactures dominating the retail market.<sup>84</sup> The issue of economic effi-

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<sup>77</sup> Celler-Kefauver Act of 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18 (2012)).

<sup>78</sup> *Id.* Although the Clayton Act's original reference to acquisitions of "stock or other share capital" arguably included mergers even before 1950, it was not generally interpreted as regulating mergers until following the Celler-Kefauver amendments.

<sup>79</sup> *Id.*

<sup>80</sup> Brief for Appellant at 128, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (No. 4).

<sup>81</sup> *Id.* at 174.

<sup>82</sup> ARMENTANO, *supra* note 73, at 245–46; BORK, *supra* note 1, at 215–16; Blake & Jones, *supra* note 73, at 456–57; Kauper, *supra* note 73, at 328–29; Posner, *supra* note 73, at 302–12.

<sup>83</sup> *Brown Shoe Co.*, 370 U.S. at 294. The decision was unanimous except for a partial dissent by Justice Harlan, who believed the Court lacked proper jurisdiction. *Id.* at 357 (Harlan, J., dissenting).

<sup>84</sup> The *Brown Shoe* decision is noted (and criticized) for establishing the legal standard that "tendencies toward concentration in industry are to be curbed in their incipency" under Section 7. *Id.* at 346 (majority opinion).



ciency, obliquely raised in the Court's opinion, was subordinated to the political goal of halting a "rising tide of economic concentration."<sup>85</sup>

Assessing the potential consequences of the merger, the Court found that in a context of increasing industry consolidation,<sup>86</sup> Brown's acquisition of Kinney and its vertical integration into retailing would "foreclose" part of the retail market to competing manufacturers (who would no longer be able to sell to Kinney), as well as part of the manufactured shoe market to competing retailers (who would no longer be able to buy from Brown).<sup>87</sup> Drawing on the legislative history of the Celler-Kefauver amendments, the Court held that by "foreclosing the competitors of either party from a segment of the market otherwise open to them," the Brown-Kinney merger would deprive competing rivals of "a fair opportunity to compete."<sup>88</sup> The Court predicted Brown would "force" its product upon Kinney, thus eliminating Kinney as a competitive factor in the marketplace.<sup>89</sup> Its condemnation of this outcome was not based in economic theory, however. In particular, the Court cited no theory explaining why Brown, assumedly a profit-maximizing enterprise, would pursue such a policy *unless* it created efficiencies allowing Brown to undersell its competitors.<sup>90</sup> This style of opinion—marked by ad hoc economic reasoning from the bench and suspicion of aggressive business practices—was typical of the Warren Court.<sup>91</sup> Although the *Brown Shoe* opinion included six citations to legal-economic scholarship, each of these citations supported interventionist conclusions, and none spoke directly to efficiency or consumer prices.<sup>92</sup> At the time *Brown Shoe* was decided, economic harm to competitors—in and of itself—tended to establish antitrust liability, with little thought to the economic consequences born by the ultimate consumer.

Indeed, despite the Court's concern over market foreclosure, evidence had been introduced that, following the acquisition, Brown continued to sell shoes to competing retailers and Kinney continued to buy shoes from competing manufacturers<sup>93</sup>—but that small, independent

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<sup>85</sup> *Id.* at 317.

<sup>86</sup> Whether or not concentration in the shoe industry was actually increasing was disputed by the parties. *See* Brief for the United States at 99, *Brown Shoe Co.*, 370 U.S. at 294 (No. 4); Brief for Appellant at 15, *Brown Shoe Co.*, 370 U.S. at 294 (No. 4). The Court accepted the government's argument that the Brown-Kinney merger represented incipient industry consolidation.

<sup>87</sup> *Brown Shoe Co.*, 370 U.S. at 328.

<sup>88</sup> *Id.* at 324.

<sup>89</sup> *Id.* at 332.

<sup>90</sup> *Id.* at 330–32.

<sup>91</sup> *Id.* at 331–33.

<sup>92</sup> *Id.* at 312 n.19, 330 n.50, 332 nn.55–57, 334 n.61, 343 n.71.

<sup>93</sup> Following the merger, Brown and Kinney continued to operate as separate business units.

firms had difficulty competing with the combined Brown-Kinney's lower prices.<sup>94</sup> Acknowledging the possibility that large, integrated firms such as Brown-Kinney might provide lower prices to consumers, the Court explicitly rejected consumer welfare as a controlling factor in Section 7 cases.<sup>95</sup> Turning again to the legislative history, the Court concluded that Congress's objectives in passing the Celler-Kefauver amendments had been to protect small businesses, preserve economic autonomy, and maintain the existing "economic way of life" by halting trends toward industrial consolidation at their earliest incipency.<sup>96</sup> To the extent these goals conflicted with minimizing consumer prices, the Court determined that preventing concentration was Congress's priority.<sup>97</sup> In a famous passage, the Court at once recognized and deprecated the value of economic efficiency under the antitrust laws:

It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.<sup>98</sup>

Whatever the economic merits of this ruling, and despite impassioned arguments to the contrary,<sup>99</sup> the Court's interpretation of Congressional intent was undoubtedly correct. The legislative history of the Celler-Kefauver amendments (and of the original Clayton Act itself) is replete with unambiguous statements of Congress's anti-bigness, anti-concentration agenda, and of its goal of halting even the earliest trends toward economic centralization.<sup>100</sup> The Court's interpretation was also consistent with the mainstream academic views of the era. Antitrust was seen by many legal academics as an important check on economic power,

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<sup>94</sup> See Brief for United States, *supra* note 86, at 120–22.

<sup>95</sup> *Brown Shoe Co.*, 370 U.S. at 342, n.69.

<sup>96</sup> *Id.* at 333.

<sup>97</sup> *Id.* at 346.

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., BORK, *supra* note 1, at 200. Throughout his academic career, Bork argued that Congress's primary objective in passing the antitrust laws was to maximize consumer welfare, rather than to protect small businesses and prevent economic concentration. In the Section 7 context (among others), this argument strains credulity. For a more measured critique of the Supreme Court's use of legislative history in the *Brown Shoe* case, see Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1326–28 (1965).

<sup>100</sup> Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 191–94 (2010); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 23–26 (1982); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060–65 (1979).

an equalitarian viewpoint complemented by the industrial organization economics of the period.<sup>101</sup> At the time *Brown Shoe* was decided, Harvard-style structuralism was the dominant approach in antitrust economics, while the revisionist arguments of the Chicago School remained underdeveloped and obscure. The immaturity of the Chicago School in 1962 is evidenced by the surprising fact that the Court cited George Stigler in support of its interventionist, anti-concentration holding.<sup>102</sup> The lack of alternatives to traditional, interventionist antitrust was also reflected in the parties' briefs, in which the market-based arguments that would characterize later antitrust cases are conspicuously absent.

## 2. Plaintiff's Arguments

The Court's opinion generally followed the arguments of the government, which were even more explicit in prioritizing equalitarianism over efficiency. Most of the government's arguments focused on Congress's anti-bigness agenda and the attendant importance of halting monopoly in its earliest incipency.<sup>103</sup> While the government's brief included a total of five legal-economic citations (generally supporting its interventionist theory of the case), efficiency and consumer prices were peripheral to its core arguments.<sup>104</sup>

The contradictions between the government's arguments and the consumer welfare model are striking. Employing a legal strategy that would seem perverse by the standards of current antitrust thinking, the government repeatedly cited *Brown-Kinney's* advantages in satisfying consumer demand as reasons to invalidate the merger. For example, according to the government, the merger was unfair to *Brown-Kinney's* competitors because the combined business could "sell its own product at a significantly lower price than the nonintegrated independent retailer."<sup>105</sup> The government also cited *Brown's* own justifications for the mer-

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<sup>101</sup> See Emanuel Celler, *What's Wrong with "What Is Wrong with the Antitrust Laws?"*, 8 ANTITRUST BULL. 571, 593 (1963); Alfred E. Kahn, *Market Power and Economic Growth: Guides to Public Policy*, 8 ANTITRUST BULL. 531, 538 (1963).

<sup>102</sup> Two of the Court's six legal-economic citations were to a 1955 Stigler article on the preventative role of merger policy. *Brown Shoe Co.*, 370 U.S. at 332 n.56, 334 n.61. The government also cited Stigler in its merits brief. Brief for United States, *supra* note 86, at 97 n.35. Stigler would emerge in the 1960s as one of the leading economists of the Chicago School, but his early work emphasized the economic danger of industrial concentration. Although ironic in light of his later scholarship, Stigler's (fleeting) anti-bigness views were consistent with an early Chicago intellectual tradition most fully expressed in the writing of Henry Simons. It was not until the work of Aaron Director in the 1950s (and its propagation by Bork, Stigler, and others in the 1960s) that Chicago became known for its free-market antitrust perspective.

