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Cover Page Footnote
The author is grateful to Barry Adler, Kathryn Genton, James Gattuso, Michael Greve, Richard Higgins, Michael McDonald, Shannon O'Chester, Alan Slobodin, and Lawrence White for many useful comments, discussions, and suggestions, and to Sean Coleman and Steven Taylor for their research assistance.
REAGAN'S JUDICIAL APPOINTEES AND ANTI TRUST IN THE 1990s

by

WILLIAM E. KOVACIC*

INTRODUCTION

WILLIAM Baxter and James C. Miller III were well-suited to lead a retrenchment of federal antitrust policy when Ronald Reagan appointed them to head the government's enforcement agencies in 1981. They were respected scholars with considerable intellectual capital in the field of regulation, they were experienced observers of the policymaking process, and they held a clear vision of the antitrust landscape they wished to leave their successors. The Reagan Administration's success in redirecting federal antitrust enforcement policy is substantially attributable to their efforts.

* Associate Professor, George Mason University School of Law. This paper is based in part on a working paper titled "The Reagan Judiciary Examined: A Comparison of Antitrust Voting Records of Carter and Reagan Appointees to the Federal Courts of Appeals" (Washington Legal Foundation, Working Paper No. 34: April 1989). An earlier version of the paper was presented at the Cato Institute Conference on "A Century of Antitrust: The Lessons, the Challenges," Washington, D.C., April 12, 1990. The author thanks the Sarah Scare Foundation and the Smith Richardson Foundation for support in the preparation of this paper. The author also is grateful to Barry Adler, Kathryn Fenton, James Gattuso, Michael Greve, Richard Higgins, Michael McDonald, Shannon O'Chester, Alan Slobodin, and Lawrence White for many useful comments, discussions, and suggestions, and to Sean Coleman and Steven Taylor for their research assistance.


In reorienting antitrust policy, Baxter and Miller enjoyed another decisive advantage: they inherited a major, ongoing transformation in doctrine which the federal judiciary engineered. Beginning in the mid-1970s, the federal courts had started to relax the relatively stringent prohibitions that had characterized the prevailing antitrust jurisprudence of the post-World War II era. These adjustments provided a crucial basis for the Reagan Administration’s antitrust reform movement in the 1980s. “I think it would have been politically impossible,” Robert Bork told the American Bar Association Section of Antitrust Law in 1985, “for a person like Professor [William] Baxter to have done what he did, had there not been an intellectual shift in the underpinnings of antitrust, a shift in which he took part before he came to office.” By 1981 the intellectual shift to which Judge Bork referred had become increasingly apparent in the antitrust opinions of federal judges.

Econ. 173 (1989) [hereinafter “Kovacic II”]; A Retrospective Examination of the Reagan Years, 33 Antitrust Bull. 201 (1986); cf. M. Eisner, Antitrust and the Triumph of Economics 4 (1991) (“The Reagan ‘revolution’ in antitrust was but an extension of well-established trends within the two antitrust agencies. It is, perhaps, no overstatement to say that while the Reagan administration may have accelerated the pace of change, it was not decisive.”).


5. See J. Miller III, The Economist as Reformer: Revamping the FTC, 1981-1985 47-50 (1989); cf. M. Eisner, supra note 3, at 230-31 (arguing that Reagan Administration claimed credit for results of preexisting institutional changes that had given economists and economics greater influence in the federal enforcement agencies' decision to prosecute).

6. Bork, The Role of the Courts in Applying Economics, 54 Antitrust L.J. 21, 25 (1985); see also Calvani & Sibarium, supra note 4, at 174 (concluding that modern antitrust policy's “most significant changes have been in the case law, influenced by work done in the academy in the fields of law and industrial organization economics, much of which predates the Reagan era”).

7. From 1975 to 1980, for example, the lower federal courts had recast exclusionary conduct jurisprudence by embracing relatively permissive antitrust standards governing single-firm pricing, product design, and promotion behavior. See Hurwitz & Kovacic, Judicial Analysis of Predation: The Emerging Trends, 35 Vand. L. Rev. 63, 139-50 (1982) (recounting limited success of plaintiffs in monopolization and attempted monopolization litigation after 1975). Perhaps the most significant and symbolic event in this development was Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

In Berkey, the Second Circuit rejected the expansive implications of Judge Learned Hand's influential opinion in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), in which Judge Hand broadly interpreted the reach of the Sherman Act's ban against monopolization. See Berkey, 603 F.2d at 272-74; see also Kovacic, Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration, 74 Iowa L. Rev. 1105, 1117-18 (1989) (describing how Alcoa significantly enlarged the range of single-firm conduct that could be deemed unlawfully exclusionary). The Berkey court emphasized that antitrust law should preserve dominant firm incentives
The judiciary's acceptance of a more conservative antitrust jurisprudence in the mid to late 1970s was only the most recent demonstration of the importance of judicial decisionmaking to the development of antitrust doctrine. Since 1890, the comparatively open-ended language of the principal antitrust statutes has given federal judges a crucial role in determining the content of the statutes' competition commands. The reach of the Sherman Act hinges on the construction of general phrases such as "conspiracy in restraint of trade" and "monopolization," and individual judges "have considerable discretion to affect outcomes through their interpretations" of antitrust's broad legislative commands. The permeability of the antitrust adjudication process, which affords standing to federal enforcement agencies, state governments, private citizens, and individual businesses, continually exposes the judiciary to a wide array of proposed liability standards from which specific rules of conduct must be selected. Commenting in 1911 on what factors would influence the definition of the Sherman Act's operative terms, future Attorney General and Associate Justice James C. McReynolds said, "[N]o one can tell with certainty—much depends on the general economic views entertained by the Judges."

Next to accomplishing a fundamental rewriting of the antitrust stat-

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utes, the power to nominate judges with a shared vision of competition policy is probably a president's most effective means for ensuring that his antitrust preferences will endure well after his term of office has ended.\textsuperscript{15} From 1981 to 1988, the Reagan Administration reshaped the federal judiciary. President Reagan appointed the Chief Justice of the Supreme Court, selected three new members for the Court, and accounted for forty-seven percent of all judges sitting on the federal district courts and courts of appeals.\textsuperscript{16} In making these appointments, the Reagan Administration sought to alter the federal judiciary's ideological perspective by choosing individuals who, among other traits, were more likely to doubt the efficacy of government intervention in the affairs of business.\textsuperscript{17} Presidents often have used judicial appointments to achieve desired policy aims,\textsuperscript{18} but the Reagan Administration's pursuit of ideological uniform-

\textsuperscript{15} For a discussion of the significance of judicial appointments to the durability of an administration's antitrust preferences, see Kovacic, Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration, 33 Antitrust Bull. 467, 495-97 (1988). The choice of judges assumes similar importance in the application of other federal regulatory schemes. See, e.g., L. Baum, American Courts—Process and Policy 300 (2d ed. 1990) (“[I]n general, from the Supreme Court to state intermediate courts, judges' preferences on individual issues and their general positions on the liberal-conservative spectrum go far toward determining their behavior on the bench. . . . Given enough opportunities and sufficient care, a chief executive can have a fundamental effect on court policies.”); R. Melnick, Regulation and the Courts: The Case of the Clean Air Act 1 (1983) (observing that, in deciding air pollution cases, federal courts “have announced sweeping rulings on policy issues left unresolved by existing legislation, often expanding the scope of government programs in the process”); Panel Discussion, The Contribution of the D.C. Circuit to Administrative Law, 40 Admin. L. Rev. 507, 514-19 (1988) (description by Chief Judge Patricia Wald of D.C. Circuit's formative role in 1970s in reviewing implementation of new environmental protection legislation).

Judicial appointments may provide an easier means for accomplishing regulatory change than gaining congressional approval for a retrenchment of existing statutes. The Reagan Administration's extensive efforts to reform the federal antitrust statutes bore little fruit. See Kovacic I, supra note 3, at 245; Millstein & Kessler, The Antitrust Legacy of the Reagan Administration, 33 Antitrust Bull. 505, 532-35 (1988). Despite the Senate's rejection of Robert Bork's nomination to the Supreme Court and its refusal to act upon the nominations of Lino Graglia to the Fifth Circuit and Bernard Siegan to the Ninth Circuit, the Reagan Administration seldom failed to gain confirmation of its candidates for the federal bench. See also Wald, Random Thoughts on a Random Process: Selecting Appellate Judges, 6 J. L. & Pol. 15, 17 (1989) (“A single, ideologically-driven administration can build a clear majority of supporters on an appellate court within a very few years.”).

\textsuperscript{16} Sheldon Goldman has calculated that, at the time President Reagan left office, 346 of the 736 positions on the federal courts of appeals and district courts were filled by his appointees. See Goldman, Reagan's Judicial Legacy: Completing the Puzzle and Summing Up, 72 Judicature 318, 318-19 (1989).


\textsuperscript{18} See, e.g., R. Carp & R. Stidham, The Federal Courts 111 (2d ed. 1991) (“In fairness to President Reagan it should be pointed out . . . that he was not the only modern
ity is widely regarded as unmatched in its determination and thoroughness.19

The possibility that the Reagan Administration’s appointments might drastically affect judicial decisionmaking has aroused substantial scholarly and popular interest.20 Discussions of Reagan Administration judicial selection frequently assert that nearly all Reagan appointees have brought conservative policy preferences to the bench.21 These views often are said to include a desire to limit the scope of antitrust enforcement and other forms of government intervention in the economy.22 In a representative evaluation of the Reagan judiciary, Professor Herman Schwartz has said that “most recent Republican appointees are considerably more hostile to civil rights, economic regulation, and other liberal


21. See, e.g., B. Schwartz, supra note 20, at 222 (“Almost all the Reagan [judicial] appointees were conservatives who shared the president’s widely expressed desire to tilt the federal bench to the right.”); Mueller, supra note 20, at 47 (due to Reagan administration judicial appointments, “we now have some 400 Borks . . . deciding our constitutional and statutory rights at the district . . . and appellate federal levels”).

22. See B. Schwartz, supra note 20, at 163-89; H. Schwartz, supra note 17, at 192-98.
programs than their Democratic colleagues." As one of his principal illustrations of "conservative court packing," Professor Schwartz observes that "in order to favor business, Reagan judges Robert Bork, Richard Posner, Frank Easterbrook, and other right-wing antitrust specialists have encouraged judicial interpretations of the antitrust and other regulatory laws that conflict with the clear congressional intent." The significance of Reagan appointee policy preferences ultimately hinges upon how such views affect the disposition of specific cases. Nonetheless, empirical efforts to test the "conservative court packing" hypothesis in the context of economic regulation cases have been rare and relatively narrow in scope. Most assessments of the Reagan judiciary have dwelled upon decisions by a small number of prominent judges. Few surveys have used broad-based empirical techniques to evaluate the impact of Reagan appointees upon the outcomes of specific groups of economic regulation cases. These patterns of scholarly inquiry are evident in evaluations of Reagan appointee decisionmaking in antitrust cases. Despite the centrality of judicial ideology to the evolution of antitrust doctrine, systematic efforts to assess the influence of recent presidential appointments to the federal bench in shaping the disposition of antitrust matters have been uncommon. Antitrust decisions of individual courts or specific

24. Id. at 9.  
25. Id. at 41.  
26. "The crucial question concerning the relationship of law and politics to the selection of federal judges is what difference the various selection patterns have made in the outcomes of cases." Solomon, supra note 18, at 343.  
27. For representative examples, see B. Schwartz, supra note 20, at 222-49; H. Schwartz, supra note 17, at 103-67; Wilson, Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter, 40 Miami L. Rev. 1171 (1986).  
judges31 have attracted continuing scholarly attention. By contrast, few broad-based studies have sought to analyze the effect of judicial appointments, particularly to courts other than the Supreme Court, upon voting behavior in antitrust cases.32

This Article considers the influence of judicial appointments upon antitrust decisionmaking by examining the votes of Carter, Reagan, and Bush appointees to the federal courts of appeals.33 It approaches the subject in three parts. The first presents the results of data gathered from a review of 1031 reported court of appeals decisions issued from January 20, 1977, through December 31, 1990, in which the appellate panel included at least one Carter or Reagan appointee. The data show that Carter and Reagan appointees alike tended to vote conservatively in a substantial percentage of antitrust matters before them. Reagan appointees, however, voted conservatively more often than their Carter counterparts.

Section II examines the voting behavior of Carter and Reagan court of appeals appointees in discrete areas of antitrust jurisprudence: monopolization and attempted monopolization cases involving allegations of predatory pricing; vertical restraints cases; tying cases; merger cases; price discrimination cases; and decisions based chiefly upon the resolution of standing and antitrust injury issues. This segment of the Article relies upon 53 predatory pricing cases, 123 vertical restraints cases, 70 tying cases, 35 merger cases, 48 price discrimination cases, and 71 standing/antitrust injury cases. Reagan appointees have voted more conservatively than their Carter counterparts in these discrete areas, with the

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33. This Article compares the voting of Reagan and Bush appointees to that of Carter appointees because one of the Reagan Administration’s stated aims was to abandon the judicial selection philosophy that had guided President Carter’s choice of judicial nominees. As Christopher Smith explains, “[c]learly the Reagan administration’s efforts to shape the judiciary evinced an intention to change the federal courts by generating different judicial outcomes than those produced by President Carter’s Democratic appointees.” Smith, supra note 20, at 133.
most substantial disparities in voting behavior emerging in the merger and vertical restraints subsets.

Section III discusses noteworthy qualitative features of the cases decided by Carter and Reagan appointees. The data indicate that conservative antitrust perspectives have deeply influenced a significant number of Carter appellate judges. This trend reflects a rightward shift in Supreme Court and academic antitrust thinking since the early 1970s, as well as changes in the economic and political environment in the United States. The survey also suggests caution in assuming that Reagan appointees invariably will embrace analytical approaches that exculpate antitrust defendants. In several important respects, Reagan court of appeals judges have not abided by the one-dimensional, laissez faire preferences that the conservative court packing hypothesis attributes to the Reagan judiciary. At the same time, this Article finds that President Reagan's strategy of appointing conservative academics to the appellate bench will pay significant dividends to his administration's campaign to retrench antitrust doctrine.

Section IV considers the importance of judicial appointments for antitrust policy in the 1990s. Recent federal and state enforcement activity has revived some antitrust approaches the Reagan Administration disfavored. In addition, ongoing developments in the legal and economic antitrust literature have generated analytical models that antitrust plaintiffs might use to rehabilitate theories of liability that lay dormant during the 1980s. The impact of these developments will depend heavily upon whether the Bush Administration adheres to the appointment philosophy that guided Reagan judicial selection. As reinvigorated public and private plaintiffs approach the federal courts, the Reagan-Bush judiciary will play a major role in determining how far the antitrust pendulum swings back toward its pre-Reagan equilibrium.

I. VOTING BEHAVIOR BY CARTER AND REAGAN APPOINTEES: BROAD PERSPECTIVE

From a reading of the leading commentaries on Reagan Administration judicial selection, one might conclude that the Reagan judges have ushered in a dramatically more conservative antitrust jurisprudence. Such an impression rests largely upon the highly visible roles of antitrust scholars such as Robert Bork, Frank Easterbrook, Richard Posner, and Ralph Winter on the federal courts of appeals. As indicated below,

34. See H. Schwartz, supra note 17, at 68-70, 192-96.
these individuals have influenced judicially-developed antitrust doctrine.\textsuperscript{36} There remains, however, the intriguing question of whether the views of these judges are representative of the vast (and lesser known) balance of Reagan appointees who have voted in antitrust matters. Rather than considering the decisions of a small number of well-known judges, this section presents a broader perspective on the Reagan judiciary’s antitrust voting tendencies.

A. Selection of Cases

This Article focuses on antitrust decisions of the federal courts of appeals. To assess the impact of Reagan appointments, this Article compares Reagan judicial voting records with those of court of appeals judges appointed by President Carter.\textsuperscript{37} A comparison with Carter appointee voting is appropriate, as it permits one to observe whether the votes of Reagan judges differ significantly from judges appointed by a president whose ideology the Reagan Administration assailed as excessively liberal. The selection of cases for study proceeded in essentially three steps.\textsuperscript{38}

1. Judges

A roster of all Carter and Reagan appointees to the federal courts of appeals was assembled.\textsuperscript{39} This roster included individuals who continue to serve on the court of appeals, as well as those who subsequently resigned their positions or otherwise left office.\textsuperscript{40} Judges who were elevated from the federal district court to the court of appeals were included only as of the day of their confirmation to the appellate court.\textsuperscript{41} Judges are

\textsuperscript{36} See infra notes 294-99 and accompanying text.

\textsuperscript{37} Bush appointees voted in only two court of appeals antitrust decisions published during the survey period. See United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990) (panel including Judge Clarence Thomas); Delaware & Hudson R.R. Co. v. Consolidated Ry. Corp., 902 F.2d 174 (2d Cir.) (panel including Judge John Walker), cert. denied, 111 S. Ct. 2041 (1990). This Article includes the Bush nominees’ votes in these matters in the Reagan appointee totals.

\textsuperscript{38} For each of these steps, I am enormously indebted to my two research assistants, Steven Taylor and Sean Coleman. A complete list of all cases addressed in the survey is on file with the author.

\textsuperscript{39} This roster was compiled by reviewing the membership listings contained in each volume of the Federal Reporter (Second) published from January 1977 through December 1990 and commercially available reference works providing biographical and appointment information on federal judges. See 1991 Judicial Staff Directory (A. Brownson ed. 1990); 1990 Judicial Staff Directory (A. Brownson ed. 1989); 1989 Judicial Staff Directory (C. Brownson & A. Brownson eds. 1987).

\textsuperscript{40} For example, the survey includes cases in which Robert Bork participated on the U.S. Court of Appeals for the District of Columbia Circuit from his confirmation in 1982 until his resignation in 1988. Similarly, the survey counts cases in which Antonin Scalia participated on the D.C. Circuit from his confirmation in 1982 until he became an associate justice of the Supreme Court in 1986.

