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In this article we suggest that the U.S. Supreme Court, far from indulging a pro-defendant or anti-antitrust bias, is methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding. Over the last four decades, the Court has increasingly: **(1)** decided antitrust cases in favor of defendants; **(2)** issued antitrust opinions subscribed to by two-thirds or more of the Justices; **(3)** decided antitrust cases in the manner recommended by the Solicitor General; and **(4)** expressly featured economic analysis in its reasoning. There is now broad and non-partisan agreement—in academia, the bar, and the courts—regarding the importance of sound economic analysis in antitrust decision making. We believe this broad consensus has contributed to both the prevalence of supermajority and even unanimous antitrust decisions and to the improved "success rate" of the United States when it appears either as a party or as an amicus in Supreme Court antitrust cases. In addition, because the near-consensus among academic commentators reflects a substantial rethinking of the plaintiff-friendly antitrust decisions of earlier decades, it has led to the present high success rate for defendants.

Leah Brannon is an Associate with Cleary Gottlieb Steen & Hamilton LLP. Douglas H. Ginsburg is the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. The authors thank Adrienne S. Binnall and David Lehn for their excellent research assistance.

I. Introduction

The U.S. Supreme Court decided four antitrust cases during its 2006 Term. Commentators have not failed to notice that the Court favored the defendant in each case, as it has done in every antitrust case for some years. In this article we suggest that the Court, far from indulging a pro-defendant or anti-antitrust bias, is methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding—what some scholars have aptly called "the new learning."[1]

In order to provide more context for the antitrust decisions of the last Term, we reviewed the 117 antitrust decisions that the Court has rendered over the last four decades. These decisions reveal four interesting and, we believe, closely related trends. Over this period, the Court has increasingly:

(1) decided antitrust cases in favor of defendants;

(2) issued antitrust opinions subscribed to by two-thirds or more of the Justices;

(3) decided antitrust cases in the manner recommended by the Solicitor General; and

(4) expressly featured economic analysis in its reasoning.

The last point is perhaps the most significant because it underlies the other three. There is now broad and non-partisan agreement in academia, the bar, and the courts regarding the importance of sound economic analysis in antitrust decision making. We believe this broad consensus has contributed to both the prevalence of supermajority and even unanimous antitrust decisions and to the improved success rate of the United States when it appears either as a party or as an amicus in Supreme Court antitrust cases. In addition, because the near-consensus among academic commentators reflects a substantial rethinking of the plaintiff-friendly antitrust decisions of earlier decades, it has led to the present high win rate for defendants.

THERE IS NOW BROAD AND NON-PARTISAN AGREEMENT IN ACADEMIA, THE BAR, AND THE COURTS REGARDING THE IMPORTANCE OF SOUND ECONOMIC ANALYSIS IN ANTITRUST DECISION MAKING.

In Section II of this article, we discuss the Court's four antitrust opinions from the October 2006 Term with an emphasis on the four themes discussed earlier. In Section III, we analyze the Court's antitrust opinions by decade over the last 40 Terms to assay the origin and strength of these trends.

1 *See* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid et al., eds., 1974).

II. October Term 2006

The four antitrust cases decided by the Supreme Court during its 2006 Term were *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, *Bell Atlantic Corp. v. Twombly*, *Credit Suisse Securities (USA) LLC v. Billing*, and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* All four were defense wins, three were supported by a supermajority (two-thirds or more) of the participating Justices, three were decided as the Solicitor General recommended, and all four featured from some to a great deal of economic analysis.

A. *WEYERHAEUSER V. ROSS-SIMMONS*

In *Weyerhaeuser*, the plaintiff alleged that defendant Weyerhaeuser had paid excessively high prices for sawlogs, outbidding the plaintiff in order to drive it out of business, in violation of Section 2 of the U.S. Sherman Act.[2] The district court instructed the jury that if Weyerhaeuser paid higher prices than necessary for sawlogs in order to prevent the plaintiff from obtaining the logs it needed at a fair price, then its conduct was indeed anticompetitive. The jury found for the plaintiff, which was awarded more than US$78 million in damages after trebling.

On appeal, Weyerhaeuser argued that the district court should have applied the legal standard for predatory pricing claims set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[3] Specifically, Weyerhaeuser argued that the jury should have been instructed that the prices it paid were unlawfully high only if those prices resulted in Weyerhaeuser losing money on the sale of processed lumber and Weyerhaeuser had a dangerous probability of recouping those losses after driving the plaintiff out of business. The U.S. Court of Appeals for the Ninth Circuit, however, affirmed the judgment for the plaintiff, noting that the Supreme Court had adopted a particularly high bar for predatory pricing claims in large part because the conduct at issue—low pricing—generally benefits consumers.[4] The Ninth Circuit saw no reason for similar concern with respect to predatory buying claims, and affirmed the district court.

The Supreme Court granted Weyerhaeuser's petition for a writ certiorari, and the United States filed an amicus brief urging the Court to reverse. The United States argued that "[a]ggressive bidding for an input sends important signals to the market, and harm to competition occurs only if the bidder is able to recoup

2 U.S. Sherman Antitrust Act, 15 U.S.C. § 2 (2000 & Supp. IV 2005).

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

4 Confederated Tribes of Siletz Indians v. Weyerhaeuser Co., 411 F.3d 1030 (9th Cir. 2005).

any losses."[5] Accordingly, the United States urged the Court to apply the predatory pricing standard of *Brooke Group* to evaluate claims of predatory buying.[6]

The Supreme Court was unanimous in adopting the economic reasoning of the Solicitor General. Justice Thomas noted that predatory buying claims raise the same concerns as predatory pricing claims.[7] Moreover, as the Court explained, "[a] predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future. For this reason, 'successful monopsony predation is probably as unlikely as successful monopoly predation.'"[8] Finally, and again in consent with the Solicitor General, the Court explained that high but non-predatory bidding is "often the very essence of competition. Just as sellers use output prices to compete for purchasers, buyers use bid prices to compete for scarce inputs."[9]

The Court's opinion in *Weyerhaeuser* neatly fits all four trends:

(1) it was decided in favor of the defendant;

(2) the opinion was unanimous;

(3) the Court adopted the standard urged by the Solicitor General; and

(4) the opinion relied heavily on economic analysis in general, and in particular, on the new learning in antitrust economics.

