

Regulating Antitrust as Amicus: The Government’s Role in Private Enforcement Actions Before the Supreme Court

Michelle Messer
Supervised Analytic Writing, Professor Klevorick
Yale Law School
Spring 2007

CONTENTS

INTRODUCTION	2
I. A COURT-SIDE VIEW	8
A. <i>Observations from the Past Twenty-Five Years</i>	8
B. <i>Three Nonexclusive Stories</i>	12
1. Taking Cues from Public Enforcement	13
2. Borrowing Economic Expertise.....	16
3. Correlation Does Not Prove Causation	17
II. LOOKING FROM THE SIDE OF JUSTICE	21
A. <i>A Narrative Account of Amicus Activity from 1980 to the Present</i>	21
B. <i>Three More Nonexclusive Stories</i>	23
1. Fewer Cases, Better Feedback.....	24
2. Political and Economic Forces	25
Chart 1: Number of Civil Cases Filed by Antitrust Division by Year, 1980-2005	28
3. The Rise of Antitrust Regulation.....	29
III. THE AMICUS BRIEF AS REGULATORY TOOL.....	33
A. <i>Advantages</i>	33
B. <i>Disadvantages</i>	35
CONCLUSION.....	37
APPENDIX A.....	40
Table A.1: Private Antitrust Cases Granted Cert. by the Supreme Court or Where the U.S. Participated at Petition Stage, Present to 1997	40
Table A.2: Private Antitrust Cases Decided by the Supreme Court, 1996-1980.....	43
APPENDIX B.....	50
List B.1: Non-Per Curiam Decisions, 1980-1985.....	50
List B.2: Non-Per Curiam Decisions With No U.S. Oral Argument Participation, 1980-1996 ...	51
List B.3: Cases for Which the U.S. Submitted Petition-Stage Briefs, 1980-1996.....	52
List B.4: U.S.’s Failures To Persuade the Court on the Merits, 1980-1996	52

INTRODUCTION

Three antitrust cases were argued before the United States Supreme Court in its 2005 Term. For each one, the United States submitted a merits brief asking the Court to reverse the decision below and then appeared at oral argument to defend its position. In the end, all three decisions came out as reversals, just as the Government had wished. This sequence of events, other than showing an impressive record for the Government, would be unremarkable were the United States actually a party to any of the three lawsuits. But it was not—the three antitrust cases of the 2005 Term arose as private lawsuits.¹ What’s more, the Court *invited*² the United States to present its views at the petition stage for one of the three 2005 Term cases;³ the Solicitor General’s Office obliged and submitted a brief in which it urged that certiorari be granted. And yet, in the antitrust arena, this pattern of Government participation and influence within wholly private actions that reach the Court is not in any way unusual, at least not in recent years. Indeed, the refrain has already begun to play out in the current Term: in the four antitrust cases that the Court has heard, all private, the United States submitted merits briefs in support of the petitioners⁴ and presented its views in the oral arguments.⁵ In two of these, before granting

¹ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281 (2006); *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); see Brief of the United States as Amicus Curiae in Support of Petitioners, *Indep. Ink*, 126 S. Ct. 1281 (No. 04-1329), 2005 WL 1864121; Brief of the United States as Amicus Curiae Supporting Petitioners, *Dagher*, 126 S. Ct. 1276 (No. 04-805), 2005 WL 2237543; Brief for the United States as Amicus Curiae Supporting Petitioner, *Volvo Trucks*, 546 U.S. 164 (No. 04-905), 2005 WL 1248280. For transcripts of the oral arguments with the United States participating, see 2005 WL 3370426 (*Indep. Ink*), 2006 WL 147631 (*Dagher*), and 2005 WL 3036314 (*Volvo Trucks*).

² According to one former Solicitor General, such “invitations” from the Court are actually regarded as orders, with sixty days marking the respectable time period in which to respond with a brief. Interview with Drew S. Days, III, Professor of Law, Yale Law School, in New Haven, Conn. (Mar. 31, 2006). See also Catherine G. O’Sullivan, *Participation by the United States as Amicus Curiae in Private Antitrust Litigation: An Overview of the Process*, ABA Antitrust Section Spring Meeting (2004), available at <http://www.abanet.org/antitrust/at-committees/at-state/pdf/programs/spring-04/saec-osullivan.pdf>.

³ *Texaco, Inc. v. Dagher*, 543 U.S. 1143 (2005) (order inviting Solicitor General to submit views of the United States).

⁴ Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods. v. PSKS Inc.*, No. 06-480 (U.S. Jan. 22, 2007), 2007 WL 173650; Brief for the United States as Amicus Curiae Supporting Vacatur, *Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157 (U.S. Jan. 22, 2007), 2007 WL 173649; Brief for the United States as Amicus Curiae Supporting Petitioner, *Bell. Atl. Corp. v. Twombly*, No. 05-381 (U.S. Aug. 25,

certiorari, the Court invited the views of the United States. As one might guess given the Court's subsequent decision on the petitions, the United States submitted briefs advocating review in both cases.⁶ And in the one case it has thus far decided, the Court followed the disposition recommended by the United States.⁷

To be sure, government involvement as amicus in private actions before the Court is not unique to the antitrust context.⁸ Once the Court has granted review, “the Solicitor General frequently files amicus briefs on the merits in cases involving issues of public importance.”⁹ Moreover, the striking degree of influence this participation has exerted¹⁰ in recent antitrust cases has been noted by others as a historical matter across all of the Solicitor General's amicus filings.¹¹ Nonetheless, as this paper will show, the Government's amicus success in private antitrust cases still seems to stand out, as the rate of success—namely, the percentage of cases in

2006), 2006 WL 2482696; Brief for the United States as Amicus Curiae Supporting Petitioner, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007) (No. 05-381), 2006 WL 2452373.

⁵ Transcripts of the oral arguments are available at 2007 WL 967032 (*Billing*), 2007 WL 967030 (*Leegin*), 2006 WL 3422211 (*Twombly*), and 2006 WL 3422209 (*Weyerhaeuser*).

⁶ See Brief for the United States as Amicus Curiae, *Billing*, No. 05-1157 (U.S. Nov. 9, 2006), 2006 WL 3309862; Brief for the United States as Amicus Curiae, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2006 WL 1491286.

⁷ See *Weyerhaeuser*, 127 S. Ct. 1069.

⁸ According to Professor Days, invitations to the Solicitor General to express the views of the United States on granting certiorari are commonly extended in private cases brought under dual enforcement statutory schemes, because the outcome of the private suit will have an impact on government enforcement. Beyond the antitrust context, invitations to the Solicitor General at the petition stage are also extended especially often in civil rights lawsuits. Interview with Drew S. Days, III, *supra* note 2.

⁹ U.S. Dep't of Justice, Office of the Solicitor General, <http://www.usdoj.gov/osg/briefs/help.html#brieftypes> (last visited Jan. 25, 2007).

¹⁰ As discussed *infra* Subsection I.B.3, whether the correlation reflects the Government's influence or merely an independent convergence in the Court's and Government's views in these cases is, as a technical matter, impossible to discern. Still, I use “influence” here to reflect the impression one gets from the above observations. Moreover, given that the Court often requests the Solicitor General's views, it seems reasonable to assume that those views carry at least some persuasive value.