<sup>103</sup> See Brief for United States, *supra* note 86, at 45.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 48.

ger,<sup>106</sup> including a smoother manufacturing-retail cycle; more effective advertising and promotion; and greater flexibility to adjust styles, quality, and prices, as additional evidence of the merger's illegality.<sup>107</sup>

During oral argument, the government (represented by Solicitor General Archibald Cox) tied its case to a larger goal of preserving the "economist's classical free market."<sup>108</sup> This goal was expressed without any reference to actual economics scholarship, however—classical or otherwise.<sup>109</sup> In any event, the economic consequences of the "classical free market" seemed secondary within the logic of the government's case to Congress's "social philosophy" of protecting small businesses.<sup>110</sup> Citing the language of the Ninth Circuit opinion in *Crown Zellerbach Corp. v. F.T.C.*,<sup>111</sup> the government argued that "[as amended Section 7] was under consideration by Congress, it was duly appreciated that decentralized and deconcentrated markets are often uneconomic and provide higher costs and prices[,] but that Congress chose to accept these costs to combat "concentration of power."<sup>112</sup> Although this argument was an accurate characterization of Congress's legislative intent, it represented an economic perspective far removed from current antitrust thought. As discussed in the context of the *Sylvania* and *Brooke Group* cases below, it is nearly inconceivable that a plaintiff would make such an argument today.

### 3. Defendant's Arguments

Unlike the government's arguments, the defendant's arguments in support of the merger gained little traction with the Court. This may have been partly the result of a misguided legal strategy: defendant's counsel<sup>113</sup> spent the majority of an over-200-page brief arguing that Brown and Kinney were not competitors—and therefore their merger did not threaten competition—because the two firms sold different varieties of shoes in different price ranges.<sup>114</sup> Although this argument was certainly relevant to the horizontal aspects of the case, it failed to impress the Court, which rejected it almost out of hand.<sup>115</sup> At a deeper level, de-

<sup>106</sup> Brown's president, Clark Gamble, testified as a witness at trial.

<sup>107</sup> Brief for United States, *supra* note 86, at 120–22.

<sup>108</sup> Transcript of Oral Argument (Part 1) at 1:16:42, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) ((No. 4), [http://www.oyez.org/cases/1960-1969/1961/1961\\_4](http://www.oyez.org/cases/1960-1969/1961/1961_4).

<sup>109</sup> *Id.* at 1:16:06–1:19:38.

<sup>110</sup> *Id.* at 1:36:26.

<sup>111</sup> 296 F.2d 800, 825 (9th Cir. 1961).

<sup>112</sup> Transcript of Oral Argument (Part 1), *supra* note 108, at 1:37.

<sup>113</sup> Brown's lead attorney was Arthur Dean, of Sullivan & Cromwell—hardly incompetent antitrust counsel.

<sup>114</sup> Brief for Appellant, *supra* note 80, at 122.

<sup>115</sup> Transcript of Oral Argument (Part 2) at :06–2:23, *Brown Shoe Co.*, 370 U.S. at 294 (No. 4), <http://www.oyez.org/cases/1960-1969/1961/1961>. Defendant's counsel argued that the shoe market was actually comprised of a large number of distinct and

fense counsel seemed unable to effectively convey why *any* merger should be viewed by courts with anything besides hostility. This broader theoretical failure may have stemmed from an absence—at the time—of market-based antitrust scholarship for defendant’s counsel to draw on.

At certain points in its briefs,<sup>116</sup> the defense broached arguments similar to those that would eventually become hallmarks of the Chicago School, but without the aura of economic sophistication that academic citations might have afforded. As an example, the defense argued that the government’s case conflated injury to *competitors* with injury to *competition*, and that evidence of Brown’s competitive success was irrelevant to establishing antitrust liability (themes common to later Chicago scholarship).<sup>117</sup> Despite the economic implications of this argument, however, defendant’s briefs included no citations to law and economics scholarship.<sup>118</sup> Without the benefit of a theoretical model of how mergers could promote economic efficiency, the defense was incapable of rebutting the assumption that all mergers were competitively suspect. Ironically, the defense went as far as to argue the merger would *not* achieve economic benefits—even for Brown itself!—in an attempt to counter the government’s claims as to Brown’s competitive advantages.<sup>119</sup> Given the inability of the defendant to coherently justify its own transaction, it is hardly surprising that it fared so poorly before the Court.

#### 4. Summary

The *Brown Shoe* case is representative of its era in at least three key respects: (1) the Court’s opinion focused on protecting competitors rather than maximizing consumer welfare, (2) the logic of the parties’ arguments did not rely on formal economic theory, and (3) neither the Court’s opinion nor the parties’ briefs contained extensive citations to law and economics scholarship.<sup>120</sup> Although modern critics have de-

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separate submarkets (corresponding with different varieties of shoes and different price ranges). The Court held that, for purposes of the case, there were only three identifiable markets: men’s shoes, women’s shoes, and children’s shoes. Both Justice Clark (concurring) and Justice Harlan (dissenting) would have taken an even stricter approach, holding that the shoe industry was comprised of a single market.

<sup>116</sup> The defendant submitted an initial brief and a reply brief.

<sup>117</sup> Brief for Appellant, *supra* note 80; Appellant’s Reply Brief at 38, *Brown Shoe Co.*, 370 U.S. at 294 (No. 4). Interestingly, the Court’s statement that the Clayton Act was meant to protect “competition, not competitors”—a phrase which would later become a touchstone of modern antitrust—appears to have been drawn from the initial brief of the defendant. It appears nowhere in the legislative history of the Celler-Kefauver amendments.

<sup>118</sup> Brief for Appellant, *supra* note 80.

<sup>119</sup> *Id.* at 193.

<sup>120</sup> At six and five citations respectively, the Court’s opinion and the plaintiff’s merits brief were each above average for the era, but well below average for all cases in the database. The defendant’s merits briefs included no law and economic citations.

nounced *Brown Shoe* as economically naive, it is important to remember that the decision reflected the mainstream antitrust views of the era. The moderate, consensus nature of the *Brown Shoe* decision is underscored by the facts that the government's case was originally brought under a Republican administration,<sup>121</sup> that the Court's opinion was authored by a Republican Chief Justice,<sup>122</sup> and that the decision on the merits was essentially unanimous.<sup>123</sup> Claims that the decision constituted a dramatic, activist overreach are both inaccurate and ahistorical.

*Brown Shoe* is also representative for another important reason: like most antitrust cases of its era, it featured no involvement of amici curiae. Amicus briefs were rarely submitted in antitrust cases before the 1970s. Although the historical phenomenon of increasing amicus briefs has affected nearly every area of the law, it may have been particularly influential in the antitrust context. As law and economics scholarship began to criticize traditional antitrust jurisprudence, amicus briefs were often the means by which these critiques were communicated to the Court.<sup>124</sup>

Significantly, it was not until after *Brown Shoe* had been decided that market-based antitrust scholarship became widely published. The decision itself may have even played a role in spurring the publication of market-based critiques: Robert Bork and Ward Bowman's 1963 *Fortune* article "The Crisis in Antitrust"—the opening salvo of both professors' career-spanning assaults on interventionist antitrust—was written partly in response to the *Brown Shoe* decision, which they saw as symptomatic of incoherent antitrust jurisprudence.<sup>125</sup> The critique outlined in "The Crisis in Antitrust" would grow increasingly influential as the years went by, and antitrust law and enforcement policy would eventually gravitate toward the Chicago perspective. *Brown Shoe*, therefore, stands today as a high-water mark of interventionist antitrust, largely disconnected from the economic concerns of the current intellectual paradigm.

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<sup>121</sup> The case was originally brought in 1955, under the Eisenhower administration.

<sup>122</sup> Albeit the single most interventionist Justice of the postwar era. See *supra* Figure 9.

<sup>123</sup> Although Justice Harlan dissented on a procedural jurisdictional issue, he concurred with the Court's decision on the merits. Justice Frankfurter and Justice White took no part in the decision of the case. For discussion of the Court's internal decision-making process in *Brown Shoe*, see Tony A. Freyer, *What Was Warren Court Antitrust?*, 2009 SUP. CT. REV. 347, 370–81.

<sup>124</sup> See, for example, the discussion of *Sylvania*, *infra* Part III.B.

<sup>125</sup> Robert H. Bork & Ward S. Bowman, *The Crisis in Antitrust*, FORTUNE, 1963, at 138, reprinted in 65 COLUM. L. REV. 363, 373 (1965).