\textsuperscript{41} For example, Judge Bruce Selya was appointed to the U.S. District Court for Rhode Island in 1982 and was appointed to the U.S. Court of Appeals for the First
counted as being Carter or Reagan appointees according to the president who appointed them to the court of appeals. The survey counts cases in which Carter or Reagan appointees to the United States Court of Appeals for one circuit participated by designation in the decisions of other circuits.

2. Cases: Initial Screening

The initial universe of cases for study consisted of all cases meeting four criteria: (a) a Carter or Reagan appointee participated on the panel deciding the case; (b) the case involved, directly or indirectly, federal antitrust issues; (c) the case was decided from January 20, 1977 to the date of this survey in 1986. The survey omits votes cast by Judge Selya when he participated in First Circuit cases by designation during his tenure on the U.S. District Court. One such case is Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985).

For example, Judge Juan Torruella was appointed to the U.S. District Court for Puerto Rico in 1974 by President Ford and was appointed to the U.S. Court of Appeals for the First Circuit in 1984 by President Reagan. Because President Reagan made the appointment to the First Circuit, Judge Torruella is counted as a Reagan appointee.

The U.S. Court of Appeals for the Federal Circuit presents an unusual situation. The Federal Circuit was created in 1982 by the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.). The FCIA abolished the United States Court of Claims and the United States Court of Customs and Patent Appeals and provided that judges then sitting on the two predecessor tribunals would form the bench of the new Federal Circuit. This survey includes the votes of judges who (a) were appointed by Presidents Carter or Reagan to the United States Claims Court or the United States Court of Customs and Patent Appeals and were reassigned to the Federal Circuit in 1982, or (b) were appointed to the Federal Circuit by Presidents Reagan or Bush after enactment of the FCIA. By this principle, the survey excludes the votes of Federal Circuit judges such as Howard Markey, who was appointed by President Nixon in 1972 to the United States Court of Customs and Patent Appeals and was reassigned to the Federal Circuit in 1982.

One such case is Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990), in which the Eleventh Circuit panel included Judge Jesse Eschbach of the U.S. Court of Appeals for the Seventh Circuit.

LEXIS and WESTLAW data bases were the principal means used to identify relevant cases. The results of LEXIS and WESTLAW searches were checked against a review of the court of appeals decision indices contained in each volume of the Commerce Clearing House Trade Cases.

Most cases reviewed for this Article were decided by three-judge panels. Thus, a case decided by a three-judge panel containing at least one Carter or Reagan appointee was included. En banc decisions in which at least one Carter or Reagan appointee participated also were included.

Deleted were cases in which the sole antitrust matters involved state antitrust claims, including instances in which federal antitrust jurisprudence supplied the sole or chief basis for interpreting the state antitrust statutes in question. See, e.g., Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289 (4th Cir.) (adjudicating vertical restraints claim based upon South Carolina antitrust statute), cert. denied, 484 U.S. 827 (1987); Pounds Photographic Labs, Inc. v. Noritsu Am. Corp., 818 F.2d 1219 (5th Cir. 1987) (adjudicating vertical restraints claim based upon Texas antitrust statute); Dimidowich v. Bell & Howell, 803 F.2d 1473 (1986), modified, 810 F.2d 1517 (9th Cir. 1987) (adjudicating vertical restraints claim based upon California antitrust statute). In addition, cases involving Federal Trade Commission consumer protection activities were omitted. See, e.g., American Fin. Serv. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985) (evaluating validity of FTC trade regulation rule governing credit practices), cert. denied,
REAGAN'S JUDICIAL APPOINTEES

59

(Reagan's Judicial Appointees) (the date of President Carter's inauguration), through December 31, 1990 and (d) the court of appeals opinion in the case was reported in either the Federal Reporter (Second) or the Commerce Clearing House Trade Cases. The initial search yielded a total of 1031 decisions meeting these criteria.

3. Cases: Screening for Substantive Issues

After analyzing the 1031 cases, the list of cases for further study was limited to matters involving substantive antitrust issues concerning standing, liability standards, and remedies. This criterion screened out a number of decisions dealing exclusively or chiefly with issues having little to do with antitrust doctrine. Examples of categories of omitted cases included matters such as the enforcement of subpoenas and civil investigative demands, proceedings to impose sanctions for document destruction and other forms of obstruction of justice, state efforts to gain access to data collected by the federal antitrust enforcement agencies, the arbitrability of antitrust claims, imposition of sanctions for discovery abuses, standards for determining the certification of a plaintiff class, standards governing interlocutory appeals of trial court orders, and challenges to the Federal Trade Commission's constitutionality raised in the context of antitrust disputes. These deletions decreased the universe of relevant cases from 1031 to 897. The remaining 897 matters provided the basis for this Article's findings.

B. Classification of Votes

As a baseline for comparing the voting records of Carter and Reagan

47 U.S. 1011 (1986); American Home Prods. Corp. v. FTC, 695 F.2d 681 (3d Cir. 1982) (deceptive advertising case). Also eliminated were cases decided under statutes such as the Bank Holding Company Act, whose competition provisions are interpreted in light of federal antitrust jurisprudence. See, e.g., Dibidale of La., Inc. v. American Bank & Trust Co., 916 F.2d 300 (5th Cir. 1990) (anti-tying provisions of Bank Holding Company Act); Lane v. Central Bank of Ala., N.A., 756 F.2d 814 (11th Cir. 1985) (same). Finally, the survey deleted cases addressing competition issues under the Newspaper Preservation Act. See, e.g., Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285 (D.C. Cir.) (interpreting application of Newspaper Preservation Act), aff'd, 493 U.S. 38 (1989); Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467 (9th Cir.) (same), cert. denied, 464 U.S. 892 (1983).

47. See FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966 (D.C. Cir. 1980).
48. See United States v. Lench, 806 F.2d 1443 (9th Cir. 1986).
49. See Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985).
52. See Abrams v. Interco, Inc., 719 F.2d 23 (2d Cir. 1983).
54. See Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987).
55. See infra notes 113-25 and accompanying text.
judicial appointees, this Article identified a "conservative" antitrust agenda mainly by reference to Reagan Administration antitrust preferences. With some exceptions noted below, the enforcement objectives articulated by Reagan antitrust officials defined the difference between a liberal vote and a conservative vote. The following discussion presents specific benchmarks used to determine whether votes in antitrust cases would be deemed consistent with a conservative antitrust agenda.

1. Single-Firm Exclusionary Conduct

Orthodox conservative thinking in antitrust is suspicious of liability theories that proscribe single-firm exclusionary behavior. The conservative vision in antitrust accords individual firms broad discretion to choose pricing, promotion, and product development strategies. Accordingly, conservatives usually reject claims of predatory pricing, predatory promotion, or exclusionary product development. During the Reagan Administration, federal enforcement leaders strongly criticized antitrust policies that closely scrutinized dominant firm pricing, product development, and promotion behavior. Reagan enforcement officials also expressed skepticism toward theories designed to compel monopolists to provide access to "essential facilities." Thus, this Article classifies as conservative decisions that adopt a permissive view toward single-firm conduct.

56. These preferences are detailed in Kovacic I, supra note 3, at 244-45; Kovacic II, supra note 3, at 177-78; Kovacic, supra note 15, at 477-79. In their effort "to define the sometimes slippery terms liberal and conservative," Professors Carp and Stidham suggest that "[i]n the area of government regulation of the economy, liberal judges would probably uphold legislation that benefitted working people or the economic underdog." R. Carp & R. Stidham, supra note 18, at 114 (emphasis in original).

57. For representative statements of this view, see generally Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263 (1981) (concluding that the theoretical basis for a rule against predation is too weak, the measures for assessing damages too inaccurate, and the administrative costs too high to justify judicial intervention to control single-firm pricing); Liebeler, Whither Predatory Pricing? From Areeda and Turner to Matsushita, 61 Notre Dame L. Rev. 1052 (1986) (rejecting theories which focus exclusively on price/cost margins and advocating judicial adoption of analytical techniques that would discourage the filing and maintenance of predatory pricing cases).


60. Examples of single-firm conduct decisions treated as conservative in this Article include cases such as Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1259 (9th Cir. 1990) (rejecting predatory hiring allegation); Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990) (rejecting essential facility allegation); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1420 (7th Cir. 1989) (rejecting predatory pricing allegation). Decisions classified as liberal include cases such as Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1439-44 (6th Cir. 1990) (affirming jury verdict for plaintiff on attempted monopolization and monopolization claims based upon defendant's acquisition of various raw material input
The conservative antitrust agenda would not completely abandon attention to the Sherman Act prohibition on monopolization and attempted monopolization. These causes of action are deemed appropriate to challenge some efforts by private entities to invoke the machinery of government to exclude rivals. For example, Reagan antitrust enforcement officials stated that the initiation of meritless, vexatious proceedings before judicial bodies and administrative boards should be condemned. Nonetheless, antitrust complaints premised upon alleged misuse of government processes often raise significant First Amendment concerns. The evolution of what commonly is known as the *Noerr* doctrine has reflected considerable wariness on the part of liberal and conservative jurists alike about using antitrust liability to restrict protected speech or petitioning activity. Because it is difficult to characterize as liberal or conservative the outcomes in cases that involve the abuse of government processes, this Article segregates the results for *Noerr* decisions and other cases focusing on antitrust immunity issues.

61. The modern revival of this line of analysis is largely attributable to the work of Robert Bork. See R. Bork, The Antitrust Paradox 347-64 (1978); see also Kovacic IV, supra note 4, at 1457 (discussing Bork's influence on modern Section 2 jurisprudence when the case involves vexatious litigation).


64. The D.C. Circuit's treatment of Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226 (D.C. Cir. 1988), rev'd, 110 S. Ct. 768 (1990), illustrates the hazards of using a liberal/conservative distinction to classify abuse of government process cases. In *Trial Lawyers*, the D.C. Circuit vacated an FTC order enjoining a refusal by a group of attorneys in the District of Columbia to accept further assignments to represent indigent criminal defendants unless the city raised the fees for such work. The Commission had ruled that the collective refusal to deal constituted an illegal group boycott under the antitrust laws. See *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510 (1984), vacated, 856 F.2d 226 (D.C. Cir. 1988), rev'd, 110 S. Ct. 768 (1990). The D.C. Circuit panel, which included Reagan appointees Douglas Ginsburg and Laurence Silberman, ruled that the FTC had failed to give appropriate weight to the "expressive" content of the lawyers' boycott. See *Trial Lawyers*, 856 F.2d at 233. Judge Ginsburg's majority opinion remanded the case to the Commission for further proceedings to determine whether the District of Columbia's decision to raise the lawyers' fees stemmed from the lawyers' market power or, alternatively, from the persuasive impact of the lawyers' political message. See id. at 252-53.

65. The survey computes the antitrust votes of Carter and Reagan appointees by sep-
2. Shared Monopolization and Market Coordination

Conservative antitrust circles disapprove of enforcement theories designed to show that oligopolists have restrained output by taking account of their interdependence. For example, the Reagan Administration's transition team for the FTC severely criticized the Commission's shared monopolization initiatives of the 1970s. Reagan antitrust enforcement officials also expressed considerable skepticism towards theories that supply a basis for attacking interfirm coordination by prohibiting facilitating practices. Cases using such theories are likely to fall outside what most conservative commentators regard as the core of proper antitrust enforcement activity.

3. Horizontal Restraints

Conservative analysis divides horizontal restraints into two categories. The first consists of conventional bid-rigging, price-fixing, or market allocation schemes for which there are no redeeming efficiency justifications. Some conservative commentators believe that horizontal price-fixing is often pro-competitive or benign and should not be subject to summary condemnation. However, most conservative antitrust scholars have ar-

arately presenting the results for (a) all decision dealing with immunity doctrines such as Noerr, and (b) all decisions other than matters dealing chiefly with immunity doctrines such as Noerr, state action, and actual or implied statutory immunity. Examples of decisions that, due to the overriding importance of Noerr issues to the outcome, are treated in this survey as immunity cases include Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2d Cir. 1987), aff'd, 486 U.S. 492 (1988); Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358 (7th Cir. 1987); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). Cases in which the disposition of Noerr issues is not crucial to the outcome are treated as non-immunity decisions. See Juster Assocs. v. City of Rutland, 901 F.2d 266, 269 (2d Cir. 1990) (affirming dismissal of plaintiff's suit on grounds that plaintiff failed to prove antitrust injury and that defendant's conduct enjoyed Noerr immunity from antitrust liability).

68. For this reason, the Article classifies as conservative decisions such as E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), in which the Second Circuit denied enforcement of an FTC order prohibiting the noncollusive adoption of various facilitating practices. At the same time, the survey also applies a conservative classification to cases in which the challenged means for attempted monopolization or monopolization consists of direct efforts by one firm to enlist a rival in a plan to restrict output and raise prices. See United States v. American Airlines, Inc., 743 F.2d 1114, 1118-19, 1122-23 (5th Cir. 1984) (invitation by chief executive officer of one airline to chief executive officer of rival firm to fix prices deemed attempted monopolization where formation of a cartel would have monopolized the market), cert. dismissed, 474 U.S. 1001 (1985).
69. See D. Armentano, Antitrust Policy: The Case for Repeal 61-67 (1986); Bittlingmayer, Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case, 25 J. L. & Econ. 201, 201-03, 228-29 (1982); Dewey, Economists and Antitrust: The
gued that antitrust doctrine should prohibit such conduct on a per se basis. 70 Consistent with this approach, the Reagan Antitrust Division mounted an unprecedented program to detect and prosecute horizontal price-fixing. 71

The second category of horizontal restraints consists of restrictions adopted pursuant to an efficiency-enhancing integration of economic activity. Conservative commentators call for these restrictions to be evaluated by a rule of reason that weighs procompetitive benefits against anticompetitive dangers. 72 A common conservative criticism of Warren-era antitrust jurisprudence is that the Supreme Court failed to distinguish "hard-core" price-fixing from restraints whose purpose was to increase the efficiency of legitimate forms of horizontal collaboration. 73 Reagan antitrust officials embraced analytical techniques that gave fuller effect to efficiency claims in evaluating horizontal arrangements. 74

Circular Road, 35 Antitrust Bull. 349, 363-64 (1990); High, Bork's Paradox: Static vs. Dynamic Efficiency in Antitrust Analysis, 3 Contemp. Pol'y Issues 21 (1984-85); Smith, Why Not Abolish Antitrust?, Regulation, Jan./Feb. 1983, at 23, 27; see also H. Demsetz, One Hundred Years of Antitrust: Should We Celebrate? 9-10 (1991) (predicting future extension of rule of reason to various price agreements now subject to outright condemnation).

70. See R. Bork, supra note 61, at 263-68, 406; Ginsburg, The Appropriate Role of the Antitrust Enforcement Agencies, 9 Cardozo L. Rev. 1277, 1282 (1988); Panel Discussion, Interview with William F. Baxter, Assistant Attorney General, Antitrust Division, 50 Antitrust L.J. 151, 153 (1981). Examples of survey cases that are classified as conservative because they affirm criminal convictions on antitrust counts for what appear to be unadorned bid-rigging agreements include United States v. Dynalectric Co., 859 F.2d 1559 (11th Cir. 1988) (upholding conviction for horizontal bid-rigging conspiracy), cert. denied, 490 U.S. 1006 (1989); United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982) (contract allocation scheme and bid-rigging deemed per se violation of the antitrust laws; convictions of defendants sustained); United States v. Inryco, Inc., 642 F.2d 290 (9th Cir. 1981) (upholding conviction of defendant found to have participated in horizontal bid-rigging conspiracy), cert. dismissed, 454 U.S. 1167 (1982). This survey also applies a conservative classification to decisions that support findings of civil liability for horizontal price-fixing and allocations of territories or customers. One example is Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884 (7th Cir. 1988). In Auwood, the Second Circuit sustained a jury verdict for a plaintiff theater operator who challenged a "movie split" agreement by its rivals to allocate first-run films among themselves. See id. at 889-90. Although it did not state whether the trial court applied a per se or rule of reason standard, the Second Circuit's opinion indicates that the horizontal behavior amounted to an allocation of markets that would be subject to per se condemnation.


72. See R. Bork, supra note 61, at 406-07.

73. See Kovacic III, supra note 4, at 57-58.

74. See In re Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549, 602 (1988) (final order); In re General Motors Corp., 103 F.T.C. 374, 386-88 (1984) (consent order); U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, 4 Trade Reg. Rep. (CCH) 3,109, at 20,593-95 (Nov. 10, 1988); Muris, The New Rule of Reason, 57 Antitrust L.J. 859, 859-61 (1989). Examples of cases in this survey that employ this approach and are treated as conservative include Drury Inn-Colorado Springs v. Olive Co., 878 F.2d 340, 343 (10th Cir. 1989) (rule of reason used to evaluate covenant by which seller of land for hotel promised not to sell adjacent parcel...
Within this general framework there are difficult classification choices. Defendants in horizontal restraints cases may argue that their conduct has efficiency properties that warrant application of a reasonableness test rather than per se condemnation. Commentators have observed that courts sometimes incorrectly have chosen to use reasonableness standards to assess conduct that poses genuine competitive dangers while of-


This survey also accords conservative status to decision that emphasize the need to draw careful distinctions between naked and ancillary restraints, yet ultimately conclude that the defendant has failed to offer sufficient proof to defeat liability. One example of a decision classified as conservative is General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984). In General Leaseways, the Seventh Circuit used a "quick look" inquiry to determine "if the elimination of competition is apparent." Id. at 595. Judge Posner's opinion for the court applied a per se standard after concluding that the defendant's horizontal market division was not "ancillary to the reciprocal provision of service or any other lawful activity." Id. A second illustration of a case that is treated as conservative on the basis of its analytical methodology is United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980). In Realty Multi-List, the Fifth Circuit evaluated a Justice Department challenge to membership criteria promulgated by a real estate multiple listing service. Following an extensive analysis of the rationales underlying per se and rule of reason standards, the court concluded that per se condemnation was inappropriate. See id. at 1361-69. The court then applied a reasonableness test and reversed the trial court's finding that the membership restrictions were facially reasonable and justified a grant of summary judgment for the defendant. See id. at 1381-89. Although the court's assessment of the purpose and effect of the conduct is in some respects questionable, its methodology and result are deemed conservative.