¹¹ For example, in the 1983 Term, cases in which the Government filed an amicus brief supporting the certiorari petition stood a seventy-eight percent chance of receiving review, up from two percent otherwise. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 4 (1987). A study analyzing all Supreme Court decisions from the 1946 through 1995 Terms found that petitioners fortunate enough to receive amicus support from the Solicitor General won at a rate as high as seventeen percent above the benchmark rate for petitioners, with the differential never dropping below twelve percent above the benchmark in any decade of the sample. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 803 (2000). For a brief descriptive study in the antitrust context, see John Thorne, *A Short Note on Government Amicus Briefs in Antitrust Cases*, ABA Antitrust Section Spring Meeting (2004), available at <http://www.abanet.org/antitrust/at-committees/at-state/pdf/programs/spring-04/saec-thorne.pdf>.

which its amicus views have matched the Court’s subsequent decision—has actually been 100 percent on the merits in the past ten years, even though the United States has submitted merits briefs in every private antitrust suit the Court has heard in this time span. The Solicitor General’s influence has been only slightly less than perfect in its petition-stage amicus filings, as he failed to sway the Court just once in these ten years.

But regardless of how the Government’s amicus participation and success rates in antitrust actions compare to its involvement in other areas—a question beyond the scope of this paper—antitrust law presents, for several reasons, an interesting test area in which to explore the role played by the Government as amicus in private suits before the Court. First, as legislative history indicates, Congress has placed responsibility for defining the contours of antitrust law squarely on the courts. Senator Sherman himself explained that while “it is difficult to define in legal language the precise line between lawful and unlawful combinations,” the boundary “must be left for the courts to determine in each particular case.”¹² Indeed, unlike other statutory schemes that provide for dual enforcement, the broadly stated antitrust laws have long been viewed as comprising one of a few remaining fields of federal common law. According to the Court, “The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”¹³ Thus, the antitrust laws offer no basis for inferring the judicial deference to executive branch interpretations that the Court has held other statutory schemes imply; in fact, just the opposite seems true.

¹² 21 CONG. REC. 2460 (1890).

¹³ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978). See also Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, in 1 *THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS* 442 (Theodore P. Kovaleff ed., 1994) (stating that “the interpretation of the Sherman Act rests with the judiciary”).

Second, the Court itself has exalted the role of the private litigant in antitrust enforcement, asserting that “the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”¹⁴ The Court has concluded, “Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.”¹⁵ The antitrust plaintiff “has been likened to a private attorney-general who protects the public’s interest” and “pos[es] a crucial deterrent to potential violators.”¹⁶ Indeed, the Court claims to have a “longstanding policy of encouraging vigorous private enforcement of the antitrust laws.”¹⁷ This praise finds support in legislative materials, as well. For example, a committee print produced fifty years after Congress passed the Sherman Act noted the reliance on private enforcement, explaining, “A man knew when he was hurt better than an agency or government above could tell him. Make it worth their while—as the triple-damage clause was intended to do—and injured members could be depended upon to police an industry.”¹⁸ Hence, in the antitrust realm, the private cause of action rests on solid historical grounds, such that one would expect judicial skepticism of private lawsuits as encroaching on public enforcement prerogatives to be low.

Third, antitrust is regarded as a malleable legal regime—one that may change as our economic understandings evolve. According to the Court, by “invok[ing] the common law

¹⁴ *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968).

¹⁵ *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

¹⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (internal citations omitted); *see also Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969) (“As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.”).

¹⁷ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977).

¹⁸ *Temp. Nat’l Econ. Comm.*, 76th Cong., *Antitrust in Action* 10 (Comm. Print 1941) (Walton Hamilton & Irene Till); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (stating that the legislative histories of the Sherman and Clayton Acts indicated that private suits were meant to provide the added values of deterrence and compensation).

itself,” the Sherman Act took on a “dynamic potential.”¹⁹ In an amicus brief urging the Court to overturn a prior antitrust precedent, the Department of Justice and Federal Trade Commission (FTC) cited this language in asserting that “[t]he essence of that potential is the ability to adapt to changed circumstances or to the accumulation of experience. Thus, the Court has not been unwilling to reconsider previous antitrust decisions whose rationales have been called into question.”²⁰ The Court’s subsequent decision accepted the Government’s characterization nearly verbatim, declaring, “[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.”²¹ It further explained that “[i]n the area of antitrust law, there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience.”²²

In addition, scholars of the Sherman Act’s legislative history have echoed this view of antitrust law as a regime meant to evolve along with economic theory.²³ Therefore, as a field influenced heavily by expertise beyond the legal realm, antitrust is an area in which amicus participation may be particularly valuable to the Court given its institutional constraints, and in which such participation can have particularly dramatic effects given the admitted malleability of the Court’s prior antitrust doctrines. At the same time, politics play into the views on antitrust enforcement, so antitrust also presents a context in which executive interference may pose separation-of-powers concerns, especially because *stare decisis* carries less weight.

¹⁹ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988).

²⁰ Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal at 26, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (No. 96-871), 1997 WL 163852.

²¹ *Khan*, 522 U.S. at 21.

²² *Id.* at 20.

²³ See, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 47 (1966) (“The rules implied by the [consumer-welfare] policy [of the Sherman Act] are alterable as economic analysis progresses . . .”).

Thus, as an end in itself and a starting point for research into the Government's amicus role in other areas of law,²⁴ this paper examines the Government's amicus participation—via the Department of Justice—in private antitrust lawsuits before the Supreme Court to develop an understanding of the function that participation serves both for the Court as its consumer and the Government as its supplier. The main vehicle for this endeavor is a summary compilation of all private antitrust cases decided by the Court dating back to 1980. From the present back to 1997, the summary also includes cases denied certiorari but in which the Government participated as amicus at the petition stage, whether or not it entered at the Court's behest.

My analysis proceeds in three parts, two empirical but complemented with explanatory theories and one normative. I begin in Part I on the demand side by analyzing this historical information from the Court's perspective, giving a descriptive account of the Court's interest in private antitrust cases overall, its willingness to engage the Government at the petition stage or in oral argument, and its tendency to align itself with the Government's views. Then, also in Part I, I offer explanations for the patterns I observe in the Court's relationship with the Government as amicus. Part II undertakes an analysis similar to Part I's, but this time from the Department of Justice's perspective—the supply side. Accordingly, I summarize changes in the Government's apparent interest in participating as antitrust amicus, the success of its participation, and the parties it tends to support. In addition, I consider those observations alongside the Government's own enforcement activities, showing how for the Department of Justice amicus participation serves as a form of antitrust regulation. Part III weighs the benefits and costs of amicus activity

²⁴ For a recent take on the Government's amicus role in bankruptcy cases, see Ronald J. Mann, *The Supreme Court, the Solicitor General and Bankruptcy: BFP v. Resolution Trust Corporation* 24 (U. of Tex. Sch. of Law, Law & Econ. Research Paper No. 84, 2006) available at <http://ssrn.com/abstract=931288> (describing Court's "willingness to defer to important governmental interests on which the bankruptcy power otherwise might intrude").

as a regulatory tool, particularly as applied to antitrust law. Finally, I conclude with thoughts on the lessons that come from recognizing Government amicus participation as regulation.

I. A COURT-SIDE VIEW

A summary look back on the Court's antitrust docket dating to 1980 reveals an active interest by the Court in the field, although interrupted by one sustained dry spell. It also shows an increasing consistency between the Court's petition and merit dispositions and the Government's recommendations as amicus. Upon closer examination of the Court's decisions, three stories for these demand-side observations emerge: that the Court gives special weight to the Government's own enforcement interest and experience in antitrust, both as a principled matter and for the sake of uniformity; that the Court recognizes an institutional advantage of the Government in economic expertise; and, simply, that the Court knows good arguments from bad arguments. I take up each of these explanations in turn after presenting a detailed account of the trends in the Court's conduct as reflected by the data.