B. Continental T.V., Inc. v. GTE Sylvania Inc.—*The Economic Turn in Antitrust*

The *Sylvania* case is widely considered a turning point in modern antitrust. Its economics-based, pro-defendant holding and its explicit break from prior Court precedent signaled a new perspective on the part of the Court toward the appropriate role of antitrust law. Although *Sylvania* was not the first decision to apply economic analysis to antitrust law, its clear endorsement of market-based economic theory heralded the future direction of the field. Andrew Gavil speaks for most commentators when he writes that, after *Sylvania*, “a revolution unfolded in the content of the law of antitrust.”<sup>126</sup>

*Sylvania* concerned the legality of non-price vertical sales restraints imposed by manufacturers on independent retailers—a different subject than raised in *Brown Shoe*, but implicating similar social, political, and economic concerns. Ten years prior to *Sylvania*, the Court had held in *United States v. Arnold, Schwinn & Co.* that a manufacturer’s practice of restricting the sales activities of wholesalers and retailers was a per se violation of the Sherman Act.<sup>127</sup> GTE Sylvania, Inc., a television manufacturer, engaged in distribution practices similar to those held illegal in *Schwinn*, restricting the locations from which its authorized dealers were allowed sell its products.<sup>128</sup> One of these dealers sued Sylvania after attempting to sell its products from an unauthorized location, in competition with the authorized Sylvania dealer for the area.<sup>129</sup> Applying *Schwinn*, the district court ruled in favor of the plaintiff.<sup>130</sup> On appeal, the Ninth Circuit (sitting en banc) reversed the decision of the district court, distinguishing the facts of Sylvania’s distribution practices from the practices held unlawful in *Schwinn*.<sup>131</sup> Granting certiorari, the Supreme Court went even further, holding that non-price vertical sales restraints were subject to the rule of reason (rather than the per se rule), expressly overruling *Schwinn*.<sup>132</sup> According to the Court’s opinion, although vertical restraints such as those employed by Sylvania could reduce competition among dealers of the same brand (so-called “intra-brand” competition), this was

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<sup>126</sup> Gavil, *supra* note 4, at 8.

<sup>127</sup> 388 U.S. 365, 382 (1967). Schwinn, a bicycle manufacturer, had secured agreements from its wholesalers not to sell outside of their assigned geographic areas, as well as agreements from its retailers to sell only to retail customers (and not to sell to other unauthorized resellers). These practices were intended to reduce competition among wholesalers and retailers, increasing the price of Schwinn products and encouraging retailers to invest in promotional and service efforts.

<sup>128</sup> Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 38 (1977).

<sup>129</sup> *Id.* at 39.

<sup>130</sup> *Id.* at 40.

<sup>131</sup> *Id.* at 41.

<sup>132</sup> *Id.* at 57.

more than offset by encouraging competition among manufacturers of competing brands (“interbrand” competition).<sup>133</sup>

Like *Brown Shoe*, *Sylvania* is a representative example of many anti-trust decisions of its era—in this case, the transitional period of the late 1970s and 1980s. Specifically, *Sylvania* demonstrates the following characteristics common to many cases of the period: (1) the decisive role of conservative Justices (particularly Justice Powell, the author of the *Sylvania* opinion); (2) extensive citation to law and economics scholarship on the part of the Court; (3) extensive citation to law and economics scholarship on the part of the defendant; (4) a relative *lack* of law and economics citations on the part of the plaintiff; and (5) the submission of multiple economically-sophisticated amicus briefs. Together, these characteristics clearly distinguish *Sylvania* from earlier cases such as *Brown Shoe* and *Schwinn*. Although a full analysis of the *Sylvania* decision—one of the most important in recent antitrust history—is beyond the scope of this Article, the discussion below highlights the ways in which *Sylvania* illustrates overarching trends.<sup>134</sup>

### 1. *The Court’s Opinion*

The *Sylvania* opinion provides a clear example of the impact of Nixon’s judicial appointees (particularly Justice Powell) on U.S. antitrust jurisprudence. Powell—the opinion’s author—purposefully crafted a far-reaching decision that extended well beyond the facts of the case, overturning prior Court precedent and reshaping the law of vertical restraints. Much of Powell’s discussion in *Sylvania* actually focused on criticizing *Schwinn*, clearly telegraphing his desire to overrule it.<sup>135</sup> After finding *Sylvania*’s distribution practices indistinguishable from those in *Schwinn*, Powell justified overruling the prior case on grounds of its fundamental doctrinal weakness; its confused, inconsistent application by the lower courts; and its overwhelmingly negative reception by academic commentators.<sup>136</sup> This last factor appears to have been particularly significant, as the opinion cites the academic literature extensively—in total,

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<sup>133</sup> *Id.* at 51–52.

<sup>134</sup> For broader analyses of *Sylvania*, see generally Warren S. Grimes, *The Life Cycle of a Venerable Precedent: GTE Sylvania and the Future of Vertical Restraints Law*, 17 ANTITRUST L.J. 27 (2002); Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978); Robert L. Steiner, *Sylvania Economics—A Critique*, 60 ANTITRUST L.J. 41 (1991).

<sup>135</sup> *GTE Sylvania, Inc.*, 433 U.S. at 47, 51, 54, 56.

<sup>136</sup> *Schwinn* is among the most criticized opinions in the history of antitrust law. Its per se result had not been advocated by the plaintiff, but was rather a confusing consequence of Justice Fortas’ widely panned opinion. Even a noted critic of the Chicago treatment of vertical restraints has identified *Schwinn* as an example of “bad workmanship, sloppy use of terms, and a persistent failure to examine the reasons why the decision might be criticized.” Peter C. Carstensen, *Annual Survey of Antitrust Developments: 1976–1977*, 35 WASH. & LEE L. REV. 1, 16 (1978).



Powell's opinion includes 24 citations to law and economics scholarship, compared to only six in *Brown Shoe* and zero in *Schwinn*.

These citations provided the basis of the opinion's economic analysis of vertical restraints, which posited that manufacturers imposed such restraints *not* to reduce retail competition and uphold prices, but rather to ensure effective product distribution and more effectively compete with rival manufacturers. Although vertical restraints reduced *intra*brand competition by limiting competition among dealers of the same brand, they enhanced *inter*brand competition by encouraging dealers of competing brands to invest in promotion, merchandising, and point-of-sale services.<sup>137</sup> The logic of this argument was deeply influenced by recent developments in antitrust scholarship, particularly (though not exclusively) the work of scholars associated with the Chicago School. Citing Richard Posner, Robert Bork, and other prominent antitrust scholars, the opinion argued that manufacturers have an economic interest in ensuring the maximum level of dealer competition consistent with the efficient distribution of their products. Thus, vertical restrictions imposed by manufacturers are unlikely to have net anti-competitive effects—particularly not to an extent justifying inflexible *per se* treatment.<sup>138</sup>

Although the logic of the Court's opinion relied heavily on economic theory, it is difficult to say whether law and economics scholarship actually influenced *Sylvania's* outcome. There is abundant evidence that Justice Powell needed little convincing to overrule *Schwinn*.<sup>139</sup> Powell had arrived on the Court in 1972 with considerable pro-business sympathies, as suggested by his prior experience as a successful corporate attorney, his service on several corporate boards of directors, and his consistent pro-business voting record following his appointment.<sup>140</sup> In addition, only two months prior to his nomination, Powell had authored the infamous "Powell memorandum" to the U.S. Chamber of Commerce, a programmatic call for the defense of the American free enterprise system.<sup>141</sup> This confidential memorandum, revealed after Powell's confirmation, warned of growing hostility in American culture to the capitalist economic system

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<sup>137</sup> *GTE Sylvania, Inc.*, 433 U.S. at 54–57.

<sup>138</sup> *Id.* at 58. This is a necessarily simplified description of the economic arguments of *Sylvania*, which are no doubt familiar to many readers. For more detailed treatments of the Court's arguments, see Grimes, *supra* note 134, at 27; Pitofsky, *supra* note 134, at 1; Steiner, *supra* note 134, at 41.

<sup>139</sup> See A. C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 845 (2003).

<sup>140</sup> Powell's pro-business voting record was not limited to antitrust cases. For example, he was also one of the most pro-defendant Justices in securities cases, spearheading a rollback of many Warren Court decisions during the 1970s and 1980s. *See id.*

<sup>141</sup> LEWIS F. POWELL, CONFIDENTIAL MEMORANDUM: ATTACK ON AMERICAN FREE ENTERPRISE SYSTEM (1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>.

and advocated concerted efforts to spread pro-capitalist ideas among universities, the media, and—most significantly—the courts.<sup>142</sup> Whether or not the Powell memorandum is proof of a premeditated judicial agenda, as some critics of Powell have claimed, it is safe to say Powell's connections to the business world likely influenced his antitrust views.