B. *BELL ATLANTIC CORP. V. TWOMBLY*

In *Twombly*, class action plaintiffs alleged that, following deregulation of the telephone industry in 1996, the defendant local exchange carriers conspired to inhibit the growth of upstart carriers and refrained from entering one another's historical monopoly territories. Plaintiffs based their claim primarily on the defendants' parallel conduct. That is, they argued that the defendants' parallel course of conduct toward the upstart carriers and the absence of meaningful competition among the defendants in each other's historical territories evidenced a conspiracy to restrain trade, and that plaintiffs were entitled to discovery in order to determine whether the defendants in fact had so conspired.

5 Brief for the United States as Amicus Curiae Supporting Petitioner at 8, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. (U.S. Aug. 24, 2006) (No. 05-381).

6 *Id.*

7 *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1076 (2007) (citing Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 591 (2005)) ("Asymmetric treatment of monopoly and monopsony has no basis in economic analysis").

8 *Weyerhaeuser,* 127 S. Ct. at 1077 (quoting R. BLAIR & J. HARRISON, MONOPSONY 66 (1993)).

9 *Weyerhaeuser,* 127 S. Ct. at 1077 (quotation omitted).

The district court granted the defendants' motion to dismiss. The court agreed with the defendants that, because parallel conduct by itself does not violate the antitrust laws, plaintiffs must at the pleading stage allege "plus factors" indicative of conspiracy. The U.S. Court of Appeals for the Second Circuit reversed.[10] In a broadly worded opinion, the court relied on the Supreme Court's decision in *Conley v. Gibson* to hold that a case may proceed to discovery unless it is clear that there is no set of facts that might show the "parallelism asserted was the product of collusion rather than coincidence."[11] The court acknowledged the risk that this approach would invite plaintiffs to engage in "fishing expeditions," threatening to impose massive costs on defendants, but stated that if the standard needed changing, then the change would have to come from either the Congress or the Supreme Court.[12] And so it did.

The Supreme Court granted the defendants' petition for a writ of certiorari, and the United States filed an amicus brief urging the Court to reverse. Specifically, the United States argued that a plaintiff must allege facts sufficient to create a "reasonably grounded expectation that discovery will reveal relevant evidence of an illegal agreement."[13] The United States pointed out that "parallel action is a hallmark of competitive markets," and argued that, because the complaint alleged nothing more than parallel conduct and made a conclusory allegation of conspiracy, it fell short of demonstrating a "reasonably grounded expectation" that a conspiracy had taken place.[14]

The Supreme Court agreed. In a 7-2 opinion written by Justice Souter, the Court adopted the standard proposed by the United States, which is that a complaint must include "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[15] The Court went on to discuss this standard at length, restating it with slight variations, among them the observation that a viable complaint must "possess enough heft to sho[w] that the pleader is entitled to relief."[16] The Court also made some broad comments regarding practical economic considerations at the pleading stage. For example:

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10 Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005).

11 *Id.* at 114; Conley v. Gibson, 355 U.S. 41, 47 (1957).

12 *Twombly*, 425 F.3d at 117.

13 Brief for the United States as Amicus Curiae Supporting Petitioner at 8, Bell Atlantic Corp. v. Twombly (U.S. Aug. 25, 2006) (No. 05-1126).

14 *Id.* at 8, 20.

15 Bell Atlantic Corp v. Twombly, 127 S. Ct. 1955, 1965 (2007).

16 *Id.* at 1966.

> "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [the summary judgment stage]. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim."[17]

The Court then dispatched the statement in *Conley* that a case may proceed to discovery unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," aptly remarking that "after puzzling the profession for 50 years, this famous observation has earned its retirement."[18]

Finally, applying its newly clarified standard to the facts at hand, the Court concluded: "An allegation of parallel conduct is … much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief."[19]

Twombly also fits into all four trends:

(1) it was decided in favor of the defendant;

(2) by a large majority of the Court;

(3) which adopted the standard proposed by the Solicitor General; and

(4) although the opinion dealt more with pleading standards than with substantive antitrust law, the Court did apply economic logic in its discussion of the costs of discovery and in its treatment of the plaintiffs' argument that defendants' parallel inaction was inherently suspicious.

The Court responded to the latter argument with the game-theoretic observation that "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[20]

17 *Id.* at 1967 (quotation omitted).

18 *Id.* at 1969.

19 *Id.* (quotation omitted).

20 *Id.* at 1972.

C. *CREDIT SUISSE FIRST BOSTON LTD. V. BILLING*

In *Credit Suisse*, a putative class of buyers of newly issued securities alleged that the nation's leading underwriting firms had entered into unlawful agreements related to the distribution of securities in initial public offerings (IPOs). Specifically, the plaintiffs claimed the defendants had conspired to manipulate the IPO market by requiring buyers of shares in the IPO to buy additional shares later at escalating prices (i.e., laddering), pay unusually high commissions on subsequent security purchases, and purchase other less-desirable securities (i.e., tying).