A. Observations from the Past Twenty-Five Years

Table A.1 of Appendix A lists in reverse chronological order all private antitrust cases that the Court has accepted for review from 1997 to the present, as well as any cases during that time that the Court declined to review but for which the Solicitor General submitted a brief presenting the views of the United States as to whether certiorari should be granted. Many more petitions reached the Court and were denied without any input from the Solicitor General. For the most recent years, the table shows a fairly strong interest in antitrust by the Court, which has heard nine private cases in the past three years. But between 1997 and 2003, the Court decided

just two private cases.²⁵ The table also reveals that, at least as far back as 1997, the United States has enjoyed tremendous success in the positions it has taken on the issues presented before the Court by private antitrust litigants. In fact, the Court has agreed with the Government's views on the merits every time during this period, not once affirming the decision below and every time deciding in favor of the antitrust defendant.

In addition, of the sixteen cases in the period in which the Solicitor General's Office submitted an amicus brief at the petition stage, only in one did the Court deviate from the Government's advice. At the petition stage in *Nynex Corp. v. Discon, Inc.*, the Government had noted flaws in the appellate court's decision but advocated against certiorari based on the case's procedural deficiencies and unusual claim.²⁶ But even that case was decided in accordance with the position taken in the Government's merits brief. Furthermore, all but one of those sixteen petition-stage amicus briefs were submitted upon invitation of the Court,²⁷ and all but two of the eleven petitions that the Court denied in accordance with the Government's advice had been submitted by antitrust plaintiffs.²⁸ The Court has never in this time explicitly invited the views of the United States at the merits stage, but the Solicitor General's Office has presented those views by submitting briefs on its own initiative in every private antitrust action to which the Court has granted certiorari. Likewise, the Solicitor General's Office has, with the Court's approval, presented the views of the United States at oral arguments in all of those cases.

²⁵ I have excluded from the list a third case, *USPS v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004), because the Solicitor General represented the Postal Service before the Court. The Court did not grant certiorari in any public enforcement cases during this dry spell either.

²⁶ See Brief for the United States and the Federal Trade Commission as Amici Curiae at 18-19, *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (No. 96-1570), 1998 WL 34080984.

²⁷ The lone exception was the Government's petition-stage brief in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

²⁸ The Government submitted briefs advising the Court to reject the certiorari petitions of the antitrust defendants in *3M Co. v. LePage's Inc.*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (1998), and *Portland General Electric Co. v. Columbia Steel Casting Co.*, 111 F.3d 1427 (9th Cir. 1996), *cert. denied*, 523 U.S. 1112 (1998).

Now compare these findings to the information in Table A.2. Table A.2 lists reverse-chronologically all private antitrust cases decided on the merits by the Supreme Court between 1980 and 1996.²⁹ This table echoes the strong interest in private antitrust displayed in Table A.1, with a brief continuation of the dry spell noted above, which seems to have begun in 1994, as the Court decided just one antitrust case, *Brown v. Pro Football, Inc.*,³⁰ between 1994 and 1996, and bringing to three the total decided in the ten years from 1994 to 2003. In contrast, the Court decided three or more private antitrust cases in ten of the fourteen years between 1980 and 1993, with a maximum of six decided in 1982 alone. In addition, the Court agreed with the Government's views on the merits in most but not nearly all cases, unlike the perfect correlation of the past ten years illustrated in Table A.1. In fact, the Court departed from the Government's recommendation seven times in the thirty-two cases for which the Government submitted an amicus brief on the merits. Notably, the Court's merits decisions did not invariably favor the antitrust defendants as in Table A.1, but were, instead, nearly evenly split between plaintiffs and defendants. In this older set of cases the Court affirmed the decision below on numerous occasions.

The Court also showed a greater tendency to rebuff the Government's recommendations at the petition stage in this period than in the ten most recent years; in five cases the Court granted certiorari against the advice in the Government's briefs it had invited.³¹ In addition, in two uninvited petition-stage amicus briefs, the Government urged the Court to limit its grant of certiorari to the first question presented in the respective petitions, but the Court decided to

²⁹ The Department of Justice's website posts all petition-stage amicus briefs filed by the Department since 1996, so locating briefs submitted pre-1996 for cases later denied certiorari is a considerably more difficult task—one that I have not achieved for the present work.

³⁰ 518 U.S. 231 (1996).

³¹ These cases were *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

accept review of the second question presented, too.³² In the cases in which the Court ultimately granted certiorari, it invited the Government's views on petitions at a rate comparable to the rate presented in Table A.1: thirteen invitations in cases later granted certiorari out of forty-six cases granted certiorari in total, relative to the past ten years' ratio of four to eleven. Of course, this information does not reveal much without knowing how many times from 1980 to 1996 the Court invited the Government's views on private antitrust petitions and then denied those petitions. However, at least twice in that span the Court invited the Government's views, the Government advised the Court to grant the petitions, and the Court went on to deny them.³³ Furthermore, although in the ten most recent years the Court has not once invited the Government's views on the merits, it did so once in the early 1980s for *Associated General Contractors, Inc. v. California State Council of Carpenters*,³⁴ in which the Government had not submitted—nor was invited to submit—a petition-stage amicus brief.

Finally, the Court's actions on two of the Solicitor General's motions to present the views of the United States in oral argument stand in marked contrast to the rest of the set and, especially, to the results in Table A.1. Twice in 1988, in *Patrick v. Burger*³⁵ and *Allied Tube & Conduit Corp. v. Indian Head Inc.*,³⁶ the Court denied the Government's requests for argument time, though the Court went on to decide the cases in accordance with the Government's merits amicus briefs. It had denied a similar request in 1985 before granting the Solicitor General's

³² The two cases were *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) and *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983).

³³ See Thorne, *supra* note 11, at 5. The two cases were *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991), and *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

³⁴ 459 U.S. 519 (1983). For a copy of the Government's brief, see Brief for the United States as Amicus Curiae Supporting Reversal, *Associated General Contractors*, 459 U.S. 519 (No. 81-334), 1982 U.S. S. Ct. Briefs LEXIS 1209.

³⁵ 486 U.S. 94 (1988).

³⁶ 486 U.S. 492 (1988).

second request two months later for the same case.³⁷ Thus, what seemed to constitute a mere formality based on the perfect consistency with which the Court granted the Solicitor General's oral argument motions in the last decade's cases in Table A.1 shows itself in Table A.2 to be more discretionary.

In sum, an overview of the past twenty-five years of private antitrust at the Supreme Court suggests several conclusions. Antitrust—particularly as presented via private enforcement actions—has stood as a mainstay of the Court's docket for most of these years, albeit having laid mostly dormant between 1994 and 2003. The Court has shown a consistent interest in—or demand for—the Government's views on certiorari and on the merits of cases, often actively seeking those views at the petition stage. But in the 1980s and early 1990s the Court did not follow those views quite as uniformly as it has in the ten most recent years, and its steady habit of deciding in favor of antitrust defendants for the last decade now does not span the full twenty-five years either. Similarly, the Court's unbroken willingness in recent years to grant argument time to the Government as amicus may mark a departure from its seemingly closer scrutiny of such requests in the past.

B. Three Nonexclusive Stories

Are there stories to tell that help to explain the Court's relationship to the Government as antitrust amicus? A more substantive examination of the Court's decisions reveals three viable yet nonexclusive accounts. The first points to the Government's own antitrust enforcement responsibilities and experience as explaining the Court's special interest in and respect for the Government's amicus advice. The second notes the importance—arguably increasing over time—of economic analysis to the evolution of antitrust doctrines and cites the expertise that the

³⁷ Compare *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 473 U.S. 931 (1985) (granting Solicitor General's request to participate in oral argument), with 473 U.S. 903 (1985) (denying Solicitor General's request to participate in oral argument).