Some of the most difficult classification issues involving horizontal restraints deal with the conduct of sports leagues and conferences. One case classified as liberal is Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir. 1983), aff'd, 468 U.S. 85 (1984). In NCAA, the Tenth Circuit used a per se standard to condemn restrictions that the NCAA imposed on its member schools concerning the sale of broadcast rights for college football games. See id. at 1152-56. Although it also found the challenged arrangements invalid under a rule of reason standard, the court's view that the NCAA television plan "constitutes illegal per se price fixing" inappropriately slighted efficiency justifications for the challenged restraints. See id. at 1156. By contrast, the survey gives a conservative classification to Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984), in which the Ninth Circuit used a rule of reason analysis to evaluate a sport league's restrictions upon the movement of its franchises. The Ninth Circuit sustained a jury verdict for the plaintiff, ruling that a reasonable jury applying a rule of reason standard could have found that the National Football League violated the Sherman Act by restraining the movement of the Oakland Raiders to Los Angeles. See id. at 1390-98. Although the Ninth Circuit seems to have undervalued the league's justifications for the restrictions in question, its analytical methodology largely coincides with the conservative classification criteria used in this Article. For another illustration of a sports league decision whose analysis warrants a conservative label, see also National Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 567-68 (9th Cir.) (reversing trial court's grant of summary judgment that treated league's franchise relocation rule as per se invalid), cert. dismissed, 484 U.S. 960 (1987).
ferring no apparent efficiency benefits. Thus, in classifying decisions as liberal or conservative, one must assess whether the court used the correct standard (summary condemnation versus a more elaborate inquiry) and, if a reasonableness test is chosen, whether the standard has been applied with appropriate attention to efficiency concerns. Efficiency arguments have been raised and rejected in several recent criminal horizontal restraints matters, particularly in suits challenging schemes to rig bids or allocate customers for public contracts. For this survey, the defendants' asserted bases for avoiding per se condemnation in such matters are considered unpersuasive. Thus, cases applying per se rules in such instances are deemed conservative.

4. Vertical Restraints

To conservative antitrust scholars, vertical restraints almost invariably serve desirable efficiency ends. Thus, conduct such as resale price maintenance, vertical allocations of marketing territories, exclusive dealing, requirements contracts, and tying arrangements should be deemed legal per se. Reagan Administration enforcement policies reflected this view. From 1981 through 1988, the federal enforcement agencies issued no complaints or consent orders involving vertical restraints in matters initiated after the Reagan appointees assumed the leadership positions at the Antitrust Division and the FTC. This survey classifies as conservative decisions that reject challenges to vertical restraints.

75. See Calkins, The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy, 59 Antitrust L.J. 339, 353-55 (1990). In Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1428 (11th Cir. 1989), amended, 893 F.2d 293 (11th Cir.), rev'd, 111 S. Ct. 401 (1990) (per curiam), a split Eleventh Circuit panel affirmed a grant of summary judgment for defendants who had engaged in what Professor Calkins properly labels "a classic market allocation scheme." Calkins, supra, at 353. This survey applies a conservative classification to both the majority opinion (authored by Carter appointee Joseph Hatchett) for its caution in using per se standards and to the dissent (written by Carter appointee Thomas Clark) for its appraisal of the conduct in question as an unadorned horizontal market allocation.


79. Examples of conservative decisions examined in this survey include cases such as Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1582-83 (11th Cir. 1988) (rejecting allegations of resale price maintenance); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1348-51 (9th Cir. 1987) (relying on business justification defense to reject tying allegation), cert. denied, 488 U.S. 870 (1988); Russell Stover Candies, Inc. v. FTC, 718 F.2d 256, 258-60 (8th Cir. 1983) (denying enforcement of FTC order based upon finding that manufacturer had violated Section 1 of Sherman Act by refusing to sell to retailers who would not sell at manufacturer's suggested retail price). Examples of liberal decisions contained in this survey include cases such as Gonzalez v. St. Margaret's House
5. Mergers

A conservative merger policy would prohibit only horizontal mergers involving firms with large market shares. Smaller horizontal mergers, all vertical transactions, and all purely conglomerate consolidations would be disregarded. In a representative statement of conservative merger philosophy, Robert Bork’s *Antitrust Paradox* proposed that merger enforcement policy should be limited to banning “[h]orizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market).”

During the Reagan Administration, the FTC and the Antitrust Division adhered to some elements of this approach. The federal agencies initiated no cases challenging conglomerate or vertical transactions. In setting horizontal merger enforcement policy, the federal agencies raised the threshold of illegality well above levels that had prevailed during the 1970s. Nonetheless, in their merger guidelines and in their enforcement choices, the FTC and the Antitrust Division stopped considerably short of the more permissive standards that Judge Bork and other conservative commentators had proposed. This Article uses the more extreme standards of the *Antitrust Paradox*, rather than the Reagan Administration’s merger guidelines, as the basis for characterizing voting

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80. See R. Bork, supra note 61, at 406.

81. Id. at 406; *see also* Y. Brozen, Mergers in Perspective 85 (1982) (“The possibility of temporary monopoly may be a reason for scrutinizing closely horizontal mergers encompassing more than 50 percent of an industry’s capacity in times when there is no excess capacity in the industry, but there is no reason at all for discouraging conglomerate or vertical mergers.”); cf. R. Posner, Antitrust Law 112 (1976) (“The revisions in our thinking about mergers call for conservative rules of liability. There is little basis in current thinking for automatic intervention in markets in which the four largest firms have a combined market share of less than 60 percent.”).


83. See Kovacic IV, supra note 4, at 1453-54.


85. See Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) 3,100 (June 14, 1984); Federal Trade Commission Statement Concerning Horizontal Mergers, 4 Trade Reg. Rep. (CCH) 3,200 (June 14, 1982); Kovacic IV, supra note 4, at 1452-53; *see also* Paradox Revisited: *Interview with Judge Robert H. Bork*, 3 Antitrust 16, 17 (Summer 1989) (comment by Robert Bork observing that enforcement thresholds in Reagan Administration’s merger guidelines “are probably too low. But there is such an improvement over what went before.”).
behavior as liberal or conservative in merger cases.\(^{86}\)

## 6. Price-Discrimination

Conservative commentators regard the Robinson-Patman Act\(^{87}\) as a singularly destructive influence in antitrust.\(^{88}\) Conservative notions of appropriate antitrust policy would endorse efforts to constrict the reach of, if not eliminate, the statute's ban on price discrimination. From 1981 through 1988, the Reagan FTC reduced already low levels of federal Robinson-Patman enforcement activity\(^9\) and initiated a single case alleging illegal price discrimination.\(^{90}\) This survey characterizes as conservative cases that reject Robinson-Patman price discrimination allegations.\(^{91}\)

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86. By this standard, the survey applies a conservative characterization to cases such as FTC v. PPG Indus., Inc., 798 F.2d 1500, 1505 (D.C. Cir. 1986) (sustaining challenge to merger that would have reduced number of industry participants from three firms to two); United States v. Waste Management, Inc., 743 F.2d 976, 983 (2d Cir. 1984) (rejecting challenge to merger on ground that ease of entry rebutted presumption of illegality arising from post-acquisition market share of 48.8 percent). Using the same classification principle, the survey attaches liberal status to the outcome of Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1387 (7th Cir. 1986) (upholding challenge to merger that reduced number of substantial firms in relevant market to four), cert. denied, 481 U.S. 1038 (1987).

A difficult classification problem is posed by United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990). The Seventh Circuit upheld the Justice Department's challenge to the merger of two hospital firms yielding a combined market share of between 64 and 72 percent. See id. at 1283. Judge Posner's majority opinion does not make clear the number and size of other remaining firms. The district court's opinion suggested that the post-acquisition market included two other firms with shares of about 18 percent and 10 percent, respectively. See United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1280-81 (N.D. Ill. 1989), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990). Given the apparently small size of the third firm (10 percent market share) in relation to its two rivals (72 percent and 18 percent market shares, respectively), this survey treats the post-merger market in Rockford as lacking the "three significant firms" that the Antitrust Paradox proposed as sufficient to avoid antimerger liability. Thus, the Seventh Circuit's Rockford decision is classified as conservative.


89. See Kovacic II, supra note 3, at 177.

90. In 1988, the FTC issued Robinson-Patman complaints against five book publishing firms, alleging that the respondents had granted illegal discounts to major bookstore chains. See Harper & Row, 5 Trade Reg. Rep. (CCH) 2,634 (F.T.C. Dec. 20, 1988).

91. Examples of price discrimination decisions classified as conservative include cases such as Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1148 (D.C. Cir. 1988) (denying enforcement of FTC price discrimination order); Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420-21 (8th Cir. 1986) (rejecting price discrimination claim for failure to show injury to competition); Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 712 (2d Cir. 1983) (affirming dismissal of Robinson-Patman claims). Examples of price discrimination decisions classified as liberal include cases such as J.F. Feerer, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1540, 1543 (3d Cir. 1990) (reversing summary judgment for defendant on Robinson-Patman and Sherman Act claims), cert. denied, 111 S. Ct. 1313 (1991); Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1428 (11th Cir. 1990) (reversing summary judgment for defendant on Robinson-Patman claims); Has-
7. Standing and Antitrust Injury

Conservative commentary frequently depicts private antitrust suits as efficiency-reducing devices that serve largely to transfer economic rents from one collection of economic actors to another. Accordingly, conservative doctrine would shrink the ability of firms to challenge their rivals' conduct by imposing more stringent standing requirements and by pressing plaintiffs to show a causal relationship between the alleged injury and the anticompetitive features of the challenged conduct. This is true, for example, for private challenges to mergers, where target firms or rivals of the acquiring firm sometimes raise antitrust objections to proposed transactions. The Reagan Justice Department played an aggressive amicus role in attempting to persuade the Supreme Court to deny standing in merger cases to firms that are rivals to the merging parties. This survey applies a conservative classification to decisions that adopt restrictive standing and antitrust injury requirements.

8. Evidentiary Standards

Liability rules and standing requirements are but two factors that shape the outcome of antitrust disputes. Much depends on how courts define the amount and types of evidence that will suffice to trigger the application of liability rules. Supreme Court decisions such as Monobrouck v. Texaco, Inc., 842 F.2d 1034, 1043 (9th Cir. 1987) (holding functional discount to be Robinson-Patman violation), aff'd, 110 S. Ct. 2535 (1990).


See Page, supra note 4, at 1268-78.

See, e.g., R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 104 (2d Cir. 1989) (private antitrust suit brought by rival of the parties to the merger); Grumman Corp. v. LTV Corp., 665 F.2d 10, 10-11 (2d Cir. 1981) (private antitrust suit brought by merger target).


See Page, supra note 4, at 1278-94.
santo Co. v. Spray Rite Corp., Matsushita Electric Industrial Co. v. Zenith Radio Corp., and Business Electronics Corp. v. Sharp Electronics Corp. have injected a permissive bias into antitrust jurisprudence by increasing the burdens that plaintiffs must bear in conspiracy cases to show that the challenged conduct resulted from collective, rather than unilateral, conduct. The most conservative of these decisions is Matsushita, which limits the inferences that may be derived from ambiguous circumstantial evidence of conspiracy and encourages summary dismissal of allegations that are economically implausible.

For this survey, decisions that use demanding evidentiary screens to eliminate antitrust claims (including the dismissal of weak claims as early in the litigation life cycle as possible) are treated as conservative.

9. State Action

State action matters pose difficult classification problems. On the one hand, some conservatives generally welcome aggressive judicial efforts to undermine rent-seeking regulatory measures adopted by state legislatures. By this logic, state action immunity should be narrowly construed. On the other hand, conservatives who place a strong emphasis on federalism are reluctant to second-guess the judgments of state legislatures and regulatory bodies, even when such judgments reduce consumer welfare. This Article gives a conservative classification to votes that favor a narrow reach for the state action doctrine and entertain

100. 475 U.S. 574 (1986).

104. The state action doctrine confers antitrust immunity upon the conduct of public and private entities when such conduct is authorized and monitored by the state. For a recent comprehensive discussion and evaluation of the state action doctrine, see Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 668 (1991).
probing efforts to limit the reach of anticompetitive legislation and regulation at the state and local levels of government. This Article separately reports the results of state action decisions and other cases involving antitrust immunities.

10. Other Immunities

The Noerr and state action immunities are two of the most important elements of a larger set of legislatively and judicially devised dispensations from the antitrust statutes. Among other areas, Congress has created express exemptions for certain activities of organized labor\textsuperscript{106} and a variety of industries such as insurance.\textsuperscript{108} Courts have recognized non-statutory immunities, such as the act of state doctrine,\textsuperscript{109} and in rare instances have dismissed antitrust claims on the ground that the comprehensiveness of an alternative federal regulatory scheme creates an implied exemption from the antitrust laws.\textsuperscript{110}

Like the Noerr and state action cases, decisions involving other immunity claims resist easy classification as liberal or conservative. A conservative judge might regard statutory exemptions unfavorably as the products of successful interest group rent-seeking, but the same judge may be wary of upsetting legislative judgments that such exemptions are appropriate. This Article treats as conservative votes that support narrow interpretation and application of statutory and non-statutory immu-

\textsuperscript{106} Examples of decisions classified as conservative include cases such as Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127, 1137 (4th Cir. 1989) (municipality not entitled to state action immunity where its actions came within scope of conspiracy exception), rev'd, 111 S. Ct. 1344 (1991); United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 538 (5th Cir. 1983) (collective rate-setting did not fall within state action exemption to federal antitrust laws), rev'd, 471 U.S. 48 (1985); Ronwin v. State Bar of Ariz., 686 F.2d 692, 698 (9th Cir. 1982) (challenged bar examination grading procedure failed to qualify for antitrust immunity as state action), rev'd sub nom. Hoover v. Ronwin, 466 U.S. 558 (1984). Examples of decisions classified as liberal include cases such as New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064, 1077 (1st Cir. 1990) (bureau's supervision of motor carrier rates was sufficiently active for state action immunity from antitrust liability); Obendorf v. City and County of Denver, 900 F.2d 1434, 1439 (10th Cir.) (state action immunity from antitrust liability applied to action taken by city pursuant to Colorado urban renewal law), cert. denied, 111 S. Ct. 129 (1990); Hancock Indus. v. Schaeffer, 811 F.2d 225, 232 (3d Cir. 1987) (county officials immune from antitrust liability when authorized by state policy to limit dumping at local landfill to trash generated within county).

\textsuperscript{107} For a discussion of the statutory bases of organized labor's antitrust exemption, see Gifford, Redefining the Antitrust Labor Exemption, 72 Minn. L. Rev. 1379, 1389-90 (1988).

\textsuperscript{108} See, e.g., Priest, The Antitrust Suits and the Public Understanding of Insurance, 63 Tul. L. Rev. 999, 1016-21 (1989) (discussing statutory foundation for and interpretation of insurance industry's antitrust exemption).


\textsuperscript{110} See id. at 4c-224f.
Because immunity cases pose especially problematic classification issues, votes in these matters are segregated and reported separately.

11. Summary

In comparing Carter and Reagan appointee voting on the federal courts of appeals, this Article defines as conservative votes that view the following behavior permissively: single-firm conduct (except exclusion by manipulation of government instrumentalities), shared monopolization, market signalling, vertical restraints, mergers (except horizontal transactions involving especially large market shares), and price discrimination. Horizontal restraints adopted as part of efficiency-enhancing integrations warrant rule of reason analysis, and only "naked" horizontal restraints (such as price-fixing on highway construction contracts) are to be condemned by a per se test. Standing and antitrust injury screens are to be applied rigorously, and plaintiffs must fulfill strict evidentiary requirements to establish liability prerequisites such as the existence of collective action in Sherman Act Section 1 conspiracy cases. As a whole, these prescriptions reflect the conservative view that antitrust doctrine should attack only conduct whose effect, examined through the lens of price theory, unmistakably harms allocative efficiency. Behavior with procompetitive, neutral, or ambiguous efficiency consequences should be ignored.112

This Article also confers conservative status upon votes that construe antitrust immunities narrowly. Thus, a conservative perspective takes a skeptical view of the state action and Noerr immunity arguments, as well as defenses premised upon other federal antitrust exemptions that tolerate conduct otherwise forbidden by the antitrust laws. Because immunity cases present issues that often defy meaningful classification on a liberal-conservative spectrum, the Article separately reports the results of non-immunity and immunity decisions, respectively.


112. See, e.g., R. Bork, supra note 61, at 133 (courts and antitrust enforcement agencies should follow policy of "nonintervention" when "changes seem roughly equal that the activity is beneficial or harmful"); Ginsburg, supra note 70, at 1282 (antitrust enforcement agencies should abide by principle of "primo non nocere—first do no harm").
C. Survey Results: Broad Perspective

This Article places relevant cases from the 1977-1990 period into four categories. The first considers all non-immunity votes cast by Carter and Reagan appointees and determines how frequently Carter judges and Reagan judges embraced positions that coincided with conservative antitrust preferences. The second consists of non-immunity cases in which either a Carter appointee or a Reagan appointee authored the majority opinion. The third category consists of all non-immunity cases in which at least one Carter appointee and at least one Reagan appointee sat on the same panel. The fourth category consists of all cases whose resolution depended chiefly upon the treatment of immunity defenses.

1. All Votes Cast by Carter and Reagan Appointees in Non-Immunity Cases

Of the 897 cases chosen for detailed study during the survey period, 751 were non-immunity decisions. In the 751 non-immunity decisions, Carter and Reagan appointees cast a total of 1296 votes. This total includes all votes cast by Carter and Reagan appointees in the following forms: majority opinions, votes cast in support of the majority outcome, votes cast in per curiam decisions, concurring opinions, dissenting opinions, votes cast in support of dissenting opinions, and votes cast in decisions en banc. These votes also include cases in which more than one Carter or Reagan appointee sat on the same panel. For example, if two Carter appointees participated on a panel in the same case, the vote of each was treated as a separate observable event.