The defendants argued that the securities laws and not the antitrust laws governed their conduct, and that only the securities laws could provide a remedy. The district court granted the defendants' motion to dismiss, holding that the securities laws impliedly repealed federal antitrust laws and preempted state antitrust laws as applied to dealings in securities. The district court noted that the Securities and Exchange Commission (SEC) either had expressly permitted or had authority to regulate the various types of conduct being challenged, and therefore application of the antitrust laws might undermine the regulatory scheme.

The Second Circuit reversed, concluding that there was no specific congressional intent, either express or implied, to immunize the challenged conduct.[21] The court rejected the defendants' argument that antitrust immunity is implied by a potential conflict between the antitrust laws and the securities laws, and held that the securities laws were not sufficiently "pervasive" to immunize the defendants' conduct from antitrust liability.[22]

The Supreme Court granted the defendants' petition for a writ of certiorari. In the Second Circuit, the SEC had argued in favor of, and the Antitrust Division of the U.S. Department of Justice (DOJ) had argued against, antitrust immunity for the challenged conduct. In the Supreme Court, the United States filed a single amicus brief suggesting an intermediate position—to withstand a motion to dismiss, a complaint must allege facts giving rise to a "reasonably grounded expectation that the alleged antitrust offense can be established without relying on activities authorized under the regulatory scheme or inextricably intertwined with authorized" (and hence immune) activities.[23]

The Supreme Court reversed. In a 7-1 decision written by Justice Breyer, the Court explained that there is a fine line separating permissible conduct from

21 Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005).

22 *Id.*

23 Brief for the United States as Amicus Curiae Supporting Vacatur at 10, Credit Suisse Securities (USA) LLC v. Billing (U.S. Jan. 22, 2007) (No. 05-1157).

impermissible conduct under the securities laws, and some measure of expertise is needed to distinguish between the two.[24] Accordingly, if antitrust suits implicating regulated securities activities were permitted, there would be a high risk of inconsistent results.[25] The Court also built on its earlier opinion in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* by holding that the SEC's oversight "makes it somewhat less necessary to rely on antitrust actions to address anticompetitive behavior" in this regulated industry.[26] Finally, the Court, referring to the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998, noted that:

THE COURT EXPLAINED THAT THERE IS A FINE LINE SEPARATING PERMISSIBLE CONDUCT FROM IMPERMISSIBLE CONDUCT UNDER THE SECURITIES LAWS, AND SOME MEASURE OF EXPERTISE IS NEEDED TO DISTINGUISH BETWEEN THE TWO.

> "Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits. To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing."[27]

Before concluding his opinion, Justice Breyer explicitly noted and rejected the newly crafted position taken by the United States.[28] As the Court explained, the recommendation that the case be remanded for consideration of whether the challenged conduct could be separated from conduct permitted by the regulatory scheme was "in effect, a compromise between the different positions that the SEC and [DOJ] took in the courts below" and simply was not a practical solution in light of the "serious risk that antitrust courts will produce inconsistent results that, in turn, will overly deter" practices authorized by the SEC.[29]

24 See Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383, 2395 (2007).

25 *Id.*

26 *Id.* at 2396; Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398 (2004).

27 *Credit Suisse,* 127 S. Ct. at 2396.

28 *Id.* at 2397.

29 *Id.*

The Court's opinion in *Credit Suisse* fits at least two, and arguably three, of the four trends:

(1) it was decided in favor of the defendant; and

(2) by a large majority.

With respect to trend **(3)**, although the Court did not adopt the position advanced by the Solicitor General, the rejection seems attributable to the unusual circumstances of the case, in which two federal agencies had conflicting views, and in which the resulting amicus brief produced a somewhat strained compromise position. (Indeed, the Justices might well have recalled the adage that a camel is a horse designed by a committee.) With respect to trend **(4)**, while the opinion did not cite any of the new literature on antitrust economics, it did apply basic economic principles in considering the costs of an overinclusive antitrust regime, the incentives facing typical parties, and the possible deterrence of beneficial conduct.

D. *LEEGIN CREATIVE LEATHER PRODUCTS, INC. V. PSKS, INC.*

In *Leegin*, the plaintiff PSKS sold the defendant's brand of fashion accessories at its retail store. Defendant Leegin instituted a "Retail Pricing and Promotion Policy," pursuant to which it established minimum retail prices for its products and later started a marketing initiative granting promotional incentives only to those retail stores that agreed to follow its policy. When the plaintiff put the entire line of Leegin's products on sale below Leegin's authorized minimum prices, Leegin stopped selling to it. PSKS then filed suit under Section 1 of the Sherman Act,[30] claiming that Leegin had entered into unlawful resale price maintenance (RPM) agreements with its retailers.

The district court excluded the proposed testimony of Leegin's economic expert, who would have testified that Leegin's policy was pro-competitive. The district court instructed the jury that vertical minimum price-fixing was illegal per se, and the jury awarded PSKS damages of approximately US$4 million after trebling.

The U.S. Court of Appeals for the Fifth Circuit affirmed.[31] It held that, while the Supreme Court had abandoned the per se rule against various types of vertical restraints, it had never abandoned the per se rule against minimum RPM announced nearly a century before in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[32] Accordingly, the Fifth Circuit held that the district court properly excluded Leegin's expert testimony regarding its pro-competitive rationale for the pricing policy.