Antitrust Division's economists supply to explain any observed reliance by the Court on the Government's views. The third credits the Court with picking out the strongest arguments, such that any correlation between the Court's decisions and the Government's recommendations reflects the soundness of the Government's positions and not any special consideration by the Court.

1. Taking Cues from Public Enforcement

The dual enforcement provisions of antitrust set it apart from many substantive areas in which the Government participates as amicus.³⁸ To the extent that the Court's decisions match the Government's amicus positions even more consistently in private actions brought under dual enforcement statutes than in other types of cases, this characteristic of antitrust law may go a long way in explaining the conclusions drawn from Tables A.1 and A.2. But because such an analysis lies beyond the scope of this paper, the discussion presented here is largely theoretical and restricted to evidence garnered from the texts of the Court's private antitrust decisions.

The principal way in which the Government's enforcement duty influences the Court's decisions—other than evincing a strong federal interest in their outcomes—is by the experience, whether real or just perceived, that the Government can bring to bear on the questions facing the Court. For instance, in *Copperweld Corp. v. Independence Tube Corp.*, the Court declared that its decision was “further suggested by the fact that the Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can ‘combine’ or ‘conspire’ under § 1.”³⁹ Based upon the existence of that enforcement policy, the Court concluded, “Elimination of the intra-enterprise conspiracy

³⁸ Compare, for instance, the anecdotally higher success rate shown here to an anecdotally lower—though still strong—rate presented in the bankruptcy context. See Mann, *supra* note 24.

³⁹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984); see also *id.* at 777 n.25 (quoting Government's brief in support).

doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple antitrust enforcement.”⁴⁰ Moreover, in deciding “that there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing,” the *State Oil Co. v. Khan* Court plainly said “[t]hat is so not only because it is difficult to accept the assumptions underlying *Albrecht*, but also because *Albrecht* has little or no relevance to ongoing enforcement of the Sherman Act.”⁴¹ Thus, the Court seems to take cues from the Government’s enforcement experience: if the Government has found it worthwhile to institute or abandon a particular enforcement policy, the Court should follow the Government’s tried-and-true approach.⁴²

The Government’s antitrust enforcement responsibility presents a secondary consideration for the Court as well: the value of ensuring uniformity between public enforcement policies and the liability that may be imposed via private enforcement actions. Indeed, the Court displayed such sensibility in one of its most recent decisions by referring to the Government’s enforcement guidelines, which forgo a presumption of market power for patented products. The Court explained, “While that choice is not binding on the Court, it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.”⁴³

This federal interest story may also help account for the Court’s departures from the Government’s views. Where the Government’s enforcement interest in the outcome of a particular case seems tenuous, the Court might regard the Government’s amicus participation

⁴⁰ *Id.* at 777.

⁴¹ *State Oil Co. v. Khan*, 522 U.S. 3, 18 (1997).

⁴² If accurate, this account of the Court’s behavior raises the concern that politics might influence, more than merely public enforcement of antitrust, the substance of antitrust *law* itself. For further discussion of this separation-of-powers issue, see *infra* Part III, especially pp. 33, 36-37.

⁴³ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1293 (2006).

with some skepticism.⁴⁴ Lincoln Caplan presents evidence that this, in fact, occurred during the Reagan Administration, most markedly at the time of Solicitor General Fried’s tenure⁴⁵—the very period in which the Court’s conspicuous denials of the Government’s requests to participate in oral argument appear in Table A.2. As Caplan describes, “Fried defined the federal interest as broadly as possible Instead of submitting briefs that were seen as attempts to help the Court, Fried filed position papers to put the Administration on record about questions of law it considered important for whatever reason.”⁴⁶ Thus, the Court “turned down the SGs’ requests on twelve occasions in the first five Terms of the Reagan era, when the Reagan SGs had asked the Justices for permission to argue as a friend of the Court as many times as their predecessors had in the previous twenty-seven terms.”⁴⁷ Although this frustration by the Court may explain the two denials for oral argument time in private antitrust cases, the federal interests at stake in those two cases were not so different from the numerous other antitrust cases in which the Court has granted the Government time. One involved the scope of state-action immunity,⁴⁸ and the other addressed the applicability of *Noerr-Pennington* immunity,⁴⁹ both matters seemingly within the

⁴⁴ The antitrust cases from the last twenty-five years offer no direct support for this theory—unsurprisingly so, considering that explicit statements by the Court doubting the legitimacy of the Government’s amicus interest in a case would likely carry with them strong symbolic consequences. But a discreet manifestation of this sort of skepticism from the Justices might be seen in the oral argument and subsequent decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). Although the Court agreed with the Government’s recommendation that it reverse the decision below, it “decline[d] the invitation” from the Government to go even further and ban predatory pricing-based merger challenges by competitors altogether. *Id.* at 119-22; *see infra* text accompanying notes 67-68. Focusing on the latter issue, the Justices at oral argument peppered the Deputy Solicitor General with questions as to why the Court should bar private parties from suing on a theory that the Government itself could still use. *See* Transcript of Oral Argument, *Cargill*, 479 U.S. 104 (No. 85-473), 1986 U.S. TRANS LEXIS 22, at *21-24. The Court, thus, seemed skeptical of the federal interest to be served by the Government’s request and, ultimately, refused to go along with it. *See Cargill*, 479 U.S. at 121 (“It would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur.”).

⁴⁵ *See* CAPLAN, *supra* note 11, at 258-60.

⁴⁶ *Id.* at 199.

⁴⁷ *Id.* at 260.

⁴⁸ *Patrick v. Burget*, 486 U.S. 94 (1988).

⁴⁹ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

realm of federal public enforcement concerns. Perhaps the exasperated Court simply believed that the Government's views were sufficiently well-represented in its briefs.

2. Borrowing Economic Expertise

Given the arguably increasingly influential role economics has played in the development of antitrust jurisprudence,⁵⁰ it seems natural that the Court would look to the Antitrust Division, with its staff of economists on hand since 1938 informing the Department of Justice's legal positions,⁵¹ to understand complex issues. In fact, with the Department's creation of the Economic Policy Organization in 1973, the staffing and function of economists at the Division have expanded significantly, to the point that today about sixty Ph.D. economists work in the Antitrust Division's Economic Analysis Group and participate in all stages of the Division's legal analyses.⁵² By this account, then, the deference observed may be explained as a matter of institutional competence. Both opposing parties in private litigation inevitably claim to have economics on their side, and the Government is better situated than is the Court to decide which arguments are actually most economically sound, since the Court does not have its own staff of economists. Again, one of the Court's latest antitrust decisions lends some support to this understanding; the economic authorities cited in *Illinois Tool Works Inc. v. Independent Ink, Inc.* had each been referenced originally by the Government's amicus brief on the merits.⁵³

⁵⁰ This characterization seems reasonable given the shift from categorical doctrines to conceptual analysis. See ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 78 (2002).

⁵¹ See ANTITRUST DIV., U.S. DEP'T OF JUSTICE, TIMELINE OF ENFORCEMENT HIGHLIGHTS, <http://www.usdoj.gov/atr/timeline.pdf>.

⁵² Charles A. James, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Program on Antitrust Policy in the 21st Century: Core Values and Convergence 16 (May 15, 2002), available at <http://www.usdoj.gov/atr/public/speeches/11148.pdf>.

⁵³ Compare *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1291 n.4 (2006) (citing works by Areeda, Hovenkamp et. al, and Landes & Posner), with Brief of the United States as Amicus Curiae in Support of Petitioners at 10, *Indep. Ink*, 126 S. Ct. 1281 (No. 04-1329), 2005 WL 1864093 (same).