Carter appointees accounted for 809 of the total of 1296 votes. In 249 instances (30.8 percent), Carter appointees supported liberal outcomes. In 560 instances (69.2 percent), Carter judges endorsed outcomes consistent with a conservative antitrust agenda. Reagan appointees cast 487 of the 1296 votes. In 86 of these instances (17.7 percent), Reagan appoin-

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113. The survey treats votes cast on a three-judge panel and in an en banc proceeding in the same matter as separately measurable events. Where an opinion has been published, withdrawn, modified, and republished, the survey counts only the final, republished opinion as an observable event. For example, the survey counts Judge Posner's votes in Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984) (en banc), rev'd, 470 U.S. 373 (1985), and Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488 (three-judge panel), vacated, 726 F.2d 1150 (7th Cir. 1983), rev'd, 470 U.S. 373 (1985), but it excludes Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (7th Cir. 1982), which was withdrawn and replaced by the opinion published at 706 F.2d 1488. The survey also omits votes in en banc decisions in which the sole basis for the request for rehearing en banc was an asserted deficiency in the three-judge panel's treatment of a non-antitrust issue of evidence or procedure. For example, the survey omits Balogh's of Coral Gables, Inc. v. Getz, 1986-2 Trade Cas. (CCH) 7,271 (11th Cir. 1986) (en banc), in which the sole issue before the court was the original panel's affirmance of the trial court's refusal to admit a witness's testimony and notarized written statement. The en banc panel's disposition of the issue hinged entirely upon its interpretation of the Federal Rules of Evidence. See id. at 61,383.
tees supported liberal outcomes. In 401 instances (82.3 percent), Reagan judges endorsed outcomes consistent with a conservative antitrust agenda. Thus, Reagan appointees adhered to conservative antitrust positions more frequently (82.3 percent of all non-immunity votes versus 69.2 percent) than their Carter counterparts.

2. Majority Opinions Authored by Carter and Reagan Appointees in Non-Immunity Cases

In the 751 non-immunity cases selected for detailed study, Carter or Reagan appointees wrote the majority opinion in 419 cases. Of these, Carter appointees authored the majority opinion in 260 cases. In 60 of the 260 cases (34.6 percent), Carter appointees issued opinions that embraced liberal doctrines. In the remaining 170 cases (65.4 percent), Carter appointees adopted positions consistent with a conservative antitrust agenda. Reagan authors of majority opinions adhered to the conservative agenda more frequently. Reagan appointees authored 159 opinions and took liberal positions in 26 cases (16.4 percent). In the remaining 134 opinions (83.6 percent), Reagan appointees endorsed conservative outcomes.

3. Votes Cast When Carter and Reagan Appointees Sat on the Same Panel in Non-Immunity Cases

Of the 751 non-immunity cases chosen for detailed review, 184 were decided by panels containing at least one Carter appointee and one Reagan appointee. In 160 cases featuring joint participation (87 percent), Carter and Reagan judges favored the same outcome. In 21 of the “agreement” cases (13.1 percent), Carter and Reagan appointees adopted liberal positions. In the remaining 139 agreement cases (86.9 percent), Carter and Reagan judges endorsed conservative outcomes. Carter appointees and Reagan appointees disagreed in seventeen cases involving joint participation in which no Carter or Reagan appointee voted with a judge appointed by the other president. In fifteen of these cases, Reagan appointees preferred conservative outcomes, and Carter judges endorsed liberal results. In two instances, Carter appointees supported a con-

serveservative outcome, and Reagan judges supported a liberal result.115

In addition to the seventeen decisions involving a complete division between Carter and Reagan appointees, there were seven cases in which at least one Carter judge and one Reagan judge disagreed, but at least one Carter or Reagan judge also endorsed the views of a judge appointed by the other president. Three of these decisions endorsed liberal outcomes,116 and four decisions adopted conservative positions.117 As a further point of comparison, there were eleven instances in which Carter and Reagan judges did not sit on the same panel and judges appointed by the same president disagreed with each other. Nine of these decisions featured disagreement among Carter appointees, with six cases support-


ing liberal outcomes and three cases endorsing conservative results. Two decisions involved disagreement between Reagan appointees, with both cases yielding liberal results.

The data presented above suggest qualifications to conclusions that might be drawn from a review of aggregate voting data. Without more decisions revealing intra-panel disagreement between Carter and Reagan appointees, it is difficult to predict whether Carter or Reagan judges will endorse or reject positions adopted by their counterparts on panels consisting of judges selected by the other president. The frequency with which Carter and Reagan appointees agreed when participating in the same case (160 cases out of 184) could stem from a number of sources. Common voting on mixed panels could indicate an underlying similarity of ideological perspectives. Such votes also could be attributable to the persuasive influence of individual judges in marshalling support for specific outcomes. Finally, common outcomes could result from internal institutional forces—for example, the need to sustain and build coalitions for voting on future cases—that favor consensus and disincline individual judges to dissent except in instances of extreme disagreement.


121. In their study of voting behavior on three-judge federal appellate panels, Professors Richardson and Vines concluded that “[t]he intrinsic loneliness of dissent on the circuits may well act as a deterrent to a single judge who faces the possibility of lone disagreement with the majority of judges.” Richardson & Vines, Review, Dissent, and the Appellate Process: A Political Interpretation, 29 J. Pol. 597, 611 (1967); cf. Arthur, Workable Antitrust Law: The Statutory Approach to Antitrust, 62 Tul. L. Rev. 1163, 1216 (1988) (“In large measure, their shared sense of the traditional judicial role provides the self-discipline—and peer pressure for those lacking that quality—that enables federal judges of varying political and social beliefs to render consistent decisions according to
whole, the data on mixed panel voting provide qualified support for the hypothesis that Reagan judges are more disposed to vote conservatively in antitrust matters than Carter judges.

The incidence of disagreement between judges appointed by the same president—eleven instances of intra-Carter or intra-Reagan disagreement involving panels with no judges appointed by the other president, and seven instances of intra-Carter or intra-Reagan disagreement on panels including judges appointed by the other president—suggests caution in evaluating hypotheses that attribute single-minded, monolithic voting preferences to appointees of either President Carter or President Reagan. Viewed one way, the number of cases involving some degree of intra-appointee disagreement (eighteen) is greater than the number of cases involving a clean division between Carter and Reagan judges participating in the same matter (seventeen). As explored in more detail below, aggregate voting data tends to mask important disparities in preferences among judges appointed by the same president. The data do not support the hypothesis that either President Carter or President Reagan appointed judges with wholly likeminded antitrust views.

4. Votes Cast by Carter and Reagan Appointees in Immunity Cases

Of the 897 cases chosen for detailed study, 146 were decided mainly on the basis of immunity issues such as the interpretation of statutory exemptions and the application of the Noerr, state action, and act-of-state doctrines. Carter appointees cast 161 votes in these matters, supporting liberal results 103 times (64.0 percent) and conservative outcomes 58 times (36.0 percent). Out of 112 total votes, Reagan judges cast 72 liberal votes (64.3 percent) and 40 conservative votes (35.7 percent). Thus, overall voting patterns in antitrust immunity cases suggest that Carter and Reagan appointees hold similar views concerning the proper scope of legislatively- and judicially-conceived dispensations from the antitrust laws.

Carter and Reagan judges participated on the same panel in 42 immunity cases. In 35 instances (83.3 percent), Carter and Reagan appointees reached agreement, endorsing liberal outcomes 24 times (68.6 percent) and conservative outcomes 11 times (31.4 percent). Four disagreement cases featured a complete division between Carter and Reagan judges, with Carter appointees favoring conservative outcomes and Reagan judges supporting liberal results. Three additional disagreement cases

law rather than personal belief"). For comprehensive discussions of collegial decision-making processes that diminish the likelihood of dissent in individual cases decided by appellate courts, see R. Carp & R. Stidham, supra note 18, at 171-96; J. Howard, Jr., supra note 18, at 189-221; W. Murphy, Elements of Judicial Strategy 56-58 (1964).

122. See infra notes 146-290 and accompanying text.

123. See Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising Inc., 891 F.2d 1127 (4th Cir. 1989) (majority opinion by Carter appointee Sprouse; dissent by Reagan appointee Wilkins), rev'd, 111 S. Ct. 1344 (1991); Barton's Disposal Serv., Inc. v. Tiger Corp., 886 F.2d 1430 (5th Cir. 1989) (majority including Carter appointee Sam
involved a split between at least one Carter appointee and one Reagan appointee but also had a judge appointed by one president supporting the position of a judge chosen by the other president. The immunity case data set also contained four decisions in which Carter and Reagan appointees did not sit together and in which judges appointed by the same president disagreed.

II. VOTING BEHAVIOR BY CARTER AND REAGAN APPOINTEES: NARROW PERSPECTIVE

A second way to consider the significance of judicial appointments is to examine voting behavior in the context of discrete sets of cases dealing with significant fields of antitrust law. This method can assist in detecting differences in judicial policy preferences in areas in which liberals and conservatives have articulated well-defined, competing visions of appropriate antitrust rules. This section describes Carter and Reagan appointee voting behavior in six areas: predatory pricing, mergers, vertical restraints, tying, price discrimination, and standing/antitrust injury.


A. Predatory Pricing

Since the mid-1970s, predatory pricing litigation has become a prominent battleground for competing views about the proper role of antitrust in controlling dominant firm conduct. Academic commentators have generated a massive literature on predatory pricing, while federal judges since 1975 have published numerous decisions dealing with predatory pricing claims under Section 2 of the Sherman Act or Section 2a of the Robinson-Patman Act. Like the academic literature, judicial opinions have featured an active debate about the choice of predation standards.

During the survey period for this Article, Carter and Reagan appointees to the courts of appeals participated in 53 cases involving predatory pricing allegations. Carter judges cast a total of 53 votes in these cases. The Carter judges endorsed liberal results in 16 instances (30.2 percent) and supported conservative outcomes 37 times (69.8 percent). Reagan judges cast 36 votes, taking liberal positions 7 times (19.4 percent) and adopting conservative approaches in 29 instances (80.6 percent). Reagan and Carter judges sat on the same panel in 14 cases and reached agreement 12 times. Twelve agreement decisions reached conservative outcomes, and two favored liberal results. In the two disagreement cases, Carter appointees uniformly favored liberal positions, and Reagan appointees, with the exception of one vote, advocated conservative views.

130. Section 2a of the Robinson-Patman Act prohibits price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly." See 15 U.S.C. § 13(a) (1988).
132. One disagreement decision featured a clean split according to the appointing president. See Eximco, Inc. v. Tran Co., 737 F.2d 505 (5th Cir. 1984) (majority consisting of Reagan appointees Davis and Jolly; dissent by Carter appointee Tate). The second disagreement case arrayed two Carter appointees and a Reagan appointee against another Reagan appointee. See U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695 (Fed. Cir. 1988) (majority consisting of Carter appointees Friedman and Smith and Reagan ap-
B. Mergers

The Reagan presidency featured a substantial, controversial retrenchment of federal merger control activity and expansive efforts to persuade the antitrust community to embrace less restrictive antimerger standards.\(^\text{133}\) Voting behavior in cases involving public or private challenges to mergers provides a useful arena in which to measure the strength of liberal and conservative antitrust preferences. Of all subsets in the non-immunity case data base, merger matters generated the greatest disparity in aggregate voting behavior between Carter and Reagan appointees.

During the survey period, Carter and Reagan judges participated in 35 merger cases. Carter appointees cast 29 votes in these matters. Twenty-one Carter votes (72.4 percent) supported liberal outcomes, and eight votes (27.6 percent) adopted conservative positions. Reagan appointees cast 32 merger votes, with ten votes (31.3 percent) endorsing liberal views and 22 votes (68.7 percent) favoring conservative results. Carter and Reagan appointees participated on the same panel in seven merger cases. Five cases produced agreement and conservative outcomes.\(^\text{134}\) The two disagreement cases produced liberal outcomes, with Carter judges favoring the liberal results and a Reagan appointee dissenting in both instances.\(^\text{135}\)

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\(^{133}\) \text{See}, e.g., Axinn, \textit{Developments in Mergers and Acquisitions}, 58 Antitrust L.J. 403, 419 (1989) ("In the 1960s and 1970s, the federal antitrust cops were out patrolling their beat . . . . Then, in the 1980s the cops retreated into the station house . . . . The prevailing view was that a little crime wouldn't hurt and probably was good for business."); Pitofsky, \textit{New Definitions of Relevant Market and the Assault on Antitrust}, 90 Colum. L. Rev. 1805, 1809 (1990) ("The 1980s witnessed a radical relaxation of government enforcement in the merger area."); Schmalensee, \textit{Horizontal Merger Policy: Problems and Changes}, 1 J. Econ. Perspectives 41, 45-47 (1987) (discussing Reagan Administration's proposed amendments to the Clayton Act's antimerger provision); \textit{Task Force Report}, supra note 84, at 757-62 (discussing Department of Justice merger enforcement policy in the 1980s).


\(^{135}\) \text{See} \textit{Consolidated Gold Fields PLC v. Minorco, S.A.}, 871 F.2d 252 (majority including Carter appointee Newman; dissent by Reagan appointee Altimari), \textit{amended}, 890 F.2d 569 (2d Cir. 1989); \textit{United States v. BNS Inc.}, 858 F.2d 436 (9th Cir. 1988) (majority consisting of Carter appointees Boocheever and Ferguson; dissent by Reagan appointee Beezer).
C. Vertical Restraints Excluding Tying

Vertical restraints cases other than tying disputes accounted for 123 cases—the largest subset of cases within the non-immunity data base of 751 decisions. Carter appointees cast 130 votes in these cases; 36 votes (27.7 percent) adopted liberal positions, and 94 votes (72.3 percent) embraced conservative perspectives. Reagan appointees endorsed liberal outcomes in a notably lower percentage of their votes in vertical restraints matters. Reagan judges cast 75 vertical restraints votes, taking liberal positions six times (8 percent) and endorsing conservative outcomes 69 times (92 percent).

Carter and Reagan judges sat on the same panel in 24 vertical restraints cases. Nineteen joint participation cases yielded agreement among Carter and Reagan appointees, with two cases endorsing liberal outcomes and seventeen decisions supporting conservative results. Carter and Reagan appointees disagreed in five vertical restraints cases. Four cases produced a complete division among Carter and Reagan judges, with Carter judges endorsing liberal positions and Reagan judges advocating conservative outcomes. In the fifth disagreement case, a Carter judge dissented from a conservative position adopted by a Reagan appointee and a Carter appointee.

D. Tying

Carter and Reagan appointees participated in 70 tying cases during the survey period. Carter appointees cast 75 votes in these matters, supporting liberal results nineteen times (25.3 percent) and conservative outcomes 56 times (74.7 percent). Reagan appointees cast 31 votes in tying cases and largely mirrored the voting patterns of their Carter counterparts. Reagan judges supported liberal outcomes seven times (22.6 percent) and endorsed conservative positions 24 times (77.4 percent). Carter and Reagan judges sat on the same panel in twelve cases and agreed in each instance. Two of the agreement decisions yielded liberal outcomes, and the remaining ten supported conservative results. There were two additional cases featuring disagreement among judges appointed by the

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same president.  

E. Price Discrimination

Carter and Reagan appointees participated in 48 cases that dealt mainly with price discrimination claims arising under the Robinson-Patman Act. Carter appointees cast 56 votes in these cases, adopting liberal positions 22 times (39.3 percent) and supporting conservative views 34 times (60.7 percent). Aggregate Reagan appointee voting data in price discrimination cases suggest a greater conservatism. Reagan judges cast 29 votes, reaching liberal results eight times (27.5 percent) and favoring conservative outcomes 21 times (72.4 percent).

Carter and Reagan judges sat on the same panel in twelve price discrimination cases. Seven of these cases featured agreement, with three decisions favoring liberal outcomes and four decisions endorsing conservative results. Five cases featured a complete division among Carter and Reagan judges, with Carter judges invariably favoring liberal outcomes and Reagan judges invariably supporting conservative positions.  

F. Standing and Antitrust Injury

Seventy-one cases in the non-immunity data set hinged chiefly on the resolution of standing or antitrust injury issues. Carter appointees cast 74 votes in these cases, endorsing liberal outcomes 22 times (29.7 percent) and conservative results 52 times (70.3 percent). Reagan judges voted conservatively somewhat more often in casting 60 votes in standing and antitrust injury matters. Reagan appointees supported liberal positions 14 times (23.3 percent) and favored conservative outcomes 46 times (76.7 percent). Carter and Reagan judges jointly participated in 22

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139. See Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791 (4th Cir. 1989) (majority opinion by Reagan appointee Chapman; dissent by Carter appointee Sprouse), cert. denied, 110 S. Ct. 1120 (1990); Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988) (majority consisting of Reagan appointees Starr and Williams; dissent by Carter appointee Mikva); Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129 (5th Cir. 1987) (majority including Reagan appointee Garwood; dissent by Carter appointee Rubin); Russ’ Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214 (5th Cir. 1985) (majority including Reagan appointee Contie; dissent by Carter appointee Kennedy); Eximco, Inc. v. Trane Co., 737 F.2d 505 (5th Cir. 1984) (majority opinion by Reagan appointee Jolly; dissent by Carter appointee Tate).

140. See Jefferson County Pharmaceutical Ass’n, Inc. v. Abbott Laboratories, 656 F.2d 92 (5th Cir. 1981) (conservative majority including Carter appointees Frank Johnson and Vance; liberal dissent by Carter appointee Clark), rev’d, 460 U.S. 150 (1983); May Dep’t Store v. Graphic Process Co., 637 F.2d 1211 (9th Cir. 1980) (liberal majority including Carter appointee Hug; conservative dissent by Carter appointee Skopil).
standing cases. Twenty cases yielded agreement, with two decisions supporting liberal outcomes and eighteen decisions reaching conservative results. The two disagreement decisions did not present a clean division between Carter and Reagan judges. Two additional standing/antitrust injury cases featured disagreement among judges appointed by the same president.

III. THE RESULTS INTERPRETED: QUALITATIVE FEATURES

The data on the voting behavior of Carter and Reagan appointees in non-immunity decisions are generally consistent with the hypothesis that Reagan judges have more conservative antitrust preferences than their Carter counterparts. Reagan judges cast conservative votes more often than Carter judges as a percentage of all non-immunity votes (82.3 percent versus 69.2 percent). Voting patterns in specific non-immunity substantive areas suggest that Reagan appointees are decidedly more inclined than Carter judges to cast conservative votes in vertical restraints cases (92 percent versus 72.3 percent) and merger cases (68.7 percent versus 27.6 percent). Although there are comparatively few instances of disagreement between Carter and Reagan judges participating in the same matter, Reagan judges adhered to conservative positions in such cases considerably more often than their Carter colleagues.