30 U.S. Sherman Antitrust Act, 15 U.S.C. § 1 (2000 & Supp. IV 2005).

31 PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. Appx. 464 (5th Cir. 2006).

32 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

The Supreme Court granted defendant's petition for a writ of certiorari, and the United States filed an amicus brief urging the Supreme Court to reverse the Fifth Circuit and abandon the per se rule against minimum RPM. The United States argued that per se rules are the exception rather than the norm in antitrust law, and that minimum RPM did not meet the Court's modern requirements for application of a per se rule.[33]

The Supreme Court agreed. In a 5-4 opinion written by Justice Kennedy, the Court held that "the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based."[34] Further, the Court noted that the "economics literature is replete with procompetitive justifications for a manufacturer's use of" RPM.[35] Among other things, the Court explained, a "manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers."[36] The Court went on to note, however, that RPM could also be put to anticompetitive use, for example, to implement a cartel among retailers.[37] Finally, the Court considered the doctrine of stare decisis, but found it less compelling in the context of the Sherman Act, which "[f]rom the beginning the Court has treated … as a common-law statute."[38] For all of these reasons, the Court overruled *Dr. Miles* and held that henceforth "[v]ertical price restraints are to be judged according to the rule of reason."[39]

The Court's decision in *Leegin* fits all of the trends but one:

(1) it was decided in favor of the defendant;

(3) as the United States had recommended; and

(4) the opinion relied heavily on economic principles and analysis.

But, with respect to trend **(2)**, this case was not decided by a supermajority—four justices dissented via an opinion written by Justice Breyer.

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33 Brief for the United States as Amicus Curiae Supporting Petitioner at 6, 9, Leegin Creative Leather Products, Inc. v. PSKS, Inc. (U.S. Jan. 22, 2007) (No. 06-480).

34 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007).

35 *Id.*

36 *Id.* at 2715.

37 *Id.* at 2717.

38 *Id.* at 2720.

39 *Id.* at 2725.

The principal basis of the dissent, however, was the role of stare decisis, not the merits of the antitrust issue.[40] The dissent went on to say of the merits that even "[w]ere the Court writing on a blank slate" the issue presented would be a difficult one.[41] The concerns the dissent addressed, however, were largely the same ones raised by the majority as relevant considerations under the rule of reason. In sum, it seems clear the case was decided by a much narrower margin than the other antitrust cases of the Term, more because of the Justices' divergent views on stare decisis than any division of opinion on antitrust law.

III. Recent Trends in U.S. Supreme Court Antitrust Cases

In order to understand how the Court's four antitrust decisions from the past Term fit into longer trends in the Court's antitrust jurisprudence, we reviewed the Court's antitrust opinions over the last 40 Terms. By our count, the Court decided 117 antitrust cases during that time. Figure 1, "Antitrust Decisions of the U.S. Supreme Court," provides some basic information related to these cases.

We included cases in Figure 1 if, and only if, they contained one or more holdings related to an antitrust statute, for example, the Sherman Antitrust Act, the Clayton Act, or the Robinson-Patman Act.[42] Thus, for example, we excluded *Intel Corp. v. Advanced Micro Devices, Inc.*[43] Although the underlying facts in that case involved a challenge to competition practices under European law, the issue that reached the Supreme Court involved the authority of federal district courts to assist in the production of evidence for use in a foreign proceeding, and the Court did not offer any guidance with respect to the U.S. antitrust laws.

With respect to amicus briefs filed by the United States, we listed "None" if the Solicitor General did not file a brief in a case and "N/A" if the United States was a party to the case. For a few of the earliest cases, we could not determine conclusively that the Solicitor General did not file a brief; we marked these "None*." In a few cases, we had to make a judgment as to which party was favored by the Solicitor General's amicus brief. For instance, in *Credit Suisse*, the

40 *Leegin*, 127 S. Ct. at 2725-26 (Breyer, J. dissenting).

41 *Id.* at 2726-2727 (Breyer, J. dissenting) (citing, inter alia, 8 P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 1628-33 (2d ed. 2004); F. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135 (1984); R. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981); Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae in Support of Neither Party, Leegin Creative Leather Products, Inc. v. PSKS, Inc. (U.S. Jan. 22, 2007) (No. 06-480)).