This economic expertise story offers insight into the apparent lack of success of antitrust amicus briefs filed by state attorneys general. They, too, have strong enforcement interests and experience, and yet one study found “no apparent correspondence between what the state AG amicus brief asked courts to do and what the courts ultimately did.”⁵⁴ What the state attorneys general offices may be missing—at least as a general rule⁵⁵—are the Ph.D. economists who help inform the Department of Justice’s policy and enforcement decisions, and whose expertise the Government’s amicus briefs make available to the Court. Moreover, the economic expertise story fits well with the observation that the Court has tended to agree with the Government’s amicus arguments with greater consistency in recent years; moving away from per se and presumptive treatment, the Court has placed great emphasis on economic theory in its latest rejections of its own precedents.⁵⁶ This story fails to explain, however, the Court’s interest in the Government’s views in cases in which economic analysis seems practically irrelevant to the antitrust questions at issue, such as those involving federal preemption.⁵⁷ Economic expertise may play a role in this relationship, but it is not playing alone.

3. Correlation Does Not Prove Causation

Of course, just because a simple comparison between the Court’s decisions in private antitrust actions and the Government’s recommendations as amicus shows a striking consistency between the two does not mean that the Court merely follows whatever the Government says, or even that it puts a thumb on the scale in the Government’s favor. The Court might well have decided each of these cases the very same way had the Government never submitted amicus

⁵⁴ Thorne, *supra* note 11, at 3.

⁵⁵ See, e.g., Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 39(1995) (“[M]ost states have only three to five antitrust lawyers, others no more than one or two, and some states none at all. In addition, almost none of the states has a staff economist . . .”).

⁵⁶ See, e.g., *Indep. Ink*, 126 S. Ct. at 1291 n.4, 1293; *State Oil Co. v. Khan*, 522 U.S. 3, 17-19 (1997).

⁵⁷ E.g., *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

briefs in them. Without a control group to test the causal hypothesis,⁵⁸ it can be nothing more than *suggested* by the information compiled in Tables A.1 and A.2. Responsible statistical analysis requires as much, but this correlation-without-causation story also finds some support in the Court’s opinions and in the Court’s exchanges with the Government as amicus in oral arguments. Specifically, those cases in which the Court disagreed with the Government seem to offer the greatest insights into the Court’s perspective on the value of the Government’s amicus filings in private antitrust lawsuits.

The most recent private antitrust cases in which the Court departed substantially from the dispositions advocated by the United States on the merits date back to 1996, 1992, 1990, and 1986.⁵⁹ Two characteristics stand out about these four cases. First, in each one, the majority opinion referred several times to the brief submitted by the United States and took care to explain either why the Court disagreed with the Government’s views⁶⁰ or how its decision still fit with those views.⁶¹ This indicates that the Court at least gives the Government’s arguments serious attention, thereby casting further anecdotal doubt on the possibility that the Court’s decisions and the views of the United States as amicus are entirely independent of one another. Second, two of the three cases in which the Court’s opinion admittedly conflicted with that expressed by the United States involved the intersection between antitrust and another statutory scheme. In both, the Court seemed concerned that the Government’s position misunderstood or underappreciated the competing legislation—labor laws in one and ratemaking laws in the other—and the oral

⁵⁸ As Thorne points out in the instance of petition-stage advice, this would contain “cases where the SG would have filed an uninvited amicus brief but chose not to as a test.” Thorne, *supra* note 11, at 4.

⁵⁹ *See id.* at 7.

⁶⁰ *See* *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242, 244-45, 246-47 (1996); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 470 nn.16-17, 472-75 (1992); *Square D Co. v. Niagara Frontier Bureau, Inc.*, 476 U.S. 409, 417-20 (1986).

⁶¹ *See* *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 565 n.22 (1990).

argument transcripts bear out these same concerns.⁶² Meanwhile, in the third case, *Eastman Kodak*, the Court’s decision focused on the divergence between the economic theory espoused by Kodak and the Government and “the contrary actual results.”⁶³ So too, in oral argument, several of the questions posed by the Court to the Assistant Attorney General⁶⁴ centered on the possibility that reality differed from what the economic theory espoused by the Justice Department would predict in this situation.⁶⁵

Even where the Court has agreed with the Government’s recommendation as to the ultimate disposition of a case, it has on a few occasions stopped short of accepting all of the Government’s views. For instance, as recently as in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, the Court set aside the Government’s claim that the Robinson-Patman Act simply does not apply to competitive-bidding sales, explaining, “We need not decide that question today.”⁶⁶ Likewise, in *Cargill, Inc. v. Monfort of Colorado, Inc.*, the Court “decline[d] the invitation” of the United States to adopt a per se rule against competitor suits to challenge acquisitions on the basis of predatory pricing,⁶⁷ a recommendation upon which the Court questioned the Deputy Solicitor General during oral argument.⁶⁸

⁶² In *Brown*, the Court interrupted the Deputy Solicitor General just as he finished saying, “and may it please the Court,” to ask why the NLRB had not been included on the United States brief. Transcript of Oral Argument, *Brown*, 518 U.S. 231 (No. 95-388), 1996 U.S. TRANS LEXIS 30, at *13.

⁶³ *Eastman Kodak*, 504 U.S. at 472. Of perhaps particular detriment to the Government’s theory was the fact that the Federal Government’s own equipment purchasing systems could not satisfy the theory’s assumptions. *See id.* at 475.

⁶⁴ Although typically the Solicitor General, or someone from the Solicitor General’s office, conducts the oral arguments on behalf of the United States before the Court, the Assistant Attorney General of the Antitrust Division has substituted for the Solicitor General in several private antitrust cases. *See, e.g.*, Transcript of Oral Argument at 1, *Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 1047902 (listing the appearance of Assistant Attorney General R. Hewitt Pate for the United States as amicus curiae); Transcript of Oral Argument at 1, *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (No. 96-871), 1997 WL 640582 (listing the appearance of Assistant Attorney General Joel I. Klein for the United States as amicus curiae).

⁶⁵ Transcript of Oral Argument at 21-26, *Eastman Kodak*, 504 U.S. 451 (No. 90-1029), 1991 WL 636270.

⁶⁶ 126 S. Ct. 860, 872 (2006).

⁶⁷ 479 U.S. 104, 121 (1986).

⁶⁸ Transcript of Oral Argument, *Cargill*, *supra* note 44, at *21-24.

These cases suggest that although the Court is willing to extend a general presumption in favor of the Government's position in private antitrust cases, it does not blindly follow the advice of the United States as amicus. Instead, the Court has shown itself ready to scrutinize the Government's arguments, sometimes for the sake of judicial restraint, and particularly when cases involve other, potentially conflicting statutory schemes or present factual contexts at odds with the economic theory adopted by the Government. The Court may, then, just do its best to distinguish good arguments from bad ones. But its analyses nonetheless indicate that the Government's arguments do factor into the Court's decision-making process, more so than those of other amici; after all, the Government's views must offer some value if the Justices take time to engage them at oral argument and in the resulting opinion. Indeed, the Court has cited its own reliance on the Government's views in explaining its decisions. In one of its most recent antitrust decisions the Court took pains to point out that the presumption it now overturned—with the support of the Government as amicus—had originally been adopted upon the advice of the brief the United States had submitted in a public antitrust action before the Court in 1947.⁶⁹

Thus, this demand story works well in conjunction with the other two stories offered. The Court respects the Government's interest and experience in antitrust enforcement and values the Antitrust Division's economic expertise, so it looks to the Government for amicus help but departs from that advice when the Government overreaches, especially in cases where the Government's institutional advantages are less relevant.