As an example, Powell's dissatisfaction with *Schwinn* (and the broader inhospitality tradition it represented) influenced nearly all aspects of the *Sylvania* case. Indeed, without Powell's intervention in the certiorari process, the Court may never have heard *Sylvania* at all. As documented by Andrew Gavil, Powell's historical papers reveal that the Court's initial vote on granting certiorari attracted only three of the four Justices necessary to accept the case.<sup>143</sup> However, Powell requested a special relisting, and lobbied fellow Justices to change their votes, successfully persuading Justice Stewart.<sup>144</sup> As the Ninth Circuit below had already ruled for *Sylvania*, Powell's motivation to hear the case was clearly to revisit *Schwinn*. Once the case had been heard by the Court, Powell worked behind the scenes during the opinion-drafting process to ensure that *Schwinn* would be expressly overruled, strategically tailoring the language of his opinion to ensure the support of fellow Justices.<sup>145</sup> Powell was highly conscious of both the jurisprudential and economic significance of reversing the per se treatment of vertical restraints, instructing his clerks to clearly articulate why *Schwinn* was both doctrinally and economically unsound.<sup>146</sup>

Ultimately, Powell's personal decision to overrule *Schwinn* was likely made independent of economic theory. Nevertheless, economic theory was the intellectual framework within which the decision was articulated and justified. As discussed below, the economic content of the *Sylvania* opinion was drawn from multiple sources—partly from the contributions of Powell's clerks, partly from the defendant's merits brief, and partly from amicus briefs (particularly that of the Motor Vehicle Manufacturers Association).<sup>147</sup> The *plaintiff's* briefs,<sup>148</sup> on the other hand, which relied

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<sup>142</sup> *Id.* For discussion of the historical context and influence of the Powell memorandum, see KIMBERLY PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL* 150–65 (2010). The memorandum is “infamous” primarily among liberal advocacy groups, which see it as an inspiration for the conservative intellectual mobilization of the 1970s and 1980s.

<sup>143</sup> Gavil, *supra* note 4, at 9.

<sup>144</sup> *Id.* Pursuant to the informal “rule of four,” the Supreme Court grants certiorari upon the affirmative vote of at least four Justices.

<sup>145</sup> *Id.* at 9–10. In the final tally, Blackmun, Burger, Stevens, and Stewart joined Powell's opinion, with White concurring. Brennan filed a dissenting opinion, which Marshall joined. Rehnquist took no part in the case.

<sup>146</sup> *Id.* at 10.

<sup>147</sup> The Court's reasoning was *not* drawn from any expression of Congressional intent, statutory or otherwise. The remarkable activism of Justice Powell (and the Court more generally) in shaping and reshaping antitrust doctrine may be an example of what Harry First and Spencer Weber Waller have referred to as

primarily on stare decisis, were largely disregarded by the Court's opinion, despite their firmer grounding in legal precedent.

## 2. *Plaintiff's Arguments*

The various *Sylvania* briefs and their different approaches to the case highlight the vigorous intellectual debates occurring in antitrust scholarship in the late 1970s. On the side of interventionist antitrust, the plaintiff was represented by Lawrence Sullivan and Jesse Choper, law professors at Berkeley and proponents of strict, per se treatment of vertical restraints.<sup>149</sup> Sullivan in particular was an outspoken defender of traditional antitrust, and one of the Chicago School's most prominent and respected intellectual opponents.<sup>150</sup> Despite Sullivan's academic engagement with the economic debates of the day, however, he failed to connect his legal arguments to the expanding economic literature, relying instead on a more traditional, precedent-based legal strategy.<sup>151</sup>

Together, the plaintiff's briefs included a total of nine citations to law and economics scholarship, compared to thirty-one in the defendant's single merits brief.<sup>152</sup> Moreover, most of these citations were actually negative citations refuting the arguments of the cited scholar.<sup>153</sup> Rather than drawing on economic support, the plaintiff's arguments against *Sylvania*'s distribution practices were primarily grounded in Court precedent—namely *Schwinn*.<sup>154</sup> This may have been a reasonable strategy given *Schwinn*'s clear application to the facts, but it left the plaintiff with little to stand on in the event that *Schwinn* were overruled.<sup>155</sup> Instead of focusing on economic efficiency, the plaintiff emphasized the broader concerns that had animated earlier antitrust cases, arguing that per se prohibition of vertical restraints ensured “fair and rational income distribution,” “an economic climate in which any person can aspire to independence and growth[,]” and the “[d]ispersion of political, social and economic power.”<sup>156</sup> These non-efficiency arguments had little impact on the Court's majority, and were summarily disposed of in a footnote in Powell's opinion: “Competitive economies have social and political as well as economic

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“antitrust's democracy deficit”—that is, the displacement of Congressional policymaking by that of unelected institutions. Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2544 (2013).

<sup>148</sup> The plaintiff submitted an initial brief and a reply brief.

<sup>149</sup> *Continental T.V., Inc., v. GTE Sylvania Inc.*, 433 U.S. 36, 37 (1977).

<sup>150</sup> Jesse H. Choper, *Tribute: Retirement of Lawrence Sullivan*, 79 *CALIF. L. REV.* 1221, 1221 (1991).

<sup>151</sup> Brief for Petitioners, *GTE Sylvania Inc.*, 433 U.S. at 36 (No. 76-15), 1976 WL 181221.

<sup>152</sup> *Id.* at iv–v.

<sup>153</sup> Citing Bork in the context of arguing that Bork is wrong, for example.

<sup>154</sup> Brief for Petitioners, *supra* note 151, at 29, 37, 41.

<sup>155</sup> See Carstensen, *supra* note 136, at 23–24.

<sup>156</sup> Brief for Petitioners, *supra* note 151, at 55.

advantages,” he wrote, “but an antitrust policy divorced from market considerations would lack any objective benchmarks.”<sup>157</sup>

Sullivan and Choper’s legal strategy was typical of many antitrust plaintiffs during this period. The emphasis on legal precedent rather than economic efficiency, the appeal to traditional notions of economic equality, and the relative dearth of law and economics citations were traits seen again and again in plaintiff’s briefs up to the 1980s. For many years, this had been a successful approach. Following the Nixon appointments, however, this strategy became much less viable, as market-based defendants’ arguments began to win a greater number of cases.

### 3. Defendant’s Arguments

The defendant’s brief was characteristic of emerging trends in antitrust practice in that it extended beyond traditional legal analysis to provide an economic justification for Sylvania’s business practices.<sup>158</sup> Defendant’s counsel supported its arguments with a total of 31 law and economics citations (compared to the plaintiff’s nine), the vast majority of which were consistent with the Chicago position on vertical restraints.<sup>159</sup> The defendant’s brief also incorporated testimony of Lee Preston, Jr., an economics professor at Berkeley, to the effect that Sylvania’s use of vertical restraints was more likely to promote competition than to harm it.<sup>160</sup> Preston’s testimony was grounded in a decidedly market-oriented economic perspective, according to which the self-interested distribution decisions of independent manufacturers such as Sylvania would—almost by definition—benefit consumers as well.<sup>161</sup> A majority of the Court apparently agreed, as many of the defendant’s economic arguments were reflected in Powell’s final opinion. Sylvania’s brief is thus representative of many defendant’s briefs of the period: grounded in economics, supported by academic citations, and addressed toward an increasingly receptive Court.

### 4. Amicus Curiae Briefs

*Sylvania* provides an early example of another important trend in antitrust practice—the increasing number of economically sophisticated amicus curiae briefs. In *Sylvania*, three amici submitted legal briefs (compared to zero in *Brown Shoe* and one in *Schwinn*), each in support of the defendant. All three briefs included economic arguments, but one in particular—submitted by the Motor Vehicle Manufacturers Association

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<sup>157</sup> *GTE Sylvania, Inc.*, 433 U.S. at 53 n.21.

<sup>158</sup> See generally Brief for Respondent, *GTE Sylvania Inc.*, 433 U.S. at 36 (No. 76-15), 1976 WL 181222.

<sup>159</sup> *Id.* at 5–6.

<sup>160</sup> *Id.* at 10.

<sup>161</sup> See Carstensen, *supra* note 136, at 29–30.

(“MVMA”)—made a particularly strong impression on the Court, perhaps even more so than the defendant’s brief itself.<sup>162</sup>

The MVMA brief was authored by Donald Turner, counsel to MVMA, together with the law firm of Wilmer, Cutler & Pickering.<sup>163</sup> In 1977, Turner was among the most prominent and respected antitrust scholars in America. Holding a law degree and a Ph.D. in economics (both from Harvard), Turner had served as Assistant Attorney General for antitrust under President Johnson, and his multivolume antitrust treatise, co-authored with Phillip Areeda, was (and remains) the single most cited publication in the field.<sup>164</sup> Although trained at Harvard, Turner’s views on antitrust policy—always informed by economic analysis—became increasingly aligned with the Chicago perspective over the course of his career. His MVMA brief was for all intents and purposes an economic essay on vertical restraints, citing many prominent figures of the Chicago School and arriving at substantially similar conclusions.<sup>165</sup>

The MVMA brief was particularly well received by Powell and his clerks. During the opinion drafting process, Powell advised his clerks to use the MVMA brief as inspiration: “[m]y recollection is that the brief filed by Wilmer Cutler is the single most helpful brief in this case”, he wrote to them. “No doubt you have drawn on it heavily. If not, I commend it to you.”<sup>166</sup> Tyler Baker, one of Powell’s clerks, was as impressed by the MVMA brief as his boss. Discussing the case with Andrew Gavil, Baker recalled that “the Wilmer Cutler brief was head and shoulders above anything else we had. It really was a masterful brief that was clearly

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<sup>162</sup> Motion for Leave to File Brief and Brief for Motor Vehicle Manufacturers Association as Amicus Curiae, *GTE Sylvania Inc.*, 433 U.S. at 36 (No. 76-15), 1977 WL 189274 [hereinafter MVMA Brief]. The two other amicus briefs were submitted by the Associated Equipment Distributors and the International Franchise Association.