As suggested above, caution is appropriate in interpreting the aggregate voting data. One cannot be sure how an individual judge would have voted if confronted by facts evaluated by another panel in a case in which she did not participate. Cases involving joint Carter-Reagan appointee participation in some subsets of cases—for example, the immunity case data set and the predatory pricing, tying, and standing/antitrust injury case data sets—presented no or few instances of disagreement between Carter and Reagan judges. Although voting in cases featuring disagreement suggests greater Reagan appointee conservatism, one cannot assume automatically that one set of judges would have reached different outcomes had they participated in other cases contained in the data set.

Three other considerations, discussed below, require qualification of


143. See supra notes 114-15 and accompanying text.
the aggregate voting data. The first caveat is that the relatively greater frequency of Carter appointee support for liberal antitrust outcomes tends to understate how extensively some Carter appointees have embraced conservative analytical approaches. Indeed, in a noteworthy number of instances, individual Carter appointees have accumulated antitrust voting records that match or exceed the conservatism of prominent Reagan appointees such as Richard Posner. This phenomenon is neither accidental nor surprising, as it flows from the guidance all court of appeals judges have received from the Supreme Court and academia—two institutions whose antitrust preferences have narrowed substantially over the past twenty years. Conservative voting tendencies also reflect economic and political change that has increased concern about regulatory programs that reduce the competitive strength of American firms.

The second caveat is that Reagan judges have not been as singlemindedly predisposed to reject antitrust claims as proponents of the conservative court-packing hypothesis have suggested. As some observers have predicted, there is evidence that at least a small subset of Reagan appointees have moderately expansive antitrust preferences. Further examination of the cases reviewed in this survey also reveals that the “conservatism” often associated with Reagan judicial appointees takes several forms, some of which do not entail a narrow conception or application of antitrust liability standards. One dimension of conservatism is a refusal by some Reagan appointees to displace comparatively expansive legal precedent with new standards based upon analytical precepts that disfavor intervention. Even for economically-oriented Reagan judges, adherence to Chicago School views sometimes may generate pro-plaintiff outcomes that the conservative court-packing hypothesis would not predict.

The third caveat is that the data do not reflect the qualitative significance of some Reagan appointees. The opinions of judges such as Robert Bork (until his departure from the bench), Frank Easterbrook, Richard

144. See Wermiel, Some Reagan Judicial Appointees Fail to Follow Conservative Path Expected by Administration, Wall St. J., Apr. 5, 1988, at 66, col. 1; see also Sullivan, Comment, in Private Antitrust Litigation 381, 383 (S. Salop & L. White eds. 1988) (“[T]here are some new court of appeals judges and several new district court judges who might well be described as conservative populists—people who value small business, wide dispersion of economic power, and the tradition of local control.”).

145. Chicago School teaching forms the principal basis for the policy views embodied in the conservative agenda that this Article uses to classify votes as liberal or conservative. See supra notes 56-112 and accompanying text. As summarized by Judge Easterbrook, the Chicago School “seems to favor little other than prosecuting plain vanilla cartels and mergers to monopoly. Its adherents are reasonably sure that these two things are harmful to consumers (though there are scattered doubters); these incurable skeptics doubt that other intervention is worth the costs.” Easterbrook, Workable Antitrust Policy, 84 Mich. L. Rev. 1696, 1701 (1986). For discussions of the development of a Chicago School perspective in antitrust, see G.E. Garvey & G.J. Garvey, Economic Law and Economic Growth 103-20 (1990); Fox & Sullivan, supra note 96, at 969-88; Page, supra note 4, at 1228-37; R. Nelson, Comments On a Paper By Posner, 127 U. Pa. L. Rev. 949 (1979).
Posner, and Ralph Winter have proven influential in shaping judicial discourse about the appropriate path for antitrust doctrine. As adherents to the conservative court packing hypothesis have suggested, the appointment of academicians experienced in antitrust and economic regulation has had a qualitatively important impact on antitrust jurisprudence that a mere recitation of voting statistics does not reveal.

**A. Conservative Aspects of Carter Appointee Voting**

For evidentiary support, the conservative court-packing hypothesis rests chiefly on the voting behavior of a small number of Reagan appointees to the courts of appeals. The non-immunity data assembled for this survey show that several prominent Reagan appointees with law and economics backgrounds have accumulated highly conservative voting records. Reagan appointees whose votes in non-immunity cases adhered closely to a conservative agenda during the survey period include Pasco Bowman of the Eighth Circuit (two liberal votes in thirteen cases), Frank Easterbrook of the Seventh Circuit (no liberal votes in twelve cases), Ernest Higginbotham of the Fifth Circuit (no liberal votes in eight cases), and Ralph Winter of the Second Circuit (no liberal votes

146. See supra note 27 and accompanying text.


148. Judge Easterbrook cast conservative votes in Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989), cert. denied, 110 S. Ct. 1948 (1990); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989), cert. denied, 110 S. Ct. 1326 (1990); Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989); Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir.), cert. denied, 488 U.S. 852 (1988); Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024 (7th Cir.), cert. denied, 488 U.S. 909 (1988); Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n, 830 F.2d 1374 (7th Cir. 1987); Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) (dissent); Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722 (7th Cir. 1986); Local Beauty Supply, Inc. v. Laman, Inc., 787 F.2d 1197 (7th Cir. 1986); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986); Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986); Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985).

149. Judge Higginbotham cast conservative votes in United States v. MMR Corp., 907 F.2d 489 (5th Cir. 1990), cert. denied, 111 S. Ct. 1388 (1991); Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253 (5th Cir.), cert. denied, 488 U.S. 890 (1988);
Although their voting records attract less attention in discussions concerning Reagan judicial appointments, one could add other Reagan appointees with decidedly conservative voting tendencies, such as Robert Beezer of the Ninth Circuit (two liberal votes in thirteen cases), Edward Davis of the Fifth Circuit (no liberal votes in twelve cases), George Fagg of the Eighth Circuit (one liberal vote in thirteen cases).
cases), 153 Joel Flaum of the Seventh Circuit (four liberal votes in 22 cases), 154 William Garwood of the Fifth Circuit (no liberal votes in eleven cases), 155 Cynthia Hall of the Ninth Circuit (one liberal vote in


eleven cases), and Robert Krupansky of the Sixth Circuit (no liberal votes in thirteen cases).

Of all Reagan appointees, the judge whose voting most often is said to epitomize the effect of conservative court packing in antitrust is Richard Posner. Critics of Judge Posner's antitrust jurisprudence present two lines of evidence to support their view that he is spearheading a conservative redirection of judicial decisionmaking in antitrust matters. The first is to cite statistical data on Judge Posner's voting record as proof of his commitment to impose what Professor Ian Shapiro calls "a minimalist view of antitrust law." Thus, Professor Bernard Schwartz emphasizes that "in the seventeen antitrust cases in which [Posner] wrote opinions on the merits, only one was decided in favor of the antitrust plaintiff."

The second is to parse Judge Posner's opinions to identify efforts to place unwarranted doctrinal obstacles in the path of plaintiffs seeking to invoke the antitrust statutes.

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156. Judge Hall cast a liberal vote in Dolphin Tours, Inc. v. Pacifiico Creative Serv., Inc., 773 F.2d 1506 (9th Cir. 1985). She cast conservative votes in Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256 (9th Cir. 1990); Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 892 F.2d 62 (9th Cir. 1989); Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504 (9th Cir. 1989); Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168 (9th Cir. 1988); Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976 (9th Cir. 1988); Orion Pictures Distrib. Corp. v. Syufy Enters., 829 F.2d 946 (9th Cir. 1987); Souza v. Estate of Bishop, 821 F.2d 1332 (9th Cir. 1987); Three Movies of Tarzana v. Pacific Theatres, Inc., 828 F.2d 1395 (9th Cir. 1987), cert. denied, 484 U.S. 1066 (1988); Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869 (9th Cir. 1987); Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986).


158. See B. Schwartz, supra note 20, at 238, 340; H. Schwartz, supra note 17, at 156-57; Shapiro, supra note 31, at 1036-45.

159. Shapiro, supra note 31, at 1040.


161. See, e.g., B. Schwartz, supra note 20, at 236 ("Posner's negative attitude toward the antitrust laws has led him to interpret them restrictively, so as to place heavy burdens on plaintiffs who rely on statutes that interfere so directly with the efficiency produced by..."

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The cases surveyed in this Article provide grounds for evaluating both criticisms. The first is to compare Judge Posner's aggregate voting record with the records of other judges who participated in antitrust matters during the survey period. Such comparisons can be misleading, as no court of appeals judge encounters a menu of antitrust cases that exactly replicates the number and type of cases faced by a colleague on the same circuit or on a different circuit. Notwithstanding this limitation, the logic of examining a judge's aggregate voting record is that such data is at least a rough measure of the judge's antitrust preferences. In effect, commentators who have criticized Judge Posner's voting behavior in antitrust cases have used votes for plaintiffs' victories as an index of liberalism. During the survey period for this Article, Judge Posner cast 25 votes in non-immunity antitrust cases. Five votes (20 percent) endorsed positions consistent with the criteria for liberalism employed in this Article, and 20 votes (80 percent) favored conservative results. Thus, free operation of the market.

162. See FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989); Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co., 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 488 U.S. 986 (1988); Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co., 839 F.2d 1206 (dissent by Judge Posner), aff'd in part, rev'd in part, 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 488 U.S. 986 (1988); Isaksen v. Vermont Casting, Inc., 825 F.2d 1158 (7th Cir. 1987), cert. denied, 486 U.S. 1005 (1988); Hospital Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987). To assemble a complete list of non-immunity cases in which Judge Posner has endorsed outcomes that favor plaintiffs, one would add two other cases in which Judge Posner's vote is classified in this survey as conservative. See United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984).

163. See United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir.), 111 S. Ct. 295 (1990); Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228 (7th Cir. 1988) (dissent); Kowalski v. Chicago Tribune Co., 854 F.2d 168 (7th Cir. 1988); Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986); Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987); Dynamics Corp. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987); Seglin v. Esau, 769 F.2d 1274 (7th Cir. 1985); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648 (7th Cir. 1984); Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261 (7th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir.), cert. denied, 469 U.S. 1018 (1984); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984); Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984) (en banc), rev'd, 470 U.S. 373 (1985); Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488 (replacing opinion published at 692 F.2d 1083), vacated, 726 F.2d 1150 (7th Cir. 1984), rev'd, 470 U.S. 373 (1985); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982); Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660 (7th Cir. 1982); In re Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982), cert. denied, 460 U.S. 1016 (1983); USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982), cert. denied, 462 U.S. 1107 (1983); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982).
Judge Posner cast conservative votes slightly less often than Reagan appointees as a whole (20 percent versus 17.7 percent).

Let us assume that Posnerian voting behavior is a meaningful benchmark of antitrust conservatism. To determine whether Judge Posner’s voting record is as aberrant as some commentators suggest, this survey has identified all Carter and Reagan appointees who voted in at least ten non-immunity cases. The ten decisions minimum serves to identify judges who have addressed antitrust issues somewhat regularly. Eight Carter appointees participated in at least ten non-immunity antitrust cases during the survey period and voted conservatively more often than Judge Posner. Carter judges with more conservative voting records in non-immunity matters are Stephen Breyer of the First Circuit (no liberal votes in sixteen cases), Amalya Kearse of the Second Circuit (two liberal votes in twelve cases), Dickson Phillips of the Fourth Circuit (three liberal votes in twenty cases), and Sam Johnson of the Fifth Circuit (two liberal votes in nine cases).


165. Judge Kearse cast liberal votes in Gonzalez v. Saint Margaret’s House Hous. Dev.

liberal votes in thirteen cases),\textsuperscript{167} Henry Politz of the Fifth Circuit (three liberal votes in seventeen cases),\textsuperscript{168} Thomas Reavley of the Fifth Circuit

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(two liberal votes in fourteen cases),\(^{169}\) Carolyn Randall King of the Fifth Circuit (two liberal votes in thirteen cases),\(^{170}\) and Cornelia Kennedy of the Sixth Circuit (one liberal vote in fourteen cases).\(^{171}\)

In addition, a number of Carter judges participated in ten or more non-immunity cases and voted conservatively as often or only slightly less often than Judge Posner. These are Jon Newman of the Second Circuit (three liberal votes in fourteen cases),\(^{170}\) Arthur Alarcon of the


Ninth Circuit (three liberal votes in fifteen cases),173 Betty Fletcher of the Ninth Circuit (three liberal votes in thirteen cases),174 William Norris of the Ninth Circuit (three liberal votes in thirteen cases),175 Mary Schroe-
der of the Ninth Circuit (two liberal votes in ten cases), 176 Thomas Tang of the Ninth Circuit (two liberal votes in ten cases), 177 Lanier Anderson of the Eleventh Circuit (three liberal votes in thirteen cases), 178 Frank Johnson of the Eleventh Circuit (three liberal votes in fourteen cases). 179


176. Judge Schroeder cast liberal votes in City of Long Beach v. Standard Oil Co., 872 F.2d 1401, amended, 886 F.2d 246 (9th Cir. 1989), cert. denied, 110 S. Ct. 1126 (1990); D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245 (9th Cir. 1982). Judge Schroeder cast conservative votes in Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256 (9th Cir. 1990) (per curiam); Newman v. Universal Pictures, 813 F.2d 1519 (9th Cir. 1987); Ralph C. Wilson Indus., Inc. v. Chronicle Broadcasting Co., 794 F.2d 1359 (9th Cir. 1986); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400 (9th Cir. 1986); Robert’s Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc., 732 F.2d 1403 (9th Cir. 1984); Feinstein v. Netleship Co., 714 F.2d 928 (9th Cir. 1983), cert. denied, 466 U.S. 972 (1984); Cascade Cabinet Co. v. Western Cabinet & Millwork Inc., 710 F.2d 1366 (9th Cir. 1983); Sausalito Pharmacy, Inc. v. Blue Shield, 677 F.2d 47 (9th Cir.), cert. denied, 459 U.S. 1016 (1986).

177. Judge Tang cast liberal votes in E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1392 (9th Cir. 1989); D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245 (9th Cir. 1982). Judge Tang cast conservative votes in West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (9th Cir. 1990); Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168 (9th Cir. 1988); Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234 (9th Cir. 1987); 49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463 (9th Cir. 1986), cert. denied, 480 U.S. 947 (1987); Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986); Carpet Seaming Tape Licensing Corp. v. Best Seam Inc., 694 F.2d 570 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983); David Orgell, Inc. v. Geary's Stores, Inc., 640 F.2d 936 (9th Cir.), cert. denied, 454 U.S. 816 (1981); First Beverages, Inc. v. Royal Crown Cola Co., 612 F.2d 1164 (9th Cir.), cert. denied, 447 U.S. 924 (1980).


and Phyllis Kravitch of the Eleventh Circuit (two liberal votes in ten cases). In sum, twelve Carter appointees (Breyer, Kearse, Phillips, Sam Johnson, Politz, Reavley, King, Alarcon, Schroeder, Tang, Kravitch, and Kennedy) and eleven Reagan appointees (Joseph Altimari of the Second Circuit, Beezer, Bowman, Davis, Easterbrook, Fagg, Flaum, Hall, Garwood, Krupansky, and Winter) cast at least ten votes in non-immunity cases and voted conservatively as often or more often than Judge Posner.

One qualification to keep in mind in considering these data is that 47 Carter appointees voted in ten or more non-immunity cases during the survey period, whereas only 18 Reagan appointees met or exceeded the ten decisions minimum. The pool of Reagan judges who could satisfy the ten decisions minimum is necessarily smaller because fewer Reagan appointees have served long enough to participate in a significant number of non-immunity antitrust matters. Roughly 61 percent of the Reagan judges (11 of 18) who participated in ten matters voted as conservatively or more conservatively than Judge Posner, compared to roughly 25 percent of Carter judges (12 of 47) who voted in ten cases. Nonetheless, if


Judge Posner’s voting record were decidedly extreme in its tendency to restrict the application of the antitrust laws, one would not expect him to be accompanied or surpassed by so many Carter appointees.

The second critique of Judge Posner is that his opinions embrace unduly permissive analytical approaches. The cases examined in this Article dictate caution in assuming that Judge Posner’s views are invariably extreme or, at a minimum, unique to Reagan appointees. A useful point of comparison is the opinion-writing of Carter appointee Stephen Breyer, who joined the First Circuit in 1980. During the survey period, Judge Breyer cast 17 votes in antitrust matters. Each vote supported the defendant’s position, and only one vote (involving a state action immunity issue) contradicted this survey’s conservative criteria. In non-immunity cases, Judge Breyer participated in more decisions than any other Carter or Reagan appointee during the survey period without casting a liberal vote.

Judge Breyer’s opinions are distinctive for their scholarly, careful approach. Indeed, no federal judge writes more thoughtfully and elegantly about antitrust issues than Judge Breyer. In a number of instances, Judge Breyer’s antitrust opinions have adopted conservative perspectives in evaluating the legality of challenged distribution practices and single-firm pricing conduct. In addressing these and other antitrust issues, the Breyer opinions have expressed recurring concern about adopting conduct rules that would diminish incentives to compete and

182. For a discussion of Judge Breyer’s jurisprudence, see Latin, Legal and Economic Considerations in the Decisions of Judge Breyer, 50 L. & Contemp. Probs., No. 4, at 57 (Autumn 1987).

183. The non-immunity cases in which Judge Breyer has participated are listed supra in note 164.

184. Massachusetts Furniture & Piano Movers Ass’n v. FTC, 773 F.2d 391 (1st Cir. 1985).


187. In Barry Wright, Judge Breyer observed that “a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning competitive markets.” Barry Wright, 724 F.2d at 231 (citations omitted). In Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court echoed Judge Breyer’s concern about incentive effects. The Court quoted Barry Wright approvingly for the view that “mistaken inferences” in exclusionary pricing disputes “are especially costly, because they chill the very conduct the antitrust laws are designed to protect . . . .” [W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging
about the administrability of suggested liability standards. In particular, Judge Breyer has played an influential role in discouraging consideration of the defendant's subjective expressions of intent in evaluating claims of unlawful exclusion.