⁶⁹ See *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1289 (2006) (referring to the Government's brief in *International Salt Co. v. United States*, 332 U.S. 392 (1947)).

II. LOOKING FROM THE SIDE OF JUSTICE

Analyzing Tables A.1 and A.2 from the perspective of the Department of Justice, which represents the views of the United States in amicus briefs, yields additional information. The Government's 100 percent amicus participation rate in private antitrust cases granted certiorari over the past ten years does not extend farther back in time, and its consistent success on the merits is, likewise, only a recent development. Also, the Government has tended increasingly toward favoring antitrust defendants. Three more stories help in interpreting these findings, this time from the Department of Justice's supply-side standpoint: that a shrinking Supreme Court docket has allowed the Government to supply its amicus views in a greater percentage of cases, and successes have fed further participation; that the scope of the Government's antitrust enforcement activities has narrowed in accordance with political and economic beliefs; and, most importantly, that the Government has used amicus participation as a means of regulating in antitrust. I begin with another detailed look at the data compiled in Tables A.1 and A.2 before turning to the explanations they suggest.

A. A Narrative Account of Amicus Activity from 1980 to the Present

Table A.1 shows that the United States has submitted a merits amicus brief and joined at oral argument in each of the eleven private antitrust cases heard by the Court since 1997. Not only has the Government participated in these cases, but it has done so with great success: every decision thus far has come out as the United States recommended. Remarkably, in all eleven amicus briefs submitted at the merits stage, the Government has advocated in favor of the antitrust defendant. At the petition stage, moreover, the lower courts' decisions in nine of the twelve cases in which the Government counseled against granting certiorari had favored antitrust defendants. And in two of the three remaining cases the Government's brief rested wholly on

procedural—not substantive—grounds: in *3M Co. v. LePage's Inc.*, empirical and judicial experience with the relevant business practice was too limited and no circuit split had yet arisen;⁷⁰ in *Nynex Corp. v. Discon, Inc.*, an unusual claim and the case's early procedural posture meant the decision below had little general applicability and review would be premature.⁷¹ In all, from the Department of Justice's standpoint, the Court has demonstrated a keen interest over this last decade in the views of the United States, having invited its opinion on whether to grant certiorari fifteen times, followed those certiorari opinions fourteen times, and granted all eleven of its requests for oral argument time. Only once did the Government submit an uninvited petition-stage brief.

Table A.2, however, presents a somewhat different picture. Although the Government has shown an active amicus interest in private antitrust actions before the Court dating at least as far back as 1980, it by no means participated in every case, as it has done more recently. Of the twenty-three non-per curiam decisions between 1980 and 1985, for instance, seven had no amicus participation at all from the Government on the merits, and three more did not have amicus involvement in oral argument.⁷² Actually, over the whole period from 1980 to 1996, the Government was absent from oral argument in nineteen private antitrust lawsuits, only two of

⁷⁰ See Brief for the United States as Amicus Curiae, *3M Co. v. LePage's Inc.*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004) (No. 02-1865), 2004 WL 1205191.

⁷¹ See Brief for the United States and the Federal Trade Commission as Amici Curiae, *supra* note 26, at 18-19. Indeed, when the Court went on to grant the antitrust defendant's petition in *Nynex* despite the Government's advice to the contrary, the Government submitted an amicus brief on the merits arguing in favor of vacating the decision below. See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Vacating the Judgment, *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (No. 96-1570), 1998 WL 321285. In the third case, however, the Government's petition-stage amicus brief took a somewhat more substantive approach. Upon the Court's invitation, the Government counseled against granting the defendant's certiorari petition, because the circuit court had applied the correct standard—one established by the Court and undisputed among the circuits—and the standard's application to the case's facts did not merit the Court's discretionary review. See Brief for the United States as Amicus Curiae at 7-8, *Portland Gen. Elec. Co. v. Columbia Steel Casting Co.*, 111 F.3d 1427 (9th Cir. 1996), *cert. denied*, 523 U.S. 1112 (1998) (No. 97-49), available at <http://www.usdoj.gov/atr/cases/f1000/1069.htm>.

⁷² List B.1 of Appendix B names these twenty-three cases and indicates which ones did not see the United States participate as amicus via a merits brief or at oral argument.

which were due to the Court's denials of its requests to participate.⁷³ Since 1988, though, the Court has consistently granted these requests within the private antitrust realm. Furthermore, from 1980 to 1996 the Government submitted nine out of its twenty-two petition-stage briefs without the Court's invitation, and it failed to convince the Court to limit or deny review in five of those twenty-two cases.⁷⁴ On the merits, the Government failed to persuade the Court of its views seven times, and substantially so in six of those cases.⁷⁵ Finally, the Government's amicus views favored the antitrust plaintiffs nearly as often as they favored defendants; in fact, three of the times in which the Court rejected the Government's recommendation, the Government had argued in favor of the plaintiffs.⁷⁶

Thus, when placed in the context of the last twenty-five years of the Government's role as antitrust amicus, the past decade reflects a considerable increase in the Government's participation rate both in writing and in oral argument, its rate of success on petitions and on the merits, and its support for antitrust defendants.

B. Three More Nonexclusive Stories

When viewed from the Department of Justice's perspective, the findings drawn from Tables A.1 and A.2 support three different interpretations of the Government's amicus participation in private antitrust cases before the Court. The story least endogenous to the Government points to the reduction in the Court's docket as evidence that greater amicus

⁷³ These cases are specified in List B.2.

⁷⁴ List B.3 details these counts.

⁷⁵ For an enumeration of the seven cases, see List B.4. In *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), the Court agreed with the Government that the antitrust suit should be allowed to continue but disagreed on the standards that should be applied. See Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity than Ever*, 62 ANTITRUST L.J. 327, 402 n.397 (1994). One of the six cases whose disposition by the Court departed from the Government's amicus brief recommendation, however, was *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), in which Congress blocked the Department of Justice from arguing in favor of abandoning the per se rule against resale price maintenance. See Department of Commerce, Justice, State, the Judiciary and Related Agencies Appropriation Act, § 510, 97 Stat. 1101, 1102 (1983).

⁷⁶ These three cases were *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), and *Hoover v. Ronwin*, 466 U.S. 558 (1984).

participation has simply become more manageable as an institutional matter. The second story points to political and economic influences affecting the Government's enforcement practices and, thereby, its views as amicus in private enforcement actions—particularly as the Court has shown itself increasingly amenable to those same influences. The third places the Government's amicus participation into the context of a larger trend of antitrust regulation. Like the stories in Section I.B, these stories can work together to explain the supply patterns we observe.

1. Fewer Cases, Better Feedback

The dramatic reduction in the number of cases granted certiorari has recently received much attention by Court commentators.⁷⁷ In its 2005 Term, the Court issued just sixty-nine signed opinions, or “fewer than half the number the court was deciding as recently as the mid-1980s,” and it is on pace to accept far fewer this Term.⁷⁸ The steepest decline came with the 1986 appointment as Chief Justice of William Rehnquist, who “had made clear his belief that the court under Chief Justice Warren E. Burger was taking too many cases.”⁷⁹ Congress facilitated Rehnquist's efforts to diminish the Court's docket when, in 1988, it abolished the Court's mandatory jurisdiction over appeals from federal court decisions declaring federal laws unconstitutional, federal appellate decisions declaring state laws unconstitutional, and state court decisions invalidating federal statutes or upholding state statutes against claims of federal unconstitutionality.⁸⁰ The decline in cases accepted by the Court coincides with the rise in the Department of Justice's consistency in supplying the Government's antitrust views as amicus.