<sup>163</sup> The precise division of labor between Turner and Wilmer Cutler is unclear, though given the brief’s high level of economic sophistication, it is reasonable to assume that Turner’s contribution was significant. Turner subsequently joined Wilmer Cutler as counsel, suggesting their working relationship was very close.

<sup>164</sup> The current iteration of the Areeda-Turner treatise, now helmed by Herbert Hovenkamp, is PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (4th ed. 2015).

<sup>165</sup> MVMA Brief, *supra* note 162 at iv. One important difference between the position of the MVMA brief and that of the Chicago School was whether vertical *price* restraints (i.e., retail price maintenance) serve the same economic function as vertical *non-price* restraints (such as the policies at issue in both *Sylvania* and *Schwinn*). Although many Chicago scholars believed that vertical price restraints and vertical non-price restraints are equivalent from an economic perspective, and thus equally deserving of rule-of-reason analysis, the MVMA brief explicitly disclaimed any support for vertical price restraints, stating they tend to uphold prices and “plainly disserve the interests of many if not most consumers.” *Id.* at 45.

<sup>166</sup> Gavil, *supra* note 4, at 11.

written and yet had all the policy arguments included.”<sup>167</sup> This is not to say that the MVMA brief *persuaded* Powell to decide one way or another—it seems likely that Powell’s mind was made up even before the certiorari process—but it does suggest that the brief helped shape the analysis used to justify the decision. This analysis, in turn, has had far-reaching jurisprudential implications. Indeed, the MVMA brief is probably unusual in the degree of influence it had on the law.<sup>168</sup> It nonetheless serves to illustrate a more general trend in antitrust cases—the rise of economics-based amicus briefs authored by prominent antitrust scholars. In the decades following the *Sylvania* decision, this trend has only intensified.

### 5. Summary

*Sylvania* represents a transition period between two eras of antitrust: the mid-century inhospitality era, marked by aggressive interventionism, and the modern era of market-based antitrust, marked by faith in the efficiency of private ordering. *Sylvania* heralded the modern era with its detailed economic arguments and extensive law and economics citations. These characteristics distinguished *Sylvania* from earlier cases such as *Brown Shoe* and *Schwinn*, in which economics played a minor role. *Sylvania* remains connected to the earlier era as well, however, particularly in terms of the legal strategy employed by plaintiff’s counsel. Although the decision to focus on legal precedent rather than abstract economic theory was clearly the wrong one, it was not until the 1980s that plaintiffs began to regularly use economic arguments. The absence of any amicus curiae supporting the plaintiff reflects a similar lag—later cases would feature economics-based amicus briefs on both sides.

Perhaps the most notable feature of *Sylvania* is the activism of Justice Powell. This aspect of the case raises difficult questions regarding the influence of law and economics scholarship, highlighting the historical ambiguity at the very heart of this study. It is clear that Powell—together with his clerks—accepted the economic arguments of *Sylvania* and MVMA, given that he incorporated them into the Court’s opinion. However, it appears equally clear that Powell’s fundamental decision to overrule *Schwinn* (and to hear the case at all) was dictated primarily by his political attitudes. Ultimately, the true significance of law and economics scholarship as employed in the *Sylvania* case may have been in persuading marginal Justices (Stevens and Stewart, for example) to join Powell’s opinion, as well as in enshrining Chicago vertical restraint analysis as au-

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<sup>167</sup> *Id.* at 13 n.31. Baker himself was almost certainly an important factor in shaping the *Sylvania* opinion. Baker came to his clerkship after having studied under William F. Baxter at Stanford Law School, and went on to work for Baxter at the Department of Justice in the early 1980s. Baxter was a committed adherent of the Chicago approach to antitrust, a perspective shared by his student Baker. *See id.*

<sup>168</sup> In the words of Stephen Calkins, most amicus briefs in antitrust cases “sparkle briefly and then expire, forgotten if not unnoticed.” Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625, 643 (2001).

thoritative Supreme Court precedent. Through its citations to the Chicago School and its explicit endorsement of market-based economics, the *Sylvania* opinion put litigants on notice that the foundations of antitrust were beginning to change.

C. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.—A New Era*

*Brooke Group*, my third and final case study, demonstrates the triumph of economic analysis in U.S. antitrust law. In this 1993 case, *Brooke Group Ltd.*,<sup>169</sup> a cigarette manufacturer, brought a predatory pricing claim under the Robinson-Patman Act<sup>170</sup> against *Brown & Williamson Tobacco Corp.*, a competing manufacturer. *Brooke Group* claimed that *Brown & Williamson* had priced its generic cigarettes below cost in an attempt to undermine *Brooke Group*'s competitive efforts and maintain oligopolistic pricing in the cigarette industry.<sup>171</sup> The Court ruled in favor of *Brown & Williamson*, relying on a market-based theory of predatory pricing.<sup>172</sup> What is most notable about *Brooke Group* is not the outcome of the case (market-based decisions had become the norm by the early 1990s), but rather the similar analytical perspectives of plaintiff's and defendant's counsel. Both sides agreed that consumer welfare was the dispositive analytical issue, and even agreed on the specific economic test to be used in predatory pricing cases.<sup>173</sup> In an antitrust "clash of the titans," plaintiff and defendant were represented by two of the most famous scholars in the field, Phillip Areeda and Robert Bork, respectively.<sup>174</sup> Areeda's association with the Harvard tradition and Bork's association with Chicago underscores the significance of their intellectual agreement, and illustrates the convergence of antitrust scholarship on a fun-

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<sup>169</sup> Formerly known as Liggett Group Inc.

<sup>170</sup> The case was brought under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. § 13(a) (2012). Like the Court and most commentators, I refer to this provision simply as the "Robinson-Patman Act." The Robinson-Patman Act forbids price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *Id.* *Brooke Group* claimed that *Brown & Williamson* had used price discrimination as a means of implementing predatory pricing. In the legal context, the term "predatory pricing" generally refers to pricing intended to drive a competitor from the marketplace. The vagueness of this concept (and its potential for encompassing otherwise legitimate competition) is one of the reasons for cases such as *Brooke Group*.

<sup>171</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 212 (1993).

<sup>172</sup> *Id.* at 243.

<sup>173</sup> *Id.* at 222.

<sup>174</sup> *Id.* at 211.

damentally economic perspective. Plaintiff and defendant's mutual acceptance of the consumer welfare vision of antitrust and their concomitant rejection of any broader, non-economic policy goals represented the culmination of a paradigm shift in antitrust law.

1. *The Court's Opinion*

The *Brooke Group* opinion bears many of the characteristics of contemporary antitrust decisions. Its ruling for the defendant was firmly grounded in market-based economics, and reflected the skepticism of many economists as to the prevalence and feasibility of predatory pricing. Among its many law and economics citations—31 in total—the opinion relied especially on a 1975 article by Phillip Areeda and Donald Turner, in which the authors criticized the traditionalist understanding of predatory pricing.<sup>175</sup> Areeda and Turner argued that true predatory pricing was rarely attempted and even more rarely successful, and that a legal claim of predatory pricing should therefore require two factors: (1) evidence that the alleged predator had priced below average variable cost and (2) a likelihood of subsequent recoupment of the predator's losses through supracompetitive pricing.<sup>176</sup> Without these two elements, Areeda and Turner argued, so-called “predatory pricing” was more likely vigorous price competition, which benefited consumers.<sup>177</sup> The Areeda-Turner analysis was highly influential even before *Brooke Group*, having already been adopted (in various forms) by most of the circuit courts of appeal.<sup>178</sup> Although the Court's *Brooke Group* opinion did not explicitly endorse the Areeda-Turner test, it established a similar burden, holding that a plaintiff alleging predatory pricing must show that the defendant (1) priced below “an appropriate measure” of its costs and (2) had a reasonable prospect of recoupment.<sup>179</sup>

This holding imposed substantial obstacles in the way of predatory pricing claims, reinforcing decisions from the 1980s such as *Cargill, Inc. v. Monfort of Colorado, Inc.*<sup>180</sup> and *Matsushita Elec. Industrial Co. v. Zenith Radio*

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<sup>175</sup> See generally Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

<sup>176</sup> Although Areeda and Turner's 1975 article is most commonly associated with the average variable cost test, it also set forth the recoupment requirement. See Herbert Hovenkamp, *Predatory Pricing Under the Areeda-Turner Test 1* (Univ. Iowa Legal Stud. Research Paper No. 15-06, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2422120](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422120).