The data on voting and opinion-writing by individual judges show that conservative antitrust perspectives are not alien to Carter appellate judges. The importance of conservative perspectives to Carter appointee decisionmaking is also evident from significant instances in which Carter judges have disagreed with each other in non-immunity matters. Nine cases have featured disagreement between Carter judges on panels that included no Reagan appointees. In two of these cases, policy perspectives embodied in a conservative dissent by a Carter judge were subsequently embraced in a Supreme Court reversal of the court of appeals majority. In still other instances, Carter appointees have allied themselves with Reagan judges who authored opinions that some commentators have criticized as excessively permissive.

188. Administrability concerns figured prominently in Judge Breyer's opinion in Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985). Judge Breyer emphasized "a judicial recognition of the practical difficulties of determining what is a 'reasonable' or 'competitive' price." Kartell, 749 F.2d at 927. In Barry Wright, Judge Breyer observed that "rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." Barry Wright, 724 F.2d at 234.

189. "'Intent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses." See Barry Wright, 724 F.2d at 232 (citation omitted). In a recent Robinson-Patman Act opinion rejecting a predatory pricing claim, Judge Easterbrook quoted from Judge Breyer's Barry Wright opinion in concluding that courts should ignore subjective expressions of the defendant's intent in evaluating exclusionary conduct allegations. See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400-02 (7th Cir. 1989), cert. denied, 110 S. Ct. 1326 (1990).

190. One study of 142 antitrust decisions issued by the courts of appeals in 1987 found a strong tendency by Democratic and Republican appointees alike to embrace what the study's authors regarded as excessively conservative analytical techniques. A summary of the study's results observes that "given the number of 'liberal' judges who've either authored or gone along with these economically-unsound antitrust opinions . . . more than ideology is clearly at work here on the federal bench." Judges Versus Juries, supra note 32, at 10.

191. See supra notes 118-19 and accompanying text.


A review of modern developments in Supreme Court antitrust jurisprudence, in academic analysis, and in the country's economic and political environment suggests why it is unsurprising that conservative antitrust perspectives would exert an important influence upon Carter judicial appointees. The past twenty years have featured a significant reorientation of Supreme Court antitrust thinking. The changes since 1974 stand out in sharper relief when set against the backdrop of prevailing Supreme Court views of the 1960s and early 1970s, a period of expansive applications of antitrust doctrine. Court decisions of the earlier period treated vertical contractual restraints with the utmost suspicion and forbade horizontal mergers involving more than relatively trivial market shares. The Court also adhered to a comparatively rigid dichotomy between per se offenses and rule of reason analysis and tended to use per se prohibitions extensively in framing antitrust rules. Chicago School economic analysis played virtually no role in guiding the Court's choice of conduct standards.

Compared to the analytical models established from Brown Shoe in 1962 through Topco in 1972, the Court's decisions since 1974 generally have turned toward the right. The United States v. General Dynamics reinforced Earth Co., 786 F.2d 424 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986). In 1987, opponents of Judge Bork's nomination to the Supreme Court repeatedly cited Rothery and Neumann as examples of dangerous judicial activism and criticized these decisions for espousing excessively permissive analytical approaches. See, e.g., Testimony of Robert Pitofsky, in Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Comm. on the Judiciary, U.S. Senate, Pt. 3, at 3443, 3453-55 (1987) (criticizing Rothery); Statement of Robert Abrams, in id. at 3417, 3426-27 (criticizing Neumann and Rothery). More recently, Judge Ginsburg joined Judge Clarence Thomas (a Bush appointee) and Judge David Sentelle (a Reagan appointee) in rejecting a Department of Justice challenge to a merger of two manufacturers of underground drilling equipment. See United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990). The Baker Hughes treatment of ease of entry as a merger analysis criterion has impeded Justice Department efforts to pursue a more stringent antimerger policy. See Austin, The DOJ's New Entry Analysis and the Courts: Does Ease of Entry Still Trump Market Concentration?, 5 Antitrust 34 (Fall/Winter 1990).


198. See Calvani & Sibarium, supra note 4, at 126-74; see also Baker, supra note 127, at
Corp. merger decision in 1974 opened the door to the use of sophisticated economic arguments to rebut presumptions based upon market share thresholds. The Court's 1977-1978 term accelerated the redirection that General Dynamics tentatively had foreshadowed with its decisions in Continental T.V., Inc. v. GTE Sylvania Inc., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., and Illinois Brick Co. v. Illinois. In the past decade, the Court has adopted more permissive liability standards for tying arrangements and certain group boycotts, applied reasonableness standards to a broader collection of horizontal restraints indicated acute skepticism toward price-based theories of exclusionary conduct, increased the evidentiary burden plaintiffs must satisfy to establish the existence of an illegal agreement in conspiracy cases, and tightened standing and antitrust injury requirements for private plaintiffs. Moreover, the Court's more liberal members have endorsed many of these developments.

This is not to say that Supreme Court antitrust decisions of the past fifteen years have pointed uniformly in the direction of more permissive liability standards. The Court's apparent embrace in Aspen Skiing Co. v. Aspen Highlands Skiing Co. of a broad notion of a monopolist's duty to deal with rivals has breathed new life into plaintiffs' efforts to use essential facility arguments and related theories to pursue attempted monopolization and monopolization challenges to single-firm conduct—a

655 ("Over the past fifteen years, the courts and enforcement agencies have created Robert Bork's Antitrust Paradise. Antitrust has adopted the Chicago School's efficiency analysis and the Chicago School's conclusions about the effects of business practices.").

200. See id. at 498-504.
210. See e.g., Atlantic Richfield, 110 S. Ct. at 1887 (majority opinion by Justice Brennan); Court majority including Justices Blackmun and Marshall; Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 719 (1988) (Justices Blackmun, Brennan, and Marshall voting with Court majority); Cargill, 479 U.S. at 105 (majority opinion by Justice Brennan); see also Calkins, supra note 75, at 376-77 (discussing Justice Brennan's role in shaping modern Supreme Court antitrust jurisprudence).
212. See id. at 601-05, 608-11.
development that many commentators across the conservative-liberal spectrum have viewed with unease.\footnote{213. See e.g., P. Areeda & H. Hovenkamp, Antitrust Law 36.1a, at 741 (Supp. 1990) ("'[T]he 'essential facility' is just an epithet describing the monopolist's situation: he possesses something the plaintiff wants. It is not an independent tool of analysis but only a label—a label that beguiles some commentators and courts into pronouncing a duty to deal . . . ."); Panel Discussion, Exclusionary Conduct, 57 Antitrust L.J. 723, 742 (1989) (remarks of William Baxter) ("Someone invested in that essential facility. Someone got out in front when it wasn't at all clear that the facility was going to work, and now someone else wants to come along and help themselves. The doctrine is a very dangerous one.").} In Federal Trade Commission v. Superior Court Trial Lawyers Association,\footnote{214. 110 S. Ct. 768 (1990).} the Court strongly reaffirmed the utility of per se rules\footnote{215. See id. at 780; see also Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982) (approving per se condemnation for horizontal agreements to fix maximum prices).} and indirectly questioned the usefulness of market power screens to evaluate certain antitrust claims.\footnote{216. See Trial Lawyers, 110 S. Ct. at 781 & n.18.} More often than not, however, the Court since 1972 has moved the focus of antitrust analysis in directions that conservatives have approved.

The Supreme Court's antitrust decisions reflect a second basic force that has brought a more conservative perspective to appellate decision-making. The Court has moved rightward partly in response to a new consensus among academics that favors a more limited role for antitrust intervention. Many Chicago School preferences of Robert Bork and Richard Posner that were regarded as extremist in the 1970s have become mainstream elements of academic discourse in the 1980s.\footnote{217. Numerous scholars have questioned the proper weight to be given to allocative efficiency in antitrust analysis,\footnote{218. For recent efforts to collect these authorities and summarize their views, see Flynn, The Reagan Administration's Antitrust Policy, 'Original Intent' and the Legislative History of the Sherman Act, 33 Antitrust Bull. 259, 265-68, 290-300 (1988); Lande, The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust, 33 Antitrust Bull. 429, 447-57 (1988); May, The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History, 59 Antitrust L.J. 93, 94-95 (1990).} Nonetheless, few question the centrality of economic analysis as a tool in modern antitrust reasoning. Indeed, most academic critics of Reagan Administration enforcement policies disavow any interest in returning to doctrinal approaches that characterized many Warren Court decisions of the 1960s.\footnote{219. See infra notes 318-21 and accompanying text.} The segment of the academy dedicated to studying antitrust and industrial organization is more
Because the Supreme Court and academics have adopted a more conservative outlook, it is not surprising that conservative perspectives would influence court of appeals judges in the routine process of deciding antitrust matters. For example, well before Ronald Reagan gained the presidency, the courts of appeals had begun to transform conduct standards governing single-firm behavior. Taking a cue from influential commentaries such as Philip Areeda's and Donald Turner's 1975 article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* appellate judges in the mid to late 1970s started to give dominant firms greater leeway in choosing pricing, product development, and promotion strategies. Not only did appellate judges learn of the emerging, conservative-oriented literature from citations in defendants' briefs, but programs such as Henry Manne's economics institutes for federal judges ensured that a large number of judges would be exposed directly to the "new learning" in antitrust.

The rightward shift in Supreme Court antitrust jurisprudence and academic scholarship since the early 1960s has occurred in the context of a major adjustment in the relative position of the United States in the world economy. The ascent of Western Europe and Japan in the
1970s as potent economic rivals to the United States created strong political pressure to reevaluate domestic regulatory policies, including antitrust, that affect the competitive capability of American firms. Among other effects, such pressure moved Congress in 1984 to loosen antitrust restrictions on certain forms of horizontal collaboration. By the late 1970s, doubts about the vitality of domestic firms contributed to a widespread judicial unwillingness to sustain plaintiffs' antitrust challenges to dominant firm product development activities. Efficiency concerns necessarily assumed greater significance in the resolution of antitrust disputes.

Even if President Carter had won a second term in 1980, appellate decisionmaking in antitrust matters probably would have continued to generate a significant number of conservative outcomes. As a group, the Reagan appointees appear to hold narrower antitrust preferences than their Carter counterparts, and the data above suggest that they vote conservatively more often in antitrust disputes than do Carter appointees. Nonetheless, this difference would be substantially greater if conservative rulings of the Supreme Court, conservative academic commentary, and changes in the country's economic and political environment had not deeply influenced the antitrust thinking of many Carter appellate judges. If conservative antitrust perspectives did not exert a substantial pull across the appellate judiciary, it would be difficult to explain recent decisions such as *United States v. Baker Hughes, Inc*, in which a Bush appointee (Clarence Thomas), a Carter appointee (Ruth Ginsburg), and a Reagan appointee (David Sentelle) unanimously adopted strongly pro-defendant analytical techniques for reviewing mergers.

**B. Interventionist Tendencies Among Reagan Appointees**

A corollary to the view that antitrust permissiveness is a distinctive trait of Reagan appointees is that judges favoring aggressive antitrust intervention reside almost exclusively within the ranks of Carter appointees. The data in this survey indicate that judges with decidedly liberal voting records usually are Carter appointees. The survey also reveals, however, a noteworthy number of instances in which Reagan judges endorse relatively liberal outcomes. Among other traits, the "conserva-

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228. In the National Cooperative Research and Development Act of 1984, 15 U.S.C. §§ 4302-03 (1988), Congress provided that certain research and development joint ventures are to be evaluated under the rule of reason and that participants in such ventures may be held liable for actual damages, rather than treble damages, for antitrust violations arising from the ventures' operations. For a discussion of the statute's background and requirements, see Wright, *The National Cooperative Research Act of 1984: A New Antitrust Regime for Joint Research and Development Ventures*, 1 High Tech. L.J. 133 (1986).


231. See id. at 982-83.
tism" attributed to Reagan appointees also sometimes takes the form of resistance to invitations to qualify or overturn precedent on the basis of new economic learning.

The survey indicates that, among Carter and Reagan appointees, the judges with the strongest liberal preferences, measured by the frequency of liberal voting in non-immunity cases, are Carter appointees. Six Carter judges participating in ten or more non-immunity decisions endorsed liberal outcomes at least half the time: Leon Higginbotham of the Third Circuit (six liberal votes in eleven cases), Nathaniel Jones of the Sixth Circuit (seven liberal votes in thirteen cases), Warren Boochever of the Ninth Circuit (nine liberal votes in eighteen cases),

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234. Judge Boochever cast liberal votes in United States v. BNS, Inc., 858 F.2d 456 (9th Cir. 1988); Harkins Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988), cert. denied, 488 U.S. 1019 (1989); Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984), cert. denied, 469 U.S. 1197 (1985); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (per curiam); Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc., 715 F.2d 1393 (9th Cir. 1983), rev'd, 472 U.S. 284 (1985); Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983); Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476 (9th Cir. 1983); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir.), cert. denied, 464 U.S. 849 (1983); Chippano v. Champion Int'l Corp., 702 F.2d 827 (9th Cir. 1983). Judge Boochever cast conservative votes in Wilcox v. First Interstate Bank of Or., N.A., 815 F.2d 522 (9th Cir. 1987); Barry v. Blue Cross, 805 F.2d 866 (9th Cir. 1986); Lucas v. Bechtel Corp., 800 F.2d 839 (9th Cir. 1986); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400 (9th Cir. 1986); Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374 (9th Cir. 1985); Fine v. Barry & Enright Prods., 731 F.2d 1394 (9th Cir.), cert. denied, 469 U.S. 881 (1984); Derish v. San Mateo-Burlingame Bd. of Realtors, 724 F.2d 1347
Reinhardt of the Ninth Circuit (ten liberal votes in eighteen cases),\textsuperscript{235} Stephanie Seymour of the Tenth Circuit (ten liberal votes in eighteen cases),\textsuperscript{236} and Thomas Clark of the Eleventh Circuit (five liberal votes in ten cases).\textsuperscript{237} Five Carter appointees participating in at least ten non-


immunity cases favored liberal outcomes in 40 to 49 percent of their votes—Sam Ervin of the Fourth Circuit (four liberal votes in ten cases), 238 Reynaldo Garza of the Fifth Circuit (seven liberal votes in sixteen cases), 239 Gilbert Merritt of the Sixth Circuit (eight liberal votes in nineteen cases), 240 Theodore McMillian of the Eighth Circuit (twelve lib-


eral votes in 27 cases), Welford and Warren Ferguson of the Ninth Circuit (four liberal votes in ten cases). A single Reagan judge, Harry Wellford of the Sixth Circuit (four liberal votes in ten cases), voted in

ten or more non-immunity cases and endorsed liberal outcomes at least 40 percent of the time.

Although a substantial number of Carter appointees have accumulated decidedly conservative voting records, relatively few Reagan appointees have displayed demonstrably liberal voting tendencies. This suggests a basic difference between the Carter and Reagan judicial selection processes. The Carter selection process generated a significant number of appointees who proved to be antitrust conservatives, but Reagan judicial screening techniques seem to have largely succeeded in eliminating candidates with strong preferences for expansive antitrust intervention. Eleven of the 47 Carter judges (23.4 percent) who voted in ten or more non-immunity cases cast liberal votes at least 40 percent of the time, compared to one of 18 Reagan judges (5.5 percent) who met the ten decisions minimum. Its judicial selection process may have endorsed some nominees who were only moderately skeptical of antitrust and other forms of economic regulation, but the Reagan Administration seems more systematically to have excluded candidates who were likely to be decidedly sympathetic toward economic regulation, including antitrust intervention.244

That Reagan Administration judicial screening did not invariably yield antitrust and regulation skeptics is evident in the voting records of Judge Wellford and a handful of Reagan judges who have participated in a smaller number of non-immunity cases. Three Reagan appointees who voted in more than five but fewer than ten non-immunity decisions favored liberal outcomes at least 40 percent of the time: Lawrence Pierce of the Second Circuit (three liberal votes in seven cases),245 Edward

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244. Professor William Page discusses judicial decisionmaking in antitrust in terms of the degree to which a judge accepts a "constrained vision [that] sees human beings as limited in their capabilities, and gives great weight to the accumulated decisions of many individuals as reflected in 'spontaneous' institutions like the market." Page, supra note 4, at 1300. He observes that "the Chicago approach reflects the influence of the constrained vision, particularly in the presumption of self-interested, maximizing behavior, and the idea that wealth maximization is the unintended but predictable outcome of open markets." Id. The absence of substantial numbers of Reagan appointees with strong preferences for antitrust intervention is consistent with Professor Page's conclusion that "[b]oth the appointments process and the greater popular acceptance of the judgments of the markets have made the judiciary more reflective of the constrained vision." Id.

Becker of the Third Circuit (five liberal votes in eight cases),246 and Robert Chapman of the Fourth Circuit (three liberal votes in six cases).247 As they vote in more antitrust cases over time, these and other Reagan appointees may emerge as a non-trivial subset of Reagan judges with comparatively moderate or liberal antitrust preferences.248

The data on individual Reagan appointee voting reveal that, while few Reagan appointees are antitrust liberals, it would be hazardous for litigants to assume automatically that all Reagan judges singlemindedly favor conservative outcomes in deciding antitrust cases. This caveat is reinforced by examining specific cases decided by panels that included Reagan judges. The cases in this survey provide several grounds for caution in accepting hypotheses that attribute to Reagan appointees a monolithic, laissez faire conservatism that favors adoption of permissive antitrust standards.

One basis for caution is that Reagan judges sometimes acquiesce in opinions that openly repudiate Chicago School views. A useful illustration is Mcgahee v. Northern Propane Gas Co.249 In Mcgahee, a unanimous Eleventh Circuit panel reversed the trial court's grant of summary judgment for the defendant on predatory pricing claims brought under the Sherman Act and the Robinson-Patman Act.250 The Eleventh Circuit panel consisted of Seybourn Lynne, a Truman appointee and district judge by designation; Joseph Hatchett, a Carter appointee; and J.L. Edmondson, a Reagan appointee. Judge Lynne's majority opinion


250. See id. at 1491.
made several observations that, by the logic of the conservative court-packing hypothesis, one would expect Reagan appointees to dispute strongly. Judge Lynne downplayed the role of economics as a basis for framing liability rules;\footnote{251} emphasized the need to give effect to the Congress's "political . . . purpose of curbing the power some individuals and corporations had over the economy";\footnote{252} and endorsed reliance upon subjective expressions of predatory intent in assessing the validity of the defendant's pricing conduct.\footnote{253} These remarks drew no rebuttal from Judge Edmondson—a silence bespeaking acceptance or tolerance of demonstrably liberal antitrust views.