42 U.S. Sherman Antitrust Act, 15 U.S.C. §§ 1-27 (2000 & Supp. IV 2005) (inclusive of all three Acts).

43 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

Figure 1

Antitrust Decisions of the U.S. Supreme Court

Case	(1) Decision Favored	(2) Vote	(3) SG Favored or Represented	(4) Law & Economics Citation
Period: OT 1997-2006				**77%**
Bush Administration				
Leegin Creative Leather Products v. PSKS, 127 S. Ct. 2705 (2007)	D	5-4	D	Yes
Credit Suisse Securities v. Billing, 127 S. Ct. 2383 (2007)	D	7-1	P	No
Twombly v. Bell Atl., 127 S. Ct. 1955 (2007)	D	7-2	D	Yes
Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007)	D	9-0	D	Yes
Illinois Tool Works, Inc. v. Independent Ink, 547 U.S. 28 (2006)	D	8-0	D	Yes
Texaco Inc. v. Dagher, 547 U.S. 1 (2006)	D	8-0	D	No
Volvo v. Reeder Simco GSM, 546 U.S. 164 (2006)	D	7-2	D	Yes
Empagran v. F. Hoffmann-LaRoche, 542 U.S. 155 (2004)	D	8-0	D	Yes
U.S.P.S. v. Flamingo Ind., 540 U.S. 736 (2004)	D	9-0	N/A	No
Verizon v. Trinko, 540 U.S. 398 (2004)	D	9-0	D	Yes
Clinton Administration				
California Dental Assn v. FTC, 526 U.S. 756 (1999)	D	5-4	N/A	Yes
NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998)	D	9-0	D	Yes
State Oil v. Khan, 522 U.S. 3 (1997)	D	9-0	D	Yes
Period: OT 1987-1996				**78%**
Brown v. Pro Football, Inc., 518 U.S. 231 (1996)	D	8-1	None	Yes
Bush, Sr. Administration				
Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993)	D	9-0	P	Yes
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)	D	6-3	None	Yes
Prof. Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993)	D	9-0	D	Yes
Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)	D	9-0	D	Yes
F.T.C. v. Ticor Title Insurance Co., 504 U.S. 621 (1992)	P	6-3	N/A	No
Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)	P	6-3	D	Yes
Summit Health Ltd. v. Pinhas, 500 U.S. 322 (1991)	P	5-4	P	No
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991)	D	6-3	None	Yes
Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990)	D	5-4	D	Yes
Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990)	P	9-0	D	Yes
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990)	D	7-2	D	Yes
California v. American Stores, 495 U.S. 271 (1990)	P	9-0	None	Yes
F.T.C. v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990)	P	7-2	N/A	Yes
Reagan Administration				
California v. ARC America Corp., 490 U.S. 93 (1989)	P	7-0	P	No
Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988)	P	7-2	P	Yes
Patrick v. Burget, 486 U.S. 94 (1988)	P	8-0	P	No
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)	D	7-2	None	Yes
Period: OT 1977-1986				**60%**
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	P	7-2	P	Yes
Cargill, Inc. v. Monfort of Colorado. Inc., 479 U.S. 104 (1986)	D	7-1	D	Yes
F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986)	P	9-0	N/A	Yes
Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986)	D	5-4	D	Yes
Fisher v. City of Berkeley, 475 U.S. 260 (1986)	D	8-1	None	No
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	P	8-0	None	Yes
Northwest Wholesale Stationers v. Pacific Stationery & Printing, 472 U.S. 284 (1985)	D	7-2	D	No
Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48 (1985)	D	7-2	N/A	Yes
Town Of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	D	9-0	D	Yes
N.C.A.A. v. Board of Regents of The Univ. of Oklahoma, 468 U.S. 85 (1984)	P	7-2	P	Yes
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	D	5-3	D	Yes
Hoover v. Ronwin, 466 U.S. 558 (1984)	D	4-3	P	Yes
Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984)	D	9-0	D	Yes
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	P	8-0	D	No
Bankamerica Corp. v. United States, 462 U.S. 122 (1983)	D	5-3	N/A	Yes
Falls City Ind., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983)	D	9-0	D	Yes
Jefferson County Pharmaceutical Ass'n v. Abbott Labs, 460 U.S. 150 (1983)	P	5-4	None	No
Associated General Contractors v. Carpenters, 459 U.S. 519 (1983)	D	8-1	D	Yes
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)	D	8-0	None	No
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	P	5-4	None	No
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	P	4-3	P	Yes
American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982)	P	6-3	P	No
Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982)	P	5-3	None	No
Carter Administration				
Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378 (1981)	P	9-0	P	No
J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981)	P	5-4	None	No
H.A. Artists & Associates, 451 U.S. 704 (1981)	P	5-4	None	Yes
Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980)	P	9-0	None	Yes
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	P	8-0	P	No
McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980)	P	8-0	P	No
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	P	8-0	P	Yes
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)	D	9-0	D	No
Group Life & Health Ins. Co. v. Royal Drug Co., Inc., 440 U.S. 205 (1979)	P	5-4	P	No

Figure 1 (cont.)

Case	(1) Decision Favored	(2) Vote	(3) SG Favored or Represented	(4) Law & Economics Citation
Carter Administration (continued)				
Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69 (1979)	D	6-2	N/A	No
St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978)	P	6-2	P	Yes
U.S. v. United States Gypsum Co., 438 U.S. 422 (1978)	D	6-2	N/A	Yes
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)	D	8-0	None	No
Nat'l Society of Professional Engineers v. U.S., 435 U.S. 679 (1978)	P	8-0	N/A	Yes
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	P	5-4	P	Yes
Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978)	P	5-3	P	No
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	P	9-0	D	Yes
Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36 (1977)	D	7-2	None	Yes
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	D	6-3	P	Yes
Period: OT 1967-1976				**30%**
Nixon-Ford Administration				
United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977)	D	9-0	None	Yes
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	D	9-0	None	Yes
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	P	6-3	P	Yes
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	D	9-0	P	No
United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975)	D	5-4	N/A	No
U.S. v. American Building Maint. Ind., 422 U.S. 271 (1975)	D	6-3	N/A	No
United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975)	D	6-3	N/A	Yes
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	P	8-0	P	No
Connell Construction Co. v. Plumbers, 421 U.S. 616 (1975)	P	5-4	D	No
Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974)	D	7-2	P	No
U.S. v. Marine BanCorp., 418 U.S. 602 (1974)	D	5-3	N/A	Yes
U.S. v. General Dynamics Corp., 415 U.S. 486 (1974)	D	5-4	N/A	Yes
U.S. v. Falstaff Brewing Corp., 410 U.S. 526 (1973)	D	5-2	N/A	No
Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973)	P	5-2	N/A	No
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	D	6-2	P	No
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)	P	5-4	D	No
Flood v. Kuhn, 407 U.S. 258 (1972)	D	5-3	None	Yes
Ford Motor Co. v. United States, 405 U.S. 562 (1972)	D	5-2	N/A	Yes
U.S. v. Topco Assocs., 405 U.S. 596 (1972)	P	6-1	N/A	Yes
U.S. v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971)	P	9-0	N/A	No
United Mine Workers of America v. Railing, 401 U.S. 486 (1971)	D	7-2	None	No
Ramsey v. United Mine Workers of America, 401 U.S. 302 (1971)	P	5-4	None	No
Zenith Radio Corp v. Hazeltine Research, 401 U.S. 321 (1971)	P	9-0	None	Yes
U.S. v. Phillipsburg, 399 US 350 (1970)	P	6-1	N/A	No
Perkins v. Standard Oil Co. of California, 399 U.S. 222 (1970)	P	8-0	None*	No
Simpson v Union Oil Co. of California, 396 U.S. 13 (1969)	P	9-0	None	No
Johnson Administration				
Perkins v. Standard Oil Co. of Cal., 395 U.S. 642 (1969)	P	6-2	None	No
Utah Public Service Commission v. El Paso Natural Gas Co., 395 U.S. 464 (1969)	P	5-2	D	No
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	P	9-0	P	No
Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969)	P	6-3	None	No
Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969)	P	5-4	None	Yes
Citizen Pub. Co. v. U.S., 394 U.S. 131 (1969)	P	7-1	N/A	No
U.S. v. Container Corp. of America, 393 U.S. 333 (1969)	P	6-3	N/A	No
U. S. v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968)	P	6-2	N/A	No
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	P	7-1	None	Yes
Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968)	P	7-2	None	No
First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253 (1968)	D	5-3	None	No
American Federation of Musicians v. Carroll, 391 U.S. 99 (1968)	D	5-2	None*	No
F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968)	P	6-2	N/A	No
Federal Maritime Commission v. Swedish Am. Line, 390 U.S. 238 (1968)	P	8-0	N/A	No
Albrecht v. Herald Co., 390 U.S. 145 (1968)	P	7-2	None	Yes
U.S. v. Third Nat. Bank in Nashville, 390 U.S. 171 (1968)	P	7-0	N/A	No
Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967)	P	8-1	None*	No
Burke v. Ford, 389 U.S. 320 (1967)	P	9-0	None	No