<sup>177</sup> Areeda & Turner, *supra* note 175.

<sup>178</sup> See Hovenkamp, *supra* note 176, at 1.

<sup>179</sup> See *Brooke Grp. Ltd.*, 509 U.S. at 222–26. The Court did not explicitly endorse Areeda and Turner's below-average-variable-cost test, instead requiring the less specific “appropriate measure of cost” test. However, the below-average-variable-cost test was agreed to by the parties and was actually the cost test used in the case.

<sup>180</sup> 479 U.S. 104, 105 (1986).



*Corp.*,<sup>181</sup> which had also relied on law and economics scholarship in denying predatory pricing allegations.<sup>182</sup> In addition, *Brooke Group* distinguished (and effectively emasculated) the 1967 case of *Utah Pie Co. v. Continental Baking Co.*, the leading case in which the Court had ruled in favor of a plaintiff claiming predatory pricing.<sup>183</sup> Although *Utah Pie* was not expressly overruled, it clearly belonged to another era. Emphasizing that the antitrust laws were for “the protection of competition, not competitors” (citing, ironically, *Brown Shoe*), *Brooke Group* affirmed the Court’s modern hostility to predatory pricing claims.<sup>184</sup>

## 2. Plaintiff’s Arguments

In many ways, the most interesting aspect of *Brooke Group* is the nature of the plaintiff’s arguments. Unlike the cases of the Warren Court era, in which economic theory was largely absent, or the transitional cases of the 1970s, in which plaintiffs were outflanked by defendants’ economic arguments, *Brooke Group* featured substantial agreement between the parties as to the fundamentally economic nature of the case. Specifically, both parties accepted the Areeda-Turner test for legally cognizable predatory pricing: pricing by the defendant below its average variable costs, with a reasonable prospect of subsequent recoupment. This adoption of an economically rigorous standard was a major departure from plaintiffs’ arguments in earlier predatory pricing cases.<sup>185</sup> The fact that *Brooke Group* was represented by Areeda—coauthor of the test—only highlighted the extent to which antitrust had evolved.<sup>186</sup>

Like the Chicago approach to predatory pricing, the Areeda-Turner test is grounded in a consumer-welfare model of antitrust, meaning that the plaintiff’s arguments necessarily acknowledged that low prices were only “predatory” if they resulted in economic harm to consumers.<sup>187</sup> Thus, although plaintiff’s counsel claimed the defendant’s arguments exalted economic theory over economic facts,<sup>188</sup> the two parties’ theoretical perspectives were actually very similar. Tacitly disclaiming *Utah Pie*, which had focused on defendants’ “intent” of injuring a competitor, the plaintiff accepted the more demanding burden of showing both below-

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<sup>181</sup> 475 U.S. 574, 594–95 (1986).

<sup>182</sup> Although *Cargill* and *Matsushita* were significantly different cases (*Cargill* concerned a merger while *Matsushita* concerned an alleged predatory pricing conspiracy), both cases involved claims of predatory pricing. See *Cargill*, 479 U.S., at 107; *Matsushita*, 475 U.S. at 578.

<sup>183</sup> See *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 688 (1967).

<sup>184</sup> *Brooke Grp. Ltd.*, 509 U.S. at 224.

<sup>185</sup> See *Utah Pie Co.*, 386 U.S. at 698.

<sup>186</sup> Areeda served as plaintiff’s counsel together with his Harvard Law School colleague, Charles Fried.

<sup>187</sup> See *Brooke Grp. Ltd.*, 509 U.S. at 225.

<sup>188</sup> See Reply Brief for the Petitioner at 4, *Brooke Grp. Ltd.*, 509 U.S. at 209 (No. 92-466), 1993 WL 290103.

cost pricing and likelihood of recoupment.<sup>189</sup> This was identical to the test proposed by defendant's counsel. The primary point of disagreement between the parties was *not* the appropriate economic analysis, but whether the plaintiff had met its evidentiary burden.<sup>190</sup> Unlike plaintiffs in many earlier cases, Brooke Group's counsel directly engaged with the defendant's economic arguments, devoting substantial effort to contesting its claim that a decision for the plaintiff would chill legitimate price competition.<sup>191</sup> Finally, not only did the plaintiff's arguments focus on consumer prices, they also dispensed with the equalitarian appeals that had long been a staple of antitrust cases. Plaintiff's full acceptance of the consumer-welfare model, its reliance on economic analysis, and its ability to engage the Chicago School on its own intellectual terms reveal the major changes in antitrust practice since the cases of the 1960s.

### 3. Defendant's Arguments

Just as Brooke Group was represented by one of the country's most prominent antitrust scholars, so too was Brown & Williamson. Defense counsel included not only Robert Bork, a leading figure of the Chicago School, but also Bork's friend and former law partner Frederick Rowe, a noted antitrust scholar in his own right and longtime critic of the Robinson-Patman Act.<sup>192</sup> Unsurprisingly, Bork and Rowe's defense of Brown & Williamson's pricing practices featured the consumer-welfare philosophy and market-based economic analysis typical of the Chicago School. More surprising was how much their arguments shared in common with the plaintiff's. Although their characterizations of the factual evidence (the true area of contention in the case) were very different, both parties endorsed the same analytical test for legally cognizable predatory pricing.<sup>193</sup>

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<sup>189</sup> This acceptance could not have been more explicit: "We accept the burden of showing that prices were discriminatory, below average variable cost, and were undertaken with a reasonable prospect of recoupment." Transcript of Oral Argument at 3:13, *Brooke Grp. Ltd.*, 509 U.S. at 209 (No. 92-466), [http://www.oyez.org/cases/1990-1999/1992/1992\\_92\\_466](http://www.oyez.org/cases/1990-1999/1992/1992_92_466).

<sup>190</sup> Brooke Group's failure to meet this burden was partly due to the testimony of its own managers. Central to plaintiff's theory of liability was its claim that the highly-concentrated cigarette industry was characterized by tacit price collusion. Brooke Group management had repeatedly testified that no such collusion existed, however, contradicting plaintiff's economic witness. Defense counsel seized on this contradictory testimony, Bork exclaiming: "I don't see how a company can come in . . . the client itself can walk in and deny its own case, and then the lawyers say yes, but I have an economist over here that will . . . contradict. That just doesn't make any sense to me." *Id.* at 46:28.

<sup>191</sup> See Brief for the Petitioner at 28–32, *Brooke Grp. Ltd.*, 509 U.S. at 209 (No. 92-466), 1992 WL 541265; Reply Brief for the Petitioner, *supra* note 188, at 41–43.

<sup>192</sup> Years earlier, Bork and Rowe had practiced antitrust law at the firm today known as Kirkland & Ellis LLP.

<sup>193</sup> This was certainly the defense's view. During oral argument, when Justice Kennedy observed "[t]here's no legal difference between you and the petitioner,"

The arguments of defendant's counsel were actually fairly restrained, considering Bork's strong market-based views: For example, defendant's counsel drew short of arguing that an independent oligopolist such as Brown & Williamson could *never* successfully recoup supracompetitive profits following a predatory pricing scheme, the pro-defendant rule which had been adopted by the Fourth Circuit below.<sup>194</sup> Nor did counsel argue that likelihood of recoupment should be the sole test of predatory pricing (a rule that would imply the alleged predator's price-cost relationship is irrelevant), the "die-hard" Chicago position which had been adopted by the Seventh Circuit. The defense even acknowledged the continuing legal validity of *Utah Pie*, a case which Bork had once described as among the worst antitrust opinions ever written.<sup>195</sup> These concessions notwithstanding, the general thrust of the defendant's arguments remained in keeping with the Chicago perspective, and many of the themes of Bork's scholarly work were front and center in the defendant's brief. Although it never cited Bork's work directly, many of the brief's arguments unmistakably harkened to ideas that Bork had developed over the course of his scholarly career. Among these, the most relevant was the brief's repeated insistence that claims of "predatory pricing" were often attempts to thwart vigorous price competition, the very economic activity that antitrust law was meant to protect. Thus, in most cases, imposing liability for aggressive price cutting was a perversion of antitrust law itself. Citing Frank Easterbrook, the brief additionally warned that courts should be suspicious of *any* antitrust suit brought by a horizontal competitor, arguing that "[t]he books are full of suits by rivals for the purpose, or with the effect, of reducing competition and increasing price."<sup>196</sup> In arguing that strict enforcement of the antitrust laws could actually *reduce* market competition, the defendant's brief echoed a central theme of decades of Chicago scholarship.