With fewer cases on the docket overall, the Appellate Section of the Antitrust Division can

⁷⁷ *E.g.*, Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1165465832.shtml> (Dec. 6, 2006, 23:30 EST) (receiving forty-two comments); Posting of Tom Goldstein to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/11/state_of_the_do.html (Nov. 30, 2006, 17:30 EST).

⁷⁸ Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1.

⁷⁹ *Id.*

⁸⁰ *Id.*; see Pub. L. No. 100-352, 102 Stat. 662 (1988). The 1988 Act also eliminated the mandatory review provisions contained in the Regional Rail Reorganization Act, the Insecticide, Fungicide and Rodenticide Act, the Federal Election Campaign Act and the Trans-Alaska Pipeline Authorization Act. See 102 Stat. at 663.

presumably devote its attention to a greater percentage of those cases. This result should hold true across all types of private cases in which the Government has shown an amicus interest, not just antitrust.

Still, the decline in cases accepted by the Court must not be the only force at play in explaining the increasing consistency with which the Government has participated as amicus in the antitrust arena; after all, while the Court's total docket may have shrunk, it still has contained multiple private antitrust cases in recent years, as Table A.1 indicates. Indeed, a comparison between Tables A.1 and A.2 shows that some of the years in which the Government did not consistently participate as antitrust amicus contained fewer private antitrust cases than did several recent years in which the Government participated every time.⁸¹ Hence, the Government's antitrust amicus participation rate has increased even though the size of the Court's docket has not changed much, if at all, from the perspective of the Appellate Section of the Antitrust Division—the section that generally bears the lead responsibility in preparing the Government's antitrust amicus filings.⁸² But another, similarly apolitical force that may be working to increase the Government's amicus participation rate in antitrust is a simple feedback effect from the success the Government has enjoyed over the last several years. The Court's recent consistency in adopting the Government's arguments, whether independently or not, may be spurring the Government to devote further resources to presenting its amicus views in more cases.

2. Political and Economic Forces

The first story has nothing to say about the Government's shift from lending its support roughly evenly between antitrust defendants and plaintiffs between 1980 and 1996 to intervening

⁸¹ For example, the Government participated in just one of the two private antitrust cases that the Court decided in 1991, whereas it participated in all three antitrust cases decided on the merits in 2006.

⁸² See O'Sullivan, *supra* note 2, at 2.

on the merits only on behalf of defendants over the last decade. This second story takes closer aim at that observation. It focuses on “the upgrading of economic analysis in the enforcement of antitrust”⁸³ and a concomitant narrowing of political commitments to antitrust enforcement. The Reagan Administration admittedly pursued as its “central policy objective . . . the maximization of consumer welfare through increased firm and market efficiency.”⁸⁴ Although the movement away from distributive and “individual rights” approaches toward an efficiency approach “began . . . well before 1980,” in the 1980s economic efficiency became “the *single goal*” of the Antitrust Division’s directors.⁸⁵ This exclusive commitment to the consumer welfare model⁸⁶ led the Antitrust Division to abandon several prior doctrines for the purposes of its own enforcement decisions. The abandoned doctrines included, most notably, the per se rules against vertical minimum and maximum price fixing,⁸⁷ as well as, more recently, the per se illegality of tying arrangements involving patented products.⁸⁸

Meanwhile, “in a series of decisions beginning with *Continental T.V., Inc. v. GTE-Sylvania, Inc.*,⁸⁹ the Supreme Court . . . virtually abandoned the ‘individual rights’ approach to

⁸³ Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice—in Perspective* 6, <http://www.usdoj.gov/atr/hmerger/11257.pdf> (2002).

⁸⁴ William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust*, 60 TEX. L. REV. 661, 702 (1982).

⁸⁵ Kauper, *supra* note 13, at 454-55, 457 (emphasis added); *see also* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 223 (1985) (“After the 1977 *Sylvania* decision, or perhaps after the 1981 appointment of Mr. Baxter to head the Antitrust Division of the Justice Department, . . . antitrust policymakers may first have begun to consider efficiency goals exclusively.”); Sanford M. Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEX. L. REV. 649, 650 (1982) (stating that the Reagan Administration’s “focus on economic theory to the exclusion of all else . . . represents a significant change in antitrust enforcement philosophy”).

⁸⁶ As it is generally applied and as I use it here, the term “consumer welfare” is actually a misnomer; most who use the phrase, including Robert Bork, with whom the confusion originated, mean total social welfare. *See* Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 430-34 (2005).

⁸⁷ *See* Baxter, *supra* note 84, at 697-98; Litvack, *supra* note 85, at 650. Indeed, vertical restraints were the area in which “the ‘rights’ theory of antitrust was most often employed.” Kauper, *supra* note 13, at 447.

⁸⁸ *See* U.S. DEP’T OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (1995), *available at* <http://www.usdoj.gov/atr/public/guidelines/0558.htm>.

⁸⁹ 433 U.S. 36 (1977).

antitrust, and relied instead upon an economic analysis of efficiency effects.”⁹⁰ Hence, the gap between “the Division’s economics-based enforcement policy” and the analytical approach used by the Court “was narrowing, not widening.”⁹¹ The Court had not yet embraced the efficiency goal as completely as had the Division,⁹² however its decisions expressed a growing willingness to rely on efficiency to the exclusion of rights or distributive concerns. The political shift⁹³ within the Justice Department toward accepting as potentially beneficial many behaviors deemed per se illegal by established Court precedents, coupled with the Court’s increasing receptiveness to the escalation of economic analysis that underlay that shift may, therefore, explain why the Government’s amicus briefs began by the mid-1990s to favor disproportionately the positions of private antitrust defendants.

Moreover, with the scope of putatively anticompetitive activities diminishing under the consumer welfare approach, the number of civil public enforcement suits filed has dropped accordingly, as the chart on the next page illustrates. Thus, a resource story emerges here too. With fewer of its own enforcement actions to pursue, the Department of Justice can devote more resources to its amicus participation,⁹⁴ which further explains the impressive consistency with which the Government has appeared before the Court in recent private antitrust cases. Significantly, although the forces at work in this story are political in the sense that they impelled changes to government policies, they are not political in a party sense; rather, they have extended

⁹⁰ Kauper, *supra* note 13, at 454.

⁹¹ *Id.* at 455.

⁹² *See, e.g.,* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); *see also* Hovenkamp, *supra* note 85, at 223 (“Although the Justice Department may be going through a period in which it recognizes efficiency as the exclusive goal of the antitrust laws, the Supreme Court has not adopted such a general antitrust policy, and some of its recent decisions seem inconsistent with such a policy.”).

⁹³ I use political here only in the sense that this was a shift in government policies.

⁹⁴ If dissatisfied with the Antitrust Division’s level of enforcement activity relative to its appropriations, Congress could presumably cut the Division’s budget. As the Division’s increasing appropriation figures indicate, however, Congress has shown no interest in doing so. *See* Appropriation Figures for the Antitrust Division: Fiscal Years 1903-2007, <http://www.usdoj.gov/atr/public/10804a.htm> (last updated Jan. 2007).

Chart 1: Number of Civil Cases Filed by Antitrust Division by Year, 1980-2005⁹⁵



temporally across Democratic and Republican administrations.⁹⁶ Indeed, one detailed study concluded that, as a historical matter, “party and credo do not matter for antitrust enforcement,”⁹⁷ and Tables A.1 and A.2, as well as Chart 1, support that conclusion, since the trends they reveal do not trace presidential party lines.

⁹⁵ Data drawn from E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1643 (2004); and U.S. DEP’T OF JUSTICE, ANTITRUST DIV. WORKLOAD STATISTICS: FY 1996-2005, <http://www.usdoj.gov/aatr/public/workstats.htm> (last visited Jan. 25, 2007).