Opinions authored by Reagan appointees offer more direct indications that Reagan judges differ among themselves in antitrust preferences and analytical perspectives. Some Reagan judges have declined to rely upon current economic learning to qualify or ignore heavily criticized, but not overruled, Supreme Court decisions from the 1960s. In United States v. American Cyanamid Co.,\footnote{254} a unanimous Second Circuit panel including two Reagan appointees (Richard Cardamone and Lawrence Pierce) reviewed a district court decision to terminate a consent decree that compelled American Cyanamid to buy part of its manufacturing inputs from other chemical producers. With the approval of the Reagan Administration's Department of Justice, American Cyanamid had asked the district court to vacate the decree, which sought, among other ends, to correct perceived foreclosure problems arising from a vertical merger.\footnote{255} In granting the termination, the district court observed that the anti-foreclosure safeguards were no longer necessary because "[c]ontemporary economic theory recognizes that vertical integration may foster corporate efficiency and enhance competition in the market place."\footnote{256}

The Second Circuit reversed the termination of the consent decree, ruling that the district court had failed to evaluate the termination in light of Brown Shoe Co. v. United States\footnote{257} and other cases establishing criteria for determining the antitrust legality of vertical mergers.\footnote{258} Judge Pierce's opinion for the court acknowledged that "Brown Shoe and its progeny have been the subject of considerable criticism by academicians who believe these cases apply overly harsh standards in assessing

\footnotesize{251. Judge Lynne stated that "[a]s a social science built on assumptions and statistics, economics is subject to the disparagement attributed by Mark Twain in his Autobiography to B. Disraeli: 'There are three kinds of lies: lies, damned lies, and statistics.'" Id. at 1496 n.19.}
\footnotesize{252. Id. at 1497-98.}
\footnotesize{253. See id. at 1496, 1500, 1504-05.}
\footnotesize{254. 719 F.2d 558 (2d Cir. 1983).}
\footnotesize{255. See id. at 559.}
\footnotesize{257. 370 U.S. 294 (1962).}
\footnotesize{258. American Cyanamid, 719 F.2d at 566-67.}
the legality of vertical mergers.”259 The court added that “these cases nonetheless continue to constitute the current state of the law as prescribed by the Supreme Court, which circuit and district courts are bound to follow.”260 Judge Pierce concluded that “it was error to apply ‘contemporary economic theory’ to the extent it may be distinct from precedent, and fail to apply the standard framework of analysis.”261

A similar, more recent example of this phenomenon is *Alan’s of Atlanta, Inc. v. Minolta Corp.*262 In *Alan’s*, a unanimous Eleventh Circuit panel including two Reagan appointees (Emmett Cox and Jesse Eschbach, sitting by designation from the Seventh Circuit) reversed a grant of summary judgment for the defendant on a variety of Robinson-Patman Act price discrimination claims.263 Judge Eschbach’s opinion reviewed academic and judicial debate over the proper interpretation of the competitive injury requirement of Section 2(a) of the anti-price discrimination statute.264 Among other sources, he quoted Robert Bork’s observation in the *Antitrust Paradox* that competitive injury for antitrust purposes occurs only when the conduct in question has the effect of restricting output and raising prices.265 Judge Eschbach then stated that “[j]udicial precedent . . . suggests that in the [Robinson-Patman Act] the meaning of competition is not so narrow, nor the gap between an injury to competition and an injury to competitors so wide.”266 He concluded this discussion by observing that “[W]hen confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel, unlike those of a more activist bent, see, e.g., R. Bork, [*The Antitrust Paradox*] 36, that economic argument is not ultimately controlling; judicial precedent is.”267

*American Cyanamid* and *Alan’s* indicate that one type of Reagan appointee conservatism entails a commitment to decide cases on the basis of precedent, however discredited such precedent might be in the eyes of economically-oriented commentators.268 This form of conservatism is significant, given the substantial number of Supreme Court decisions

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259. *Id.* at 567 n.9 (citing IV P. Areeda & D. Turner, Antitrust Law 00-19 (1980); R. Bork, *supra* note 61, at 225-45 (1978); Y. Brozen, Concentration, Mergers, and Public Policy 402-04 (1982)).
260. *Id.* at 567.
261. *Id.* The Second Circuit then instructed the district court “to apply the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe*” and other vertical merger decisions. *Id.*
262. 903 F.2d 1414 (11th Cir. 1990).
263. *See id.* at 1416.
264. *See id.* at 1417.
265. *See id.* at 1418 n.6 (citing R. Bork, *The Antitrust Paradox* 122 (1978)).
266. *Id.*
267. *Id.*
268. *Cf.* Panel Discussion, *Judicial Precedent and the New Economics*, in Antitrust Policy in Transition: The Convergence of Law and Economics 5, 15 (E. Fox & J. Halverson eds. 1984) (Judge Robert Bork: “If the economic analysis of the Supreme Court was part of its rationale in deciding the case, then I think the lower court must adopt the same rationale, although it is free to be critical of it in the process.”).
from the 1960s and early 1970s that adopted expansive liability standards and have not been overruled. Beyond a sense of duty to apply precedent, fidelity to established legal doctrine also may stem from discomfort in relying on theoretical economic propositions to dispose of cases posing factually complex and difficult issues of industry analysis. Such hesitation on the part of some Reagan judges is evident when the court of appeals reviews a district court’s grant of summary judgment for the defendant on the basis of an austere factual record. Thus, the conservatism of some Reagan appointees may manifest itself in adherence to precedent of questionable economic wisdom, suspicion of abstract economic theory as a decisionmaking tool, and distaste for resolving difficult issues on a spare factual foundation.

Variations in the conservatism attributed to prominent Reagan appointees also has emerged in decisions involving federal government challenges to mergers. For merger cases contained in this survey, no judges treated the federal enforcement agencies more favorably than Richard Posner and Robert Bork. Judge Posner was the author of three opinions sustaining Justice Department and FTC challenges to acquisitions.

In *Hospital Corp. of America v. Federal Trade Commission*, A divided Ninth Circuit panel reversed the district court’s ruling. The majority opinion by Judge Charles Wiggins, a Reagan appointee, said the court could not uphold the summary judgment on the “theoretical basis” of Kodak’s interbrand competition argument. *Id.* at 617. Judge Wiggins noted that the court of appeals “lack[ed] the benefit of the district court’s consideration of the market power issue” and was “presented with a record that was not fully developed through discovery on this issue.” *Id.* (footnote omitted). Judge Wiggins then described the court’s reluctance to give full effect to Kodak’s “theoretical” argument without a fuller factual framework:

> [M]arket imperfections can keep economic theories about how consumers will act from mirroring reality. . . . While appellants have not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality.

*Id.* (citation omitted). Later in the opinion, Judge Wiggins commented that “there is logical appeal in Kodak’s theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand markets. But in light of appellants’ evidence we cannot say that this theory mirrors reality.” *Id.* at 621. Judge Richard Chambers, an Eisenhower appointee, joined the Wiggins opinion, and Judge Clifford Wallace, a Nixon appointee, dissented.

See United States v. Rockford Memorial Corp., 898 F.2d 1278, 1280 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990); FTC v. Elders Grain, Inc., 868 F.2d 901, 902 (7th Cir.)
Judge Posner's majority opinion sustained an FTC administrative decision that compelled dissolution of a hospital merger. As an academic, Judge Posner had attacked the FTC's performance as an antitrust enforcement agency; in Hospital Corp. he emphasized the deferential nature of the court's review of the FTC's assessment of the evidence and lauded the painstaking quality of the FTC's analysis. Although neither case involved review of the results of administrative adjudication, the tone of Judge Posner's majority opinions in United States v. Rockford Memorial Corp. and Federal Trade Commission v. Elders Grain, Inc. also bespeak a willingness to give federal enforcement officials the benefit of the doubt concerning the soundness of their analytical methodology and the wisdom of their decision to prosecute. Judge Bork participated in a single merger case on the D.C. Circuit, but his majority opinion in Federal Trade Commission v. PPG Industries is noteworthy for its willingness to sustain the enforcement decision and analysis of a federal agency Bork had denounced before coming to the bench.

The deference explicitly and implicitly given the federal government in the Bork and Posner merger opinions contrasts sharply with the drubbings that Judge Alex Kozinski, a Reagan appointee, and Judge Clarence Thomas, a Bush appointee and nominee to the Supreme Court, recently administered to the Justice Department in, respectively, United States v. Syufy Enterprises and United States v. Baker Hughes, Inc. In style and content, Judge Alex Kozinski's opinion for the Ninth Circuit in Syufy Enterprises is noteworthy for its willingness to sustain the enforcement decision and analysis of a federal agency Bork had denounced before coming to the bench.

In Rockford, Judge Posner described the Justice Department's burden in the following terms:

[The government is not required to await the maturation of the relevant scholarship in order to establish a prima facie case . . . .] The principles of civil procedure do not require that the plaintiff make an airtight case, only that his case satisfy some minimum threshold of persuasiveness and be better than the defendant's case. The government showed large market shares in a plausibly defined market in an industry more prone than many to collusion. The defendants responded with conjectures about the motives of nonprofits, and other will o' the wisps, that the district judge was free to reject, and did.

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1989); Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1383 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).
273. See id. at 1393.
275. See Hospital Corp. of Am., 807 F.2d at 1384-86.
276. 898 F.2d 1278 (7th Cir. 1990).
277. 868 F.2d 901 (7th Cir. 1989).
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898 F.2d at 1286 (citation omitted). See also Elders Grain, 868 F.2d at 906 ("[C]onsidering the haste with which the FTC was compelled to act by the defendants' decision to accelerate the acquisition, the [Federal Trade] Commission cannot be faulted for having failed to calculate market shares in capacity as well as output terms.").
279. 798 F.2d 1500 (D.C. Cir. 1986).
280. See id. at 1506. For Judge Bork's acid critique of the FTC's antitrust work, see R. Bork, supra note 61, at 48, 252.
281. 903 F.2d 659, 667 (9th Cir. 1990).
ufy dispatched the government's case in a torrent of ridicule. Beyond serving as a showcase for its author's knowledge of movie titles, the Syufy majority opinion depicts the Justice Department's decision to prosecute as virtually irrational. Such a characterization is striking if only because the Assistant Attorney General for Antitrust who decided to attack the merger in question (Douglas Ginsburg) is not ordinarily associated with an indiscriminate hostility to mergers. Judge Thomas' majority opinion in Baker Hughes lacks Judge Kozinski's flamboyance, but it is equally unforgiving of the government's decision to prosecute. Judges Kozinski, Posner, and Thomas undoubtedly share many common conservative perspectives, but litigants appearing before them in the future would be unwise to regard their attitudes in government merger cases as fungible.

A final qualification to the monolithic conception of laissez faire conservatism on the part of Reagan appointees is that the strong economic orientation of some Reagan judges sometimes yields expansion, rather than narrowing, of the scope of antitrust intervention. One example is Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., in which a divided en banc Seventh Circuit panel recognized a limited exception to the principle of Hanover Shoe, Inc. v. United Shoe Machinery Corp. and Illinois Brick Co. v. Illinois that precludes indirect purchasers from seeking damages attributable to illegal overcharges. Writing for the Seventh Circuit majority, Judge Posner held that the indirect purchaser restriction did not embrace overcharges associated with certain cost-plus natural gas supply contracts. Economically-based analytical tech-

283. Hidden in Judge Kozinski's Syufy opinion are the titles of over 200 films. See Movie Movie, ABA J., Aug. 1990, at 20.
284. Judge Kozinski observed:

It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources. Yet we cannot help but wonder whether bringing a lawsuit like this, and pursuing it doggedly through 27 months of pretrial proceedings, about two weeks of trial and now the full distance on appeal, really serves the interests of free competition.

Syufy, 903 F.2d at 672 (footnote omitted).
286. Judge Thomas stated that "The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery." Baker Hughes, 908 F.2d at 992 n.13. Immediately afterwards Judge Thomas added a quotation from Judge Kozinski raising the same question about the decision to prosecute in Syufy. See id.
287. 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 488 U.S. 986 (1988).
288. The Panhandle majority consisted of five Reagan appointees (Coffey, Flaum, Kanne, Posner, and Ripple) and one Carter appointee (Cudahy). The dissent consisted of two Johnson appointees (Cummings and Fairchild), a Ford appointee (Bauer), and a Reagan appointee (Manion).
291. Panhandle, 852 F.2d at 899.
niques figured prominently in Judge Posner's discussion of the operation of rate-of-return regulatory schemes and in his assessment of the economic incentives to sue, confronting, respectively, a regulated gas distribution firm and residential consumers of natural gas. The economically-oriented analysis that Judge Posner's critics associate exclusively with pro-defendant outcomes was instrumental in surmounting the barrier imposed by Hanover Shoe and Illinois Brick—an outcome that often has eluded state governments seeking to sue as parens patriae on behalf of indirect purchasers under the federal antitrust laws.

C. Qualitative Significance of Reagan Appointments

A mere recital of voting statistics understates the influence of the Reagan appointments in shaping antitrust doctrine. In a number of instances, the Reagan Administration looked to individuals with long experience in legal instruction to fill vacancies on the courts of appeals. This brought to the bench several distinguished academics equipped with a coherent, informing vision about the correct course for antitrust policy. By virtue of their extensive scholarship and study in the area, former academics such as Robert Bork, Frank Easterbrook, Douglas Ginsburg, Richard Posner, and Ralph Winter were well positioned to attempt to recast antitrust doctrine along conservative lines. Since 1981 several of these individuals have written important opinions that have laid the foundation for a narrowing of the reach of antitrust doctrine.

Robert Bork's tenure on the District of Columbia Circuit illustrates the point. Judge Bork wrote few antitrust opinions during his service on the court, but one decision—Rothery Storage & Van Co. v. Atlas Van Lines, Inc.—is significant in several ways. First, it represents an important effort to shift the boundaries of horizontal restraints doctrine. In Rothery, Judge Bork stated that restraints ancillary to an integration of economic activities are not illegal per se and are to be evaluated by rule of reason. Judge Bork's opinion concluded that recent Supreme Court...
decisions had “effectively overruled” United States v. Topco Associates, Inc., which had displayed a categorical hostility toward horizontal price and market division restrictions, regardless of the role such restrictions might play in establishing and maintaining an efficiency-enhancing integration of activities. In adopting this position, Rothery strongly encourages an efficiency-based assessment of horizontal restraints that fall outside the bounds of conventional bid-rigging or market allocation schemes.

Rothery is interesting not only for its substantive outcome, but also for its intellectual lineage. Judge Bork’s majority opinion distilled ideas he had pursued in scholarly writing and academic debate during his career as a member of the Yale Law School faculty. Rothery’s operative elements are borrowed largely from the analysis Judge Bork had spelled out in his 1978 book, Antitrust Paradox. The opinion placed previous judicial treatments of horizontal restraints in their historical and intellectual context, and demonstrated how recent Supreme Court decisions had departed from the approach Topco endorsed in 1972. The result is a powerful, succinct statement of a reformed analytical framework for evaluating horizontal restraints. The sophistication of the analysis and the persuasiveness of its approach were certifying marks of the author’s considerable command of the field.

Rothery-like opinions are not accidental in antitrust or in any other field. They place a premium on the author’s intellectual capital and experience. President Reagan’s selection of distinguished academics to sit on the courts of appeals yielded jurists with the necessary reservoir of ideas to make the process of opinion-writing an important vehicle for adjusting the boundaries of legal doctrine. The intellectual capital of these appointees supplies a significant tool for shaping the thinking of other members of the same court, as informal and formal discussion of cases affords opportunities to advocate adoption of the academic’s preferred analytical approach. Depending on her personality and persuasiveness, the former academic may be seen by colleagues as a valuable repository of insights and approaches to solving difficult problems. Thus, a president committed to fostering change in existing judicial doctrines of any sort is wise to choose judges who possess the informing intellectual vision, analytical tools, and technical command of subject matter that can produce influential opinions.

IV. JUDICIAL APPOINTMENTS AND ANTITRUST IN THE 1990s

The conclusions one can draw from reviewing experience with Carter and Reagan appointees raise the question of how the Bush administra-
tion's nominations will affect the judiciary's collective approach toward antitrust policy. From January 1989 through December 1990, the Bush Administration accounted for twenty-two new judges on the courts of appeals. Although this number is relatively small, the pace of nominations has increased following a period of minimal activity during the first six months of the Bush Administration. Forthcoming appointments promise to be particularly important for the future of antitrust policy and other forms of economic regulation.

If the Bush Administration accelerates the pace of appointments and secures confirmation of its nominees, the cumulative impact of Reagan and Bush appointments could affect the disposition of economic regulation cases to an extent not yet apparent in decisions since 1981. Reagan and Bush judges now hold parity with non-Reagan judges or constitute narrow majorities on most of the federal courts of appeals. If one assumes what could prove to be an unrealistic condition—that Reagan and Bush judges will serve long terms—the Bush appointments could create supermajorities of Reagan-Bush judges by the end of 1992. It appears likely that Reagan-Bush nominees will account for between 65 and 70 percent of all federal court of appeals judges by the end of 1992.