#### 4. *Amicus Curiae* Briefs

*Brooke Group* featured four amicus briefs, each filed in support of the defendant. Two were filed by business firms with litigation interests similar to Brown & Williamson (in that they were past, current, and/or potential defendants in predatory pricing cases), one was filed by the Grocery Manufacturers of America, a trade group whose individual members had often been subject to predatory pricing litigation, and one was filed by The Business Roundtable (the "Roundtable"), an advocacy group

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Bork agreed: "I don't think there is, Your Honor." Transcript of Oral Argument, *supra* note 189, at 25:18.

<sup>194</sup> See *Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 341 (4th Cir. 1992).

<sup>195</sup> BORK, *supra* note 1, at 210.

<sup>196</sup> Respondent's Brief on the Merits at 48 n.37, *Brooke Grp. Ltd.*, 509 U.S. at 209 (No. 92-466), 1992 WL 445371.

composed of CEOs of major American business corporations. Among these four briefs, the Roundtable's is the most notable, as it represented a growing trend of amicus participation by nationwide lobbying organizations. Unlike each of the other three amici, which had more or less direct interests in the outcome of the litigation, the Roundtable's brief was intended to exert a more general influence on the direction of antitrust law. In its brief, the Roundtable claimed to be neutral as between the parties, both large corporations: "[N]either party is a member," it stated, "and The Business Roundtable has no special interest in the individual fortunes of either company."<sup>197</sup> However, the association did have "a critical interest in the standards that are applied to judge the legality of aggressive competition in the marketplace."<sup>198</sup> Its efforts to promote this interest at the Supreme Court were part of a larger historical pattern. Throughout the 1980s and accelerating in the 1990s, the submission of amicus briefs by conservative business and political groups (such as the U.S. Chamber of Commerce, the American Enterprise Institute, the Pacific Legal Foundation, and the Roundtable itself) became increasingly common. Today, these briefs have become a regular feature of Supreme Court antitrust cases, often presenting market-based arguments that parallel the holdings of the Court.

As it happens, the Roundtable's brief in *Brooke Group* was relatively thin on academic citations, though it did cite to Areeda's work on predatory pricing.<sup>199</sup> The main thrust of the brief was a general warning that predatory pricing claims could chill legitimate price competition, together with an admonition that subjective "intent" (i.e., intent to take market share from a rival) was an inappropriate grounds for antitrust liability.<sup>200</sup> Claiming that the Court's decision would have effects "far beyond the case at hand," the Roundtable predicted "a real risk that aggressive price competition in a large segment of the business world will be chilled" if the Court ruled in favor of the plaintiff.<sup>201</sup> Like defense counsel, the Roundtable cast the plaintiff's case as an attempt to frustrate legitimate price competition, a familiar narrative in antitrust discourse by 1993. The Roundtable's brief is therefore significant less for the originality of its argument than for presenting it on behalf of a powerful advocacy organization claiming to speak for the larger business community.

In at least one respect, the amicus briefs in *Brooke Group* are also *unrepresentative* of broader trends. Unusually for a case after the 1980s,

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<sup>197</sup> Brief for The Business Roundtable as Amicus Curiae in Support of Respondent at 16, *Brooke Grp. Ltd.*, 509 U.S. at 209 (No. 92-466), 1993 U.S. S. Ct. Briefs LEXIS 45.

<sup>198</sup> *Id.* at 1.

<sup>199</sup> *See id.* at 5, 12 n.5.

<sup>200</sup> Note that plaintiff's counsel did not argue that intent alone could establish antitrust liability, despite the Roundtable's focus on the issue. *See id.*

<sup>201</sup> *Id.* at 16.

*Brooke Group* featured no pro-plaintiff amici. Although pro-defendant amicus briefs outnumber pro-plaintiff briefs in many cases, the submission of pro-plaintiff amicus briefs by businesses, advocacy groups, and legal and economic scholars had become a regular occurrence by the 1990s. The high level of economic analysis which often characterizes such briefs speaks to the broader economization of antitrust law, and their absence from *Brooke Group* is therefore something of an anomaly.<sup>202</sup>

#### 5. Summary

*Brooke Group* is another useful example of historical changes in the antitrust field. From a purely doctrinal perspective, the *Brooke Group* holding was far removed from earlier, interventionist pricing cases such as *Utah Pie*. More significant for purposes of this Article, however, was the convergence of plaintiff's and defendant's counsel on a shared intellectual vision of antitrust—one in which consumer welfare is the dominant policy goal and economic analysis the dominant epistemological framework. Although defendants had made little use of economics during the Warren Court era, and plaintiffs had been slow to adopt economic arguments in the 1970s, modern antitrust has become defined by a universal embrace of the dismal science. The fact that in *Brooke Group* both plaintiff's and defendant's counsel were among the most eminent scholars in the field only reinforces the significance of the similarity of their approaches. Antitrust cases had once been argued in terms of fairness, opportunity, and independence. *Brooke Group* announced the ascendancy of the more limited ambitions of the modern era.

### IV. CONCLUSION

Having explored both quantitative and qualitative features of 60 years of antitrust jurisprudence, I return now to the central question posed in the introduction: What explains the transition from antitrust interventionism to the market-based economic approach that dominates antitrust today? Did law and economics scholarship convince the Court of the importance of economic analysis? Or, as the attitudinal model would suggest, was this transition determined primarily by the ideological views of conservative appointees? Given the possibility of mutual causality, are these factors necessarily distinct and separable?

Based on the findings presented in this Article, my conclusion is that *both* factors played important roles in antitrust's transformation, though the nature and mechanisms of their respective influences were very different. First and foremost, changes in the composition of the Court (and *not* changes in individual Justices' views) were the most direct and most significant cause of changes in decision outcomes. The evi-

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<sup>202</sup> Of the 25 cases in the database decided between 1990 and 2010 (i.e., the final two decades), only three featured no pro-plaintiff amicus briefs.

dence on this point is clear. The switch from interventionist to market-based decisions in the early 1970s closely corresponds with the establishment of the Burger Court's conservative voting bloc.<sup>203</sup> Although the voting records of certain incumbent Justices (most notably Justice Brennan) did shift in a market-oriented direction over time, the effect of this shift was minor compared to the retirement of liberals such as Black, Douglas, and Warren and the appointment of conservatives such as Powell, Burger, and Rehnquist. In fact, when viewed in terms of retirements and appointments, the reversal in antitrust decisions of the 1970s was as much a reflection of the pronounced liberalism of the Warren Court as it was of the conservatism of the Burger Court. The evidence regarding economic arguments tells a similar story. Individual voting data show that the Justices who responded most positively to economic arguments were the Justices who were already predisposed to casting market-based antitrust votes.<sup>204</sup> Justices who were predisposed to casting interventionist votes, on the other hand (and with the exception of Justice Brennan), generally responded negatively to economic arguments.<sup>205</sup> Together, these patterns indicate that when it comes to individual voting, preexisting political attitudes are of greater importance than the parties' arguments. This is further illustrated by the specific example of Justice Powell, for whom academic scholarship was a means of justifying predetermined ends. For judges such as Powell, voting decisions in antitrust cases were shaped by deep-seated political attitudes regarding the role of business in American society and the proper scope of government regulation. The evidence suggests that these attitudes "primed" conservative Justices to be receptive to economic arguments. It does not suggest that economic arguments determined their fundamental policy views.

If changes in antitrust law were primarily the result of changes in the membership of the Court, does it therefore follow that law and economics was irrelevant to the antitrust revolution? I would argue no—in fact, I believe that academic developments have been nearly as important as judicial appointments to antitrust's transformation, though the mechanism of their influence is more difficult to specifically identify. Essentially, by altering the intellectual perspective of the broader antitrust community, the law and economics movement changed the premises upon which the entire field is based, with profound and lasting implications for the continuing development of the law.

The evidence of this change is the increasing acceptance of market-based economic assumptions among intellectuals who had previously been guided by interventionist principles. Considering the cases discussed in this Article, Donald Turner's role as amicus counsel in *Sylvania*

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<sup>203</sup> See *supra* Figure 1.

<sup>204</sup> See *supra* Figure 10.

<sup>205</sup> *Id.*

is a prime example. As Assistant Attorney General for antitrust under President Johnson, Turner oversaw the case against Schwinn in 1967, which established the per se rule against vertical restraints. Only ten years later, Turner argued essentially the opposite position in *Sylvania*, citing many of the Chicago School's economic criticisms of *Schwinn*. Even before *Sylvania*, moreover, the Harvard tradition of antitrust scholarship had begun to move in the direction of Chicago. In 1975, for example, Turner and Areeda had published their economic model of predatory pricing, which shared many of the Chicago School's central analytical assumptions.<sup>206</sup> By the time that Areeda deployed this model as plaintiff's counsel in *Brooke Group*, his economic analysis of predatory pricing was little different from Robert Bork's.