Key

P = Plaintiff

D = Defendant

N/A = United States was a party to the case.

None = SG did not file a brief in the case.

None* = Unable to confirm whether SG participated and assumed no participation.

United States styled its brief as "supporting vacatur," but we treat the brief as supporting the plaintiffs because it called for some liability under the antitrust laws, whereas the defendants sought complete immunity therefrom.

In listing the party favored by the Supreme Court, we focused solely on antitrust issues and disregarded issues arising under other laws. In some cases we had to make a judgment in tallying the vote count or as to which party the Court's opinion favored. For instance, *Hartford Fire Insurance Co. v. California* involved a multitude of issues and a fractured decision. Among other things, the Court held that domestic defendants were exempt from the antitrust laws by virtue of the McCarran-Ferguson Act, but that principles of comity did not bar U.S. courts from exercising jurisdiction over the foreign defendants.[44] We treat this as a 9-0 decision favoring the defendants.

In the "Law & Economics Citation" column, we used a handful of rough proxies for the new learning in antitrust economics. In particular, we searched for citations to the writings of Phillip Areeda, Robert Bork, Richard Posner, and Ward Bowman. We also searched generally for citations to economic journals, law reviews, and other academic literature connected with the economics-influenced trend in modern antitrust analysis. Where one or more of these proxies appeared, we listed the decision as involving a "Law & Economics Citation."

Finally, we should note some other important limitations of Figure 1. First, it does not reflect the nature of the question presented in each case. As a result, each case counts as one entry even though this obviously understates the importance of some decisions and overstates the importance of others. In addition, the figure focuses only on the Supreme Court's treatment of antitrust cases at the merits stage. Other interesting observations might be made if the analysis were extended to the Court's consideration of petitions for certiorari in antitrust cases, including those cases that the Court ultimately declined to review.

With these points in mind, we discuss the Court's decisions over the last 40 Terms with respect to:

(1) the defendants' win ratio;

(2) the degree of agreement among the Justices;

(3) the success of the Solicitor General, both as an amicus and when representing the United States as a party; and

(4) the Court's reliance on the law and economics literature.

44 Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).

A. DEFENSE WIN RATIO

Figure 2, "Party and Solicitor General Success," depicts the performance of plaintiffs, defendants, and the Solicitor General (whether appearing as an amicus or on behalf of the United States as a party) over the past 40 years. As this Figure shows, the win ratio for defendants has improved quite substantially with every passing decade over the past 40 years. During the decade beginning with October Term 1967, the defendant won 16 of 44 (36 percent) of all antitrust cases decided by the Supreme Court. During the decade beginning with October Term 1977, the defendant won 19 of the 42 antitrust cases, or 45 percent of all such cases. In the decade beginning with October Term 1987, the defendant won 9 of the 18 antitrust cases, or 50 percent of the cases. And during the most recent decade, the defendant won all 13 cases, that is, 100 percent.

B. SOLICITOR GENERAL WIN RATIO

Figure 2 also shows that like the Court itself, the Solicitor General's amicus briefs tended to favor antitrust plaintiffs much more frequently 40 years ago than they do today.[45] During the decade beginning with October Term 1967, the Solicitor General supported the defendant in only 33 percent of the cases (3 of 9) in which the United States filed an amicus brief. During the next decade, the Solicitor General supported the defendant in 44 percent of the cases (11 of 25) in which the United States filed an amicus brief. During the decade beginning with October Term 1987, the Solicitor General supported the defendant in 55 percent of the cases (6 of 11) in which the United States filed an amicus brief. And, in the decade beginning in 1997, the United States supported the defendant in 91 percent of the cases (10 of 11) in which it filed an amicus brief.

This trend is less smooth than the one discussed in the prior section. There is a modest increase in pro-defense positions over three decades, followed by a dramatic increase in pro-defense positions in the last decade. Again, the direction of the change does not correlate with changes in the political party of the U.S. Presidential Administration. The Solicitor General filed an amicus brief supporting the defendant in 45 percent of the cases in which he filed an amicus brief under President Reagan, 60 percent of those cases under President George H.W. Bush, 67 percent of the time under President Clinton, and 80 percent of the time under President George W. Bush**.** The substantial (and increasing) support for antitrust defendants across the previous four administrations contrasts sharply with the tepid support for antitrust defendants across the three preceding administrations—14 percent under President Carter, 11 percent under Presidents

45 In addition, the United States has filed amicus briefs in an increasing percentage of the private antitrust cases in the Supreme Court. The United States went from filing amicus briefs in 33 percent of private antitrust cases in the decade beginning with the October Term 1967, to filing amicus briefs in 69 percent of such cases in each of the next two decades and 100 percent in the past decade. *See* Figure 2.