303. Through December 31, 1990, there were 126 vacancies on the federal district courts and courts of appeals—approximately fifteen percent of the federal judiciary. The Federal Judgeship Act of 1990 established 85 of these positions. See Moran, supra note 300, at 14.
305. Before the recent increase in judicial salaries, many commentators had warned that mass defections from the federal bench might occur if Congress did not raise compensation for judges substantially. See Raven, Maintaining a Quality Judiciary: The Need for Adequate Compensation, A.B.A. J., Dec. 1, 1988, at 8; Grey, How to Guarantee a Mediocre Judiciary, N.Y. Times, Apr. 4, 1989, at A27, col. 2; Bork, Miserable Wages, Miserable Leaders, N.Y. Times, Dec. 23, 1988, at A39, col. 2. In 1989 Congress approved a new salary scale that establishes a ceiling of $132,700 for court of appeals judges. See Rehnquist Lauds Raise for Judges, Wash. Post, Jan 1, 1991, at A21, col. 1. This step may discourage departures for the time being. However, many court of appeals judges have high professional opportunity costs for remaining on the bench. It remains possible that the durability of a Reagan-Bush judicial revolution may diminish if significant, periodic salary increases are not forthcoming.
306. See Goldman, The Bush Imprint on the Judiciary: Carrying On a Tradition, 74
Preliminary evidence suggests that President Bush will nominate judicial candidates with roughly the same bundle of ideological preferences held by Reagan appointees. Creating Reagan-Bush supermajorities with narrow antitrust preferences on the individual courts of appeals would increase the likelihood that two or more Reagan-Bush judges would sit on any individual panel. This could shape the disposition of antitrust cases in two important ways. First, it might raise the likelihood that a panel would favor a conservative outcome in any single case. Second, and perhaps more significant, it could alter the stated basis on which a panel embraces a conservative result. Where they constitute a majority on any given panel and hold a supermajority within a given circuit, Reagan-Bush judges might endorse more extreme positions in writing majority opinions. A tendency to adopt extreme positions would flow from the reduced need to achieve consensus with more moderate judges on three-judge panels and in en banc deliberations. Thus, the manner in which the Bush Administration fills existing and forthcoming court of appeals vacancies could exert an increasingly pronounced influence on the course of antitrust policy.

The voting behavior of Reagan-Bush appointees will be significant in large part because appellate judges will confront an increase in cases that seek to push antitrust doctrine and policy beyond the bounds established in the late 1970s and in the 1980s. Several recent developments have


308. It should be noted that the results from the 751 non-immunity cases in this survey do not indicate a difference in voting patterns when Carter or Reagan judges constituted a panel majority. In 195 cases, Carter appointees either constituted a majority in an en banc proceeding or held two or more seats on a three-judge panel. Fifty-six of these cases (28.7 percent) reached liberal outcomes, and 139 decisions (71.3 percent) endorsed conservative results. By comparison in 809 total non-immunity votes, Carter appointees endorsed liberal outcomes 249 times (30.8 percent) and favored conservative positions 560 times (69.2 percent).

Reagan judges held majorities in en banc deliberations or on three-judge panels in 108 cases. Nineteen decisions (17.6 percent) supported liberal outcomes, and 89 cases (82.4 percent) endorsed conservative results. In the total non-immunity data set, Reagan judges cast 487 votes, with 86 votes (17.7 percent) taking liberal positions and 401 votes (82.3 percent) endorsing conservative outcomes.

309. Cf. Flynn, supra note 9, at 886:

The direction taken by the Bush administration in its judicial appointments and congressional reaction to them will have a great influence over the next decade in determining whether antitrust policy will remain a significant element in determining economic policy and the rights of consumers and competitors or
created possibilities for more expansive public and private antitrust enforcement. First, new leaders at the Department of Justice and the FTC have displayed greater enforcement activism.\footnote{310} Compared to their Reagan-appointed predecessors, Bush Administration enforcement officials have adopted more stringent policies for, among other practices, mergers\footnote{311} and distribution restraints.\footnote{312} Although the actual extent of deviation from Reagan antitrust preferences during the Bush Administration ultimately may prove to be modest,\footnote{313} the center of gravity of federal enforcement has moved to the left of its equilibrium of the Reagan era.

Second, continuing a pattern that emerged during the Reagan presidency, state attorneys general have expanded their antitrust enforcement activities.\footnote{314} States such as New York and California have become particularly active in enforcing federal antitrust prohibitions against mergers\footnote{315} and distribution restraints,\footnote{316} two areas in which federal enforcement waned dramatically during the Reagan administration.

whether it will become a curious backwater largely of historical interest like it was in the 1920's; of little interest until the next economic disaster such as the Great Depression of the 1930's undermines the economy.


\footnote{315} See, e.g., Farmer, *Introduction: State Merger Enforcement*, 58 Antitrust L.J. 221 (1989) (discussing state merger enforcement in 1980s); Constantine, *The States' Role in
cent Supreme Court decisions such as *California v. American Stores Co.* have ensured that state governments will continue to play an important role in vindicating federal antitrust policies.

Third, recent academic literature has featured new, enforcement-oriented theories that directly or indirectly support the revival of liability theories that had fallen into relative disfavor. One important strand of this literature proposes stronger efforts to address dominant firm strategic behavior, leveraging, and nonprice predation. Another strand provides justifications for antitrust scrutiny of vertical practices such as resale price maintenance and efforts by firms to deny rivals access to suppliers or distribution networks. Such theories will equip antitrust plaintiffs with arguments to persuade courts that efficiency considerations, properly treated, warrant imposing greater antitrust limits upon certain types of conduct.

Finally, while invoking the new economic literature, plaintiffs also can try to avail themselves of heavily criticized but still extant Supreme Court precedents that establish far-reaching liability standards. The conservatism in the Supreme Court's antitrust jurisprudence over the past fifteen years has consisted less of directly loosening liability standards than of endorsing restrictive evidentiary and standing requirements.

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*Challenging National Mergers is Vital, Antitrust, Spring 1989, at 37 (presenting rationale for state merger enforcement in 1980s).*


317. 110 S. Ct. 1853 (1990). In *American Stores*, the Supreme Court upheld the ability of states to obtain divestiture to remedy violations of federal antitrust laws. See *id.* at 1866-67.

318. For a summary of this literature, see Baker, *supra* note 127, at 647-55; see also Kovacic, *supra* note 13, at 32-33 (describing institutional forces that contribute to the development of pro-enforcement antitrust theories).


322. See Blair & Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1540-
Left intact is what Richard Steuer aptly calls the "mothball fleet" of antitrust—a collection of seemingly dormant cases whose logic or impact the Court has undercut, but whose holdings the Court has not overruled. Thus, vessels not yet stricken from the mothball fleet's registry include decisions such as United States v. Von's Grocery, Utah Pie v. Continental Baking, and United States v. Topco Associates, Inc., all of which contain sweeping prohibitions on conduct that much modern antitrust jurisprudence and academic commentary have deemed benign or procompetitive. These and similar decisions remain fair game for litigants seeking to persuade individual federal judges that expansive liability rules are appropriate in specific cases. A judge's ideological preferences easily could be the difference in determining whether such precedents shall be treated as vital or moribund.

It is unremarkable that the country would experience a resurgence of antitrust activity. Throughout a century of Sherman Act experience, antitrust's strongest revivals have followed periods of comparatively permissive enforcement policy. The preferences of Reagan-Bush appointees will deeply influence how much the forces for expansion will succeed in reviving antitrust approaches the Reagan Administration disfavored. Among other areas, this is particularly true for the course of federal enforcement policy. Compared to their Reagan predecessors,

41, 1543-52 (1989); Page, supra note 4, at 1278-89; see also Gibbons, Antitrust, Law & Economics, and Politics, 50 L. & Contemp. Probs., No. 4, at 221-22 (1987) (discussing impact of Supreme Court decisions that apply "door-closing devices" to dismiss private antitrust suits).


325. See supra note 4, at 1223-24.

326. 384 U.S. 270 (1966). In Hospital Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987), Judge Posner recited the foundations of Supreme Court horizontal merger jurisprudence (including Von's Grocery) from the 1960s and observed that "[n]one of these decisions has been overruled." Id. at 1385.

327. 386 U.S. 685 (1967). In A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989), cert. denied, 110 S. Ct. 1326 (1990), Judge Easterbrook noted that "[n]o case since Utah Pie questions its holding, as opposed to its outlook." Id. at 1405 (emphasis in original).


329. See Kovacic, supra note 7, at 1140-43; cf. Baker and Blumenthal, Ideological Cycles and Unstable Antitrust Rules, 31 Antitrust Bull. 323, 333 (1986) (observing that antitrust populism "continues to enjoy support among academic commentators and within Congress and the judiciary, and its resurgence simply awaits the right set of political circumstances" (footnote omitted)).

Bush appointees to the Justice Department and the FTC have embraced a more expansive view of the appropriate scope of government antitrust intervention. At the same time, Bush appointees to the federal bench appear to share the largely conservative disposition of their Reagan counterparts. Continued nomination of regulation skeptics will mean that the fruits of expanded federal enforcement programs will face review by judges with narrower antitrust preferences. Reagan and Bush appointees who previously have given the government the benefit of the doubt—perhaps because they believed that the Reagan Administration had properly constricted the focus of federal enforcement activity—may review government cases more warily if they become convinced that the government is willing to take more chances on antitrust's frontiers. What the Bush Administration's invigorated Antitrust Division and FTC give, the Reagan-Bush judiciary may take away.

CONCLUSION

The federal antitrust system gives federal judges considerable discretion to determine the rules of competition by which businesses operate. Nowhere is this more apparent than in the Supreme Court's 1986 decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* In *Matsushita*, the Court invited lower court judges to dismiss antitrust claims that hinge upon ambiguous circumstantial evidence of conspiracy or lack economic plausibility. Whether circumstantial evidence is "ambiguous" or a claim is "economically plausible" are questions whose resolution largely depends upon the intuition and preferences of federal judges. *Matsushita* displays a bias toward non-intervention, but individual judges have considerable discretion to determine how deeply its commands will affect the adjudication of each case. Outcomes in specific cases often will depend on a judge's predisposition either to trust or doubt the curative powers of antitrust intervention.

In choosing federal judges, the Reagan Administration sought to ensure that the discretion inherent in *Matsushita* and similar cases would be exercised to disfavor intervention. This Article finds that Reagan/Bush
appointees have adhered to conservative antitrust preferences more frequently than their Carter counterparts. However, the data also underscore the significant extent to which conservative preferences have come to influence antitrust decisionmaking by Carter appellate judges. The conservatism of a substantial number of Carter appointees has yielded a greater convergence of Carter and Reagan voting conduct than the conservative court-packing hypothesis would predict. This conservatism is unremarkable when considered against the backdrop of modern Supreme Court jurisprudence, academic scholarship, and change in the status of the United States in the global economy.

The recent resignation of Justice Thurgood Marshall and the nomination of Judge Clarence Thomas to fill his seat on the Supreme Court have provided an opportunity to consider how widely conservative antitrust perspectives influence federal appellate judges today. Judge Thomas wrote one antitrust opinion during his tenure on the United States Court of Appeals for the District of Columbia Circuit. In United States v. Baker Hughes, Inc., Judge Thomas pointedly rejected the Justice Department's argument that the defendant in a Clayton Act Section 7 horizontal merger prosecution could rebut a prima facie case of illegality "only by a clear showing that entry into the market by competitors would be quick and effective." While acknowledging that Supreme Court decisions such as United States v. Philadelphia National Bank and United States v. Von's Grocery Co. had seemed to give decisive effect to market share data alone, Judge Thomas emphasized that the Court's later cases—particularly United States v. General Dynamics Corp.—indicated that the introduction of evidence concerning post-merger market concentration only begins the inquiry into a transaction's likely competition impact:

*General Dynamics* began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence. These cases discarded *Philadelphia Bank*'s insistence that a defendant "clearly" disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a "showing."

Judge Thomas recited the variety of paths that defendants can take to rebut inferences based on market share data, and he noted that "[t]he government hardly maximizes its scarce resources when it allows statis-

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335. 908 F.2d 981 (D.C. Cir. 1990).
336. 908 F.2d at 983. Judge Thomas said "We find no merit in the legal standard propounded by the government. It is devoid of support in the statute, in the case law, and in the government's own Merger Guidelines." *Id.*
340. *Baker Hughes*, 908 F.2d at 991 (footnote and citation omitted).
341. *Id.* at 985-86.
tics alone to trigger its ponderous enforcement machinery."

As noted above, Baker Hughes adopts a restrictive view of Section 7 of the Clayton Act and its jurisprudence. If confirmed to the Supreme Court, Judge Thomas would be a voice for disavowing the expansive enforcement possibilities articulated in the Court's merger decisions of the 1960s and for restating merger doctrine in a way that fully accounts for defenses recognized in General Dynamics and its progeny. Such an approach assuredly reflects conservative antitrust values, but it would be a mistake to conclude that the views of Judge Thomas are unique to Rea-
gan and Bush appointees to the federal appellate courts. The Reagan and Bush Administrations accounted for two members of the unanimous Baker Hughes panel (Judges Thomas and Sentelle), but the third partici-
pant was Ruth Ginsburg, a Carter appointee whose votes in non-immu-
nity antitrust matters have been as consistently conservative as any
Carter, Bush, or Reagan judge on the D.C. Circuit.

Nor would it be safe to assume that Judge Thomas will be dramati-
cally more conservative in deciding antitrust matters before the Court
than Justice Marshall. Regarded as one of the Court's most liberal mem-
bers, Justice Marshall occasionally authored opinions or cast votes that
established or reflected the liberal antitrust orthodoxy of the Warren Era.
As Professor Victor Kramer has demonstrated, Justice Marshall
often voted to support the government's position in antitrust disputes,
including a significant number of merger cases. Baker Hughes indi-
cates that Judge Thomas will be considerably less sympathetic to the
government's position in merger cases than Justice Marshall was.

At the same time, it is difficult to imagine that Judge Thomas will vote
more conservatively than Justice Marshall in placing obstacles in the
path of private antitrust plaintiffs. Scholars often point to the 1977 rul-

342. Id. at 992 n.13.
343. See supra notes 281-86 and accompanying text.
legiate Athletic Ass'n, 735 F.2d 577 (D.C. Cir. 1984); FTC v. Weyerhaeuser Co., 665 F.2d 1072 (D.C. Cir. 1981); see also supra note 193 and accompanying text (discussing
Judge Ginsburg's rejection of Justice Department challenge to merger of two drilling
equipment companies).
(Marshall, J., dissenting); United States v. General Dynamics Corp., 415 U.S. 486, 511
(1974) (Marshall, J., dissenting); United States v. Falstaff Brewing Corp., 410 U.S. 526,
545 (1973) (Marshall, J., concurring); United States v. Topco Assocs., Inc., 405 U.S. 596
(1972) (majority opinion by Marshall, J.).
ing in Continental T.V., Inc. v. GTE Sylvania, Inc. as the watershed event in the emergence of a more conservative Supreme Court antitrust jurisprudence. The attention lavished on Sylvania tends to overshadow the Court's decision in the same year in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. which has been at least as important as Sylvania in shaping outcomes in private antitrust litigation. Justice Marshall's opinion for a unanimous Court in Brunswick established the requirement that private plaintiffs prove "antitrust injury" to establish their right to relief. In what proved to be a powerful symbolic and substantive departure from the egalitarian antitrust jurisprudence of the Warren era, Brunswick supplied the much-quoted observation that "[t]he antitrust laws . . . were enacted for the 'protection of competition, not competitors.' Not only did Justice Marshall vote in later cases to extend Brunswick's application, but he also endorsed the strengthening of evidentiary standards that plaintiffs must satisfy to establish antitrust liability. On the whole, the liberalism that Justice Marshall brought to the resolution of civil liberties disputes did not extend to antitrust. If he joins the Court it will take a potent mix of circumstance and effort for Judge Thomas to author an opinion whose impact is more conservative than Brunswick's.

The cases examined in this Article indicate that conservative antitrust perspectives influence appellate decisionmaking well beyond the chambers of Reagan and Bush appointees. The cases also show that one cannot assume that Reagan and Bush judges automatically will resist pro-enforcement theories or otherwise favor approaches that restrict the operation of the antitrust laws. The Reagan-Bush judicial selection process appears to have had the effect of screening out candidates with strong preferences for expansive antitrust enforcement, but the process has yielded a small but potentially significant subset of judges with moderate or liberal instincts on matters such as distribution restraints. It is also apparent that the conservatism of some Reagan-Bush judges takes the form of an unwillingness to disregard much-criticized but still extant an-

350. 429 U.S. at 489.
351. See Kovacic IV, supra note 4, at 1426-27 & n.56.
352. Id. at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. at 320; emphasis in original). To practitioners who often represented antitrust plaintiffs, it soon became apparent that Brunswick was a potent shield for defendants. See Susman, Standing in Private Antitrust Cases: Where is the Supreme Court Going?, 52 Antitrust L.J. 465 (1983).
titrust precedents of the Warren Court or to give decisive effect to theo-
retically plausible economic defenses in the absence of a full factual
record. The Reagan-Bush court of appeals judges are more conservative
than their Carter colleagues on antitrust matters, but their conservatism
does not invariably entail rejection of moderate or liberal approaches to
antitrust analysis.

The aggregate statistical data on voting behavior obscure the signifi-
cance of Reagan-Bush judicial appointments in one other important re-
spect. President Reagan's appointees included individuals such as
Robert Bork, Frank Easterbrook, Douglas Ginsburg, Richard Posner,
and Ralph Winter, who came to the bench following academic careers
that featured extensive scholarship in the fields of antitrust and economic
regulation. Their small number belies their impact, as these judges have
used the opinion-writing process to imbue antitrust doctrine with con-
servative thinking. Drawing upon a substantial base of intellectual capi-
tal, the academics have exerted a disproportionate influence on the
direction of antitrust doctrine. So long as they remain on the bench,
these judges will play a formative role in framing the way in which other
federal judges analyze antitrust issues.

One lesson that emerges from the latter pattern is the importance pres-
idents might attach to the intellectual qualifications of their appointees.
It is one thing to appoint individuals who might be counted on to cast
conservative votes in cases before the courts of appeals. It is another to
choose judges whose learning and intellect provide an informing vision
about the appropriate path of the law and a strategy for pursuing that
path through the adjudication of individual cases. Academics constitute
the subset of potential nominees with the strongest incentives and oppor-
tunities to acquire this type of intellectual capital. Perhaps the shrewdest
and most influential element of President Reagan's judicial selection
strategy will prove to be his willingness to entrust the decision of appel-
late cases to academic scholars who have the intellectual capital to make
a preferred agenda of ideas take root in the law.