Turner and Areeda's increasing affinity with the analytical approach of the Chicago School is only one of many historical examples of the growing influence of market-based antitrust.<sup>207</sup> Richard Posner, a noted proponent of the Chicago approach and a central figure in the law and economics movement, began his career as an antitrust traditionalist. Working in the Office of the Solicitor General, Posner argued several government antitrust cases during the 1960s in which he advocated (and personally agreed with) the government's interventionist legal theories—before abruptly changing his antitrust views circa 1970.<sup>208</sup> William F. Baxter, Assistant Attorney General for antitrust under Reagan and committed supporter of market-based antitrust policy, also held interventionist antitrust views earlier in his career, which he explicitly recanted during the 1970s.<sup>209</sup> Even the Chicago School's founding intellectuals, including George Stigler, Ward Bowman, and Aaron Director himself, had at one time advocated breaking up large corporations.<sup>210</sup> Within the academic

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<sup>206</sup> See Areeda & Turner, *supra* note 175, at 697.

<sup>207</sup> Nearly 30 years ago, Richard Posner addressed the convergence of the Harvard and Chicago schools, writing that “the debate is no longer one between schools that employ consistently different and ideologically tinged premises to render predictably opposite results.” Posner, *supra* note 18 at 933–44. Marc Eisner suggests that this convergence has been to Harvard's disadvantage, pointing out that “it is difficult to identify any concessions on the part of the Chicago school.” EISNER, *supra* note 3, at 111.

<sup>208</sup> See Stephen F. Ross, *From Von's to Schwinn to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals*, ANTITRUST, Spring 1992, at 4.

<sup>209</sup> See William F. Baxter, *How Government Cases Get Selected—Comments from Academe*, 46 ANTITRUST L.J. 586, 588 (1977). Baxter “recanted” earlier positions that he had endorsed in the 1967 Report of the White House Task Force on Antitrust Policy (commonly referred to as the Neal Report), a special antitrust policy report commissioned by the Johnson administration which had made a number of interventionist policy recommendations. 115 CONG. REC. 13890 (1969) (report of the White House Task Force on Antitrust Policy).

<sup>210</sup> A conversion narrative appears again and again in the intellectual history of the Chicago School. Robert Bork referred to his own studies under Director in religious terms: “A lot of us who took the antitrust course or the economics course

world, market-based antitrust theory has shown a remarkable power of persuasion, converting former skeptics and displacing the prior intellectual mainstream.

By influencing the study, teaching, and practice of antitrust law, these academic developments have had long-term policy implications. Today, most antitrust scholars agree that the jurisprudence of the Warren Court was economically naïve, that consumer welfare is (and should be) the primary goal of antitrust policy, and that economic analysis is indispensable to the proper understanding of antitrust disputes—each principles attributable to law and economics scholarship. Even “post-Chicago” scholars, who challenge the analytical models of the Chicago School, do so from a position of fundamental agreement with its focus on economic efficiency. For example, a recent text critical of the Chicago School nevertheless acknowledges that “U.S. antitrust enforcement, as a result of conservative economic analysis, is *better* today than it was during the Warren years—more rigorous, more reasonable, more sophisticated in terms of economics.”<sup>211</sup> Given this broad normative consensus, it is difficult to study antitrust in a law school environment today without being deeply exposed to orthodox economic theory, the intellectual assumptions of which have achieved nearly hegemonic status. Given historical developments in legal education, it is hard to envision future Justices (or perhaps more importantly, their clerks) breaking from this economic paradigm to any significant degree. Although changes in antitrust originally resulted from the partisan cycle of judicial appointments, academic developments have ensured these changes are unlikely to be reversed.

As a final note, it is also important to emphasize that the “legal” and “attitudinal” models are not the only explanations for changes in antitrust law. In addition to the jurisprudential developments discussed in this Article, changes in the cultural, political, and economic landscape have weakened the strength of antitrust as a populist force in American politics and greatly reduced public demand for vigorous antitrust enforcement.<sup>212</sup> Although the court-centric evidence presented in this Article does not speak directly to these broader changes, speculation as to their major causes may nevertheless be warranted. First, Americans may have simply grown accustomed to the presence of large, dominant firms

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underwent what can only be called a religious conversion. . . . We became janissaries as a result of this experience.” Panel Discussion, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 J.L. & ECON. 163, 183 (1983).

<sup>211</sup> HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 18, at 5.

<sup>212</sup> The decline of antitrust in American politics has been a long historical process, not limited to recent decades. Richard Hofstadter’s classic 1964 essay “What Happened to the Antitrust Movement?” shows that public interest in antitrust had been fading throughout the twentieth century. Hofstadter identifies antitrust as one of the “faded passions” of the populist reform movement. RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 188–237 (2d prtg. 1966).



in many industries. High levels of industry concentration seem commonplace today (think communications, information technology, etc.), but represented unfamiliar and often frightening change early in the twentieth century. Even as late as the 1960s, amidst growing acceptance of large corporations, consolidation in major industries continued to spark public concern.<sup>213</sup> Second, the rise of international competition from countries such as Germany and Japan (and more recently China) seems to have reduced public interest in aggressive antitrust policy, in two ways: by providing new competitors in the domestic market and by rousing protectionist sentiment.<sup>214</sup> In the context of economic globalization and the rise of international business, the American public has become less concerned with limiting the size of domestic firms. Finally, the populist impulses that originally gave rise to the earlier era of antitrust policy have taken new forms in the twenty-first century, adapting to the problems of the age. While economic populism remains a powerful force in American politics, it is today expressed primarily in terms of reducing wealth inequality, achieving campaign finance reform, and punishing the financial industry, rather than the more traditional concerns of halting industrial concentration and protecting small businesses. Americans today seem largely indifferent toward the market dominance of many large corporations, and with the exception of the financial sector, there is little de-

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<sup>213</sup> For a mid-century perspective on Americans' attitude toward large industrial firms, see generally *id.* For the classic historical examination of the rise of big business, see ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (15th prtg. 1999).

<sup>214</sup> The strength of this sentiment is reflected by the election of Donald Trump, who made criticizing U.S. trade policy a centerpiece of his presidential campaign. During his run for president, Trump threatened to penalize corporations that move production overseas, impose new trade barriers against China and Mexico, and renegotiate or "break" NAFTA. See Meghashyam Mali, *Trump Threatens to 'Break' Trade Pact with Mexico, Canada*, HILL: BALLOT BOX (Sept. 26, 2015, 8:30 AM), <http://thehill.com/blogs/ballot-box/255053-trump-vows-to-renegotiate-or-break-trade-pact-with-mexico-canada>. At the time of this writing, it is difficult to predict what trade reforms the Trump administration will actually pursue, though early indications suggest President Trump will continue to take a hard stance on trade policy. See Tal Kopan, *Trump Transition Memo: Trade Reform Begins Day 1*, CNN (Nov. 16, 2016) <http://www.cnn.com/2016/11/15/politics/donald-trump-trade-memo-transition/>. Other presidential candidates—both Republican and Democrat—also criticized American trade policy as overly favorable to foreign nations. Most notably, left-wing populist Bernie Sanders committed to "[r]eversing trade policies like NAFTA, CAFTA, and PNTR with China that have driven down wages and caused the loss of millions of jobs." *Income and Wealth Inequality*, BERNIESANDERS.COM, <https://berniesanders.com/issues/income-and-wealth-inequality> (last visited Dec. 22, 2016). Even moderate Democrat Hillary Clinton felt compelled to renounce trade agreements such as the Trans-Pacific Partnership, suggesting the strength of the American electorate's concerns over global competition.

mand for breaking up big businesses.<sup>215</sup> Whether these changes in American politics have influenced *judicial* decisions is difficult to say, but they have certainly reduced public pressure for antitrust legislation and enforcement.

Despite—or perhaps because of—this loss of public interest, few areas of law have changed as profoundly as antitrust since World War II. Although much less dramatic in human terms, the changes in Supreme Court antitrust jurisprudence are comparable in scope to changes in civil rights, criminal justice, and personal privacy over the same time period. As discussed in this Article, the proximate cause of these far-reaching changes were the Nixon appointments of the late 1960s and early 1970s, and the resulting shift in the attitudinal balance among the individual members of the Court. At the same time, however, developments in academic scholarship have transformed antitrust’s intellectual foundations, reducing the likelihood that these changes will be reversed, even in the case of future liberal appointments. This broader intellectual shift may ultimately prove the more significant of the two, as it has thoroughly—and likely permanently—severed antitrust from its populist origins. Moreover, to the extent that antitrust is the prototypical example of the influence of law and economics, antitrust’s embrace of economic efficiency over traditional notions of economic justice is emblematic of larger developments in recent American legal history.

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<sup>215</sup> In the wake of the 2008 financial crisis, dismantling large financial companies has become a rallying cry for many on the left (and some on the right). The campaign proposals of Bernie Sanders, for example, included a pledge of “[b]reaking up huge financial institutions so that they are no longer too big to fail.” *Income and Wealth Inequality*, *supra* note 214. However, even in Sanders’s highly populist presidential campaign, this pledge did not extend to firms outside the financial sector.