Figure 2

Party and U.S. Solicitor General Success

Party	Party won	Party won / total suits	SG appeared as amicus for	SG appeared as amicus for / total SG appearances as amicus	SG won as amicus for	SG won as amicus for / SG appearances as amicus for	SG appeared as counsel for	SG won as counsel for	SG appeared as amicus for + SG appeared as counsel for / total SG appearances as counsel + total SG appearances as counsel	SG won as amicus for + SG won as counsel for / SG appeared as amicus for + SG appeared as counsel for	SG won as amicus for + SG won as counsel for
Period: OT 1997-2006											
Plaintiff	0	0%	1	9%	0	0%	1	0	15%	0%	
Defendant	13	100%	10	91%	10	100%	1	1	85%	100%	
Total	13		11		10	91%	2	1	100%	85%	
Total private suits:	11		Total SG appearances as amicus / total private suits:						100%		
Period: OT 1987-1996											
Plaintiff	9	50%	5	45%	4	80%	2	2	54%	86%	
Defendant	9	50%	6	55%	4	67%	0	0	46%	67%	
Total	18		11		8	73%	2	2	100%	77%	
Total private suits:	16		Total SG appearances as amicus / total private suits:						69%		
Period: OT 1977-1986											
Plaintiff	23	55%	14	56%	12	86%	6	2	65%	70%	
Defendant	19	45%	11	44%	9	82%	0	0	35%	82%	
Total	42		25		21	84%	6	2	100%	74%	
Total private suits:	36		Total SG appearances as amicus / total private suits:						69%		
Period: OT 1967-1976											
Plaintiff	28	64%	6	67%	3	50%	17	10	88%	57%	
Defendant	16	36%	3	33%	0	0%	0	0	12%	0%	
Total	44		9		3	33%	17	10	100%	50%	
Total private suits:	27		Total SG appearances as amicus / total private suits:						33%		

Nixon and Ford, and 13 percent under President Johnson as illustrated in Figure 3, "Solicitor General Position by U.S. Presidential Administration."

With the Court and the United States moving in the same (generally pro-defendant) direction, it is not surprising that the Court and the United States are increasingly in agreement. In measuring agreement we considered only the party favored by the Solicitor General and by the Court, ignoring subtle distinctions that may have existed between the reasoning of the Solicitor General and that of the Court. For example, in *Trinko*, the United States urged the Court to hold in favor of the defendant on the ground that a refusal to deal should be law-

Figure 3

Solicitor General Position by U.S. Presidential Administration

Party	SG appeared as amicus for	SG appeared as amicus for / total SG appearances as amicus	SG appeared as counsel for	SG appeared as amicus for + SG appeared as counsel for / total SG appearances as amicus + total SG appearances as counsel
Bush Administration				
Plaintiff	1	11%	0	10%
Defendant	8	89%	1	90%
Total	9	100%	1	100%
Clinton Administration				
Plaintiff	0	0%	1	33%
Defendant	2	100%	0	67%
Total	2	100%	1	100%
Bush Sr. Administration				
Plaintiff	2	25%	2	40%
Defendant	6	75%	0	60%
Total	8	100%	2	100%
Reagan Administration				
Plaintiff	8	47%	3	55%
Defendant	9	53%	0	45%
Total	17	100%	3	100%
Carter Administration				
Plaintiff	9	82%	3	86%
Defendant	2	18%	0	14%
Total	11	65%	3	100%
Nixon-Ford Administration				
Plaintiff	5	71%	11	89%
Defendant	2	29%	0	11%
Total	7	100%	11	100%
Johnson Administration				
Plaintiff	1	50%	6	88%
Defendant	1	50%	0	13%
Total	2	100%	6	100%

ful unless that refusal made no "business sense."[46] Although the Court did not adopt the "no business sense" standard, it did decide the case in favor of the defendant. Accordingly, we treat this as a "win" for the United States.

46 *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 7-8, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (U.S. May 23, 2003) (No. 02-682).

In the decade beginning with October Term 1967, the Court agreed with the Solicitor General in 50 percent of the cases (13 of 26) in which the Solicitor General filed an amicus brief or appeared on behalf of the United States as a party. In the decades beginning with October Terms 1977, 1987, and 1997, respectively, the Court agreed with the Solicitor General by a fairly consistent margin—in 74 percent (23 of 31), 77 percent (10 of 13), and 85 percent (11 of 13) respectively, of such cases as illustrated in Figure 2 earlier.

C. DEGREE OF CONSENSUS AMONG JUSTICES

By several measures, the degree of consensus among the Justices hearing antitrust cases has been increasing over the past four decades. Figure 4, "Consensus Among the Justices." divides their decisions into those decided by a supermajority of two-thirds or more (including unanimity) and those decided by a closer margin. Although the percentage of antitrust cases decided by a supermajority of the Justices has not changed significantly over the past four decades, there is a dramatic shift with respect to the party favored in these decisions—namely, from the plaintiff to the defendant.

Figure 4

Consensus among the Justices

Party	Win	Supermajority* vote for	Close majority vote for	Supermajority* vote for / Total decisions	Close majority vote for / Total decisions
Period: OT 1997-2006					
Plaintiff	0	0	0	0%	0%
Defendant	13	11	2	85%	15%
Total	13	11	2	85%	15%
Period: OT 1987-1996					
Plaintiff	9	8	1	44%	6%
Defendant	9	8	1	44%	6%
Total	18	16	2	89%	11%
Period: OT 1977-1986					
Plaintiff	23	14	9	33%	21%
Defendant	19	15	4	36%	10%
Total	42	29	13	69%	31%
Period: OT 1967-1976					
Plaintiff	28	24	4	55%	9%
Defendant	16	11	5	25%	11%
Total	44	35	9	80%	20%

*Supermajority=2/3 or more

During the decade beginning with October Term 1967, the Court decided 25 percent of all its antitrust cases by a supermajority vote in favor of the defendant. That is, the Court decided 44 antitrust cases; in 11 of them, a supermajority voted in favor of the defendant. Over the following two decades, that percentage rose to 36 percent and then to 44 percent. Finally, in the decade beginning with October Term 1997, the Court decided 85 percent of all its antitrust cases by a supermajority in favor of the defendant. During these same four decades, the percentage of all antitrust cases that the Court decided by a supermajority in favor of the plaintiff fell from 55 percent to zero. We believe that these figures reflect the increasing convergence among the Justices on the economic approach to antitrust law, which—at least in comparison to the previously prevailing approach—tends to favor the defendant.

D. RELIANCE ON "LAW AND ECONOMICS" LITERATURE

Finally, it is apparent that, over time, the Supreme Court's antitrust opinions have increasingly relied on careful analysis informed by modern economic thought. It has been a long path from the era of infamous decisions such as *Albrecht v. Herald Co.* and *Utah Pie Co. v. Continental Baking Co.*,[47] that were heavily criticized by antitrust scholars,[48] to the Court's 5-4 decision in *Leegin* and its unanimous decision in *Weyerhaeuser*, in which the opinions relied heavily on the writings of legal and economic scholars.

As noted earlier, in attempting to measure this trend we used citations to respected commentators, including Phillip Areeda, Ward Bowman, Robert Bork, and Richard Posner, as a proxy for the Court's reliance on economic analysis. This is a very rough measure, and it probably tends to be underinclusive. For instance, the Court's opinion in *Credit Suisse* applies modern economic analysis in its balancing of error costs and its consideration of incentives and possible over-deterrence of beneficial conduct. But, because the Court does not cite to one of our proxies, the decision falls into the "non-economic" group for purposes of this count.

This rough measure shows an increase in the Court's reliance on economic thought over the last four decades. Supreme Court antitrust opinions that cite the new learning increased from 30 percent in the decade beginning with the October Term 1967 to 60 percent in the next decade, and to 78 percent and 77 percent respectively, in the following two decades (see Figure 1).

47 Albrecht v. Herald Co., 390 U.S. 145 (1968) (in which the Court held that maximum RPM is per se unlawful); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) (in which the Court held that deteriorating price structure was evidence of unlawfully low prices).

48 *See, e.g.*, Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); Ward Bowman, *Restraint of Trade by the Supreme Court: The* Utah Pie *Case*, 77 YALE L.J. 1 (1967).

IV. Conclusion

Over the last four decades, the Supreme Court has increasingly relied on modern economic analysis in its antitrust opinions. We believe that this new learning in antitrust economics underlies the other three trends we have discussed:

(1) defendants' increasing win ratio;

(2) the increasing degree of agreement among the Justices; and

(3) the growing convergence between the positions taken by the Solicitor General and those adopted by the Supreme Court.

Another result of the new learning has been a change in the nature of the dialogue in Supreme Court antitrust cases. Today, as, for example, in *Leegin*, it is not uncommon to see briefs on both sides of a case making arguments based on sophisticated economic literature. In fact, in several recent cases independent economists have filed their own amicus briefs to offer their assistance to the Court. In a few cases, such as *Illinois Tool Works, Inc. v. Independent Ink*, groups of economists have filed amicus briefs taking opposing positions on the question presented.[49] Even in such cases where there is no consensus among economists, there is, nevertheless, virtually universal agreement among antitrust economists and lawyers alike, that the Court should answer questions of antitrust law with reference to economic competition—matters of consumer welfare and economic efficiency—rather than make political judgments about such economically irrelevant matters as the "freedom of traders," or "the desirability of retaining 'local control' over industry and the protection of small businesses."[50]

TODAY IT IS NOT UNCOMMON TO SEE BRIEFS ON BOTH SIDES OF A CASE MAKING ARGUMENTS BASED ON SOPHISTICATED ECONOMIC LITERATURE.

Armed with the new learning, the Court has revisited and revised many of the significant holdings of earlier eras. There are still some subjects yet to be reconsidered, such as the per se condemnation of tie-in sales, on which a majority cast substantial doubt, but which the Court ultimately upheld for the sake of stare decisis, in *Jefferson Parish Hospital v. Hyde*.[51] For the most part, though, it seems

49 Illinois Tool Works, Inc. v. Independent Ink, 547 U.S. 28 (2006).

50 *Albrecht*, 390 U.S. at 152; Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962).

51 Jefferson Parish Hospital v. Hyde, 466 U.S. 2 (1984).

likely that the Court will increasingly face novel antitrust issues as to which there is no consensus among academic economists, in cases bolstered by sophisticated economic analyses supporting each side.[52] If so, then the propensity of the Court to agree with the Solicitor General, to favor defendants, and to decide antitrust cases by a supermajority, all will be up for grabs.

52 *See, e.g.*, Brief for the United States as Amicus Curiae at 14-15, 3M Co. v. LePage's Inc. (U.S. May 28, 2004) (No. 02-1865) (urging the Court to decline review in part because further study may "provide useful guidance in resolving the proper treatment of bundled rebates"); *see also* Brief for the United States as Amicus Curiae at 11-13, Joblove v. Barr Labs. Inc. (U.S. May 23, 2007) (No. 06-830) (urging the Court to decline review, in part because "[p]atent litigation settlements that include 'reverse payments' . . . implicate complex and conflicting policy considerations" worthy of review in another case with more typical facts).