⁹⁶ See Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 512 (2006) (noting that “the shift in antitrust doctrine that took place during the late 1970s and 1980s appears to reflect a bipartisan consensus”).

⁹⁷ ANDREW JACKSON HOLLIDAY, *THE DEFINITION AND MEASUREMENT OF ANTITRUST ENFORCEMENT* 156 (1998). *But see* B. Dan Wood & James E. Anderson, *The Politics of U.S. Antitrust Enforcement*, 37 AM. J. POL. SCI. 1 (1993).

3. The Rise of Antitrust Regulation

As the second story begins to suggest, the 1980s saw the rise of antitrust regulation: that is, the proactive shaping of antitrust law by agencies—rather than by courts or Congress—and, in particular, without bringing enforcement actions.⁹⁸ Although “the [Antitrust] Division’s movement away from the law enforcement model, and toward a more direct regulatory role, had already been underway for some time, particularly with respect to mergers,”⁹⁹ the 1980s marked a pronounced shift in that movement as evidenced by the sheer quantity of guidelines issued and their detachment from case law. When the Department of Justice issued the 1982 Merger Guidelines,¹⁰⁰ the antecedent version was fourteen years old,¹⁰¹ yet just two years later the Department issued a revision.¹⁰² Moreover, “the 1982 Guidelines were generally viewed as being less rooted in the case law than the previous version, and introduced new concepts, particularly the use of the Herfindahl-Hirschman Index to measure market concentration and the

⁹⁸ See Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1448-49 (1998); A. Douglas Melamed, Commentary, *Antitrust: The New Regulation*, ANTITRUST, Fall 1995, at 13. To be sure, the FTC’s and the Antitrust Division’s interpretations do not bear formal legal effect and generally have not been found to warrant the deferential review set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Nonetheless, the Division’s guidelines have enjoyed much influence in courts. See *infra* notes 115, 119 and accompanying text.

⁹⁹ Kauper, *supra* note 13, at 456.

¹⁰⁰ ANTITRUST DIV., U.S. DEP’T OF JUSTICE, MERGER GUIDELINES, 47 Fed. Reg. 28,493 (June 30, 1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102.

¹⁰¹ ANTITRUST DIV., U.S. DEP’T OF JUSTICE, MERGER GUIDELINES OF THE DEPARTMENT OF JUSTICE (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101.

¹⁰² ANTITRUST DIV., U.S. DEP’T OF JUSTICE, MERGER GUIDELINES (1984), 49 Fed. Reg. 26,823 (June 29, 1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103. Granted, the Department of Justice issued the 1984 Guidelines in part to correct “certain aspects of the 1982 Guidelines [that] either are ambiguous or have been interpreted by observers in ways that are not fully consistent with the Department’s actual policy”—the “*Cellophane Fallacy*” probably the most famous among these. U.S. Dep’t of Justice, Statement Accompanying Release of Revised Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,103, at 20,551 (June 14, 1984). But the Department’s issuance of revisions in such short order also reflected a regulatory ambition broader than the mere correcting of oversights, as indicated in the statement that accompanied the 1984 release:

[T]he Department recognizes that unless its analysis is as dynamic and vital as the economy to which it is applied, that analysis may unnecessarily impede the efficiency of the economy, restrict the efforts of American businesses to compete internationally, and, thus, reduce the well-being of American consumers. Thus, over the past two years, the Department has continued to refine its merger analysis to incorporate new insights and to ensure the continued relevance of that analysis to a changing economic environment.

Id.

so-called ‘5 percent tests’ for market definition.”¹⁰³ The 1984 Guidelines are, likewise, “phrased entirely in terms of economic analysis.”¹⁰⁴ As antitrust scholar and former Assistant Attorney General Thomas Kauper concluded, “This emphasis on economic policy, and the phrasing of standards in terms neither previously used nor recognized by the courts, is itself a manifestation of the degree to which the Division has departed from the simple ‘law enforcement’ model.”¹⁰⁵

The regulatory rise of the 1980s reached beyond mergers. The Division also promulgated guidelines on vertical restraints,¹⁰⁶ international operations,¹⁰⁷ and research and development joint ventures.¹⁰⁸ These, too, relied on economics over law.¹⁰⁹ The trend has continued on to the present, with new guidelines issued for intellectual property¹¹⁰ and a revised set of guidelines for international operations,¹¹¹ the latter more immersed in economic analysis than its predecessor.

Kauper characterized this movement as having created two Divisions:

One, the criminal prosecutor, handles price-fixing and bid-rigging cases, utilizing detective work, grand juries, indictments, criminal trials and jail sentences. . . . The other Division, which handles mergers and a variety of other restraints, regulatory interventions and legislative issues, has little in common with the first. Litigation is uncommon, although the threat of litigation continues to be the

¹⁰³ ABA SECTION OF ANTITRUST LAW, PRIVATE LITIGATION UNDER SECTION 7 OF THE CLAYTON ACT: LAW AND POLICY 58-59 (1989); *see* Litvack, *supra* note 85, at 654-55.

¹⁰⁴ Kauper, *supra* note 13, at 460.

¹⁰⁵ *Id.*

¹⁰⁶ ANTITRUST DIV., U.S. DEP’T OF JUSTICE VERTICAL RESTRAINTS GUIDELINES, 50 Fed. Reg. 6263 (Jan. 23, 1985), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,105. These controversial guidelines, completely at odds with case law, were quickly repudiated by Congress. *See* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act of 1986, Pub. L. No. 99-180, § 605, 99 Stat. 1136 (1985). Although they “purportedly embodied the Division’s policies concerning *non-price* vertical restraints,” the guidelines had contained a widely recognized “price-related subtext.” Willard K. Tom, Counselor to the Assistant Attorney General, Antitrust Div., U.S. Dep’t of Justice, Address Before the ABA Antitrust Section: Vertical Price Restraints (Apr. 7, 1994), *available at* <http://www.usdoj.gov/atr/public/speeches/0105.htm>. The Antitrust Division rescinded the guidelines in 1993. *See* Anne K. Bingaman, Assistant Attorney General, Antitrust Div., U.S. Dep’t of Justice, Address Before the ABA Antitrust Section: Antitrust Enforcement, Some Initial Thoughts and Actions (Aug. 10, 1993), *available at* <http://www.usdoj.gov/atr/public/speeches/0867.htm>.

¹⁰⁷ ANTITRUST DIV., U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS, 53 Fed. Reg. 21,584 (June 8, 1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,109.

¹⁰⁸ ANTITRUST DIV., U.S. DEP’T OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980).

¹⁰⁹ *See* Kauper, *supra* note 13, at 462.

¹¹⁰ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra* note 88.

¹¹¹ U.S. DEP’T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995), *available at* <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

Division's ultimate sanction. Decisions are made pursuant to published guidelines, which retain a broad range of discretion to proceed on the basis of economic analysis in individual cases.¹¹²

The decline in civil enforcement cases filed by the Department of Justice illustrated in Chart 1 supports the conclusion that as the Government increased its antitrust regulatory activities, its prosecutions dropped.¹¹³ Seen in the context of this regulatory rise, the Government's increasing persistence in participating as amicus in private antitrust actions before the Court makes perfect sense. Kauper put the point well: "The most significant threat to the Division's ability to regulate remains the threat of private litigation. And in true regulatory fashion, the Division of the 1980's has actively sought to curtail this threat, except where private litigation reinforces Division policies."¹¹⁴

Combined with the economic-forces story, the rise in regulation further explains the Government's increasing tendency to advocate in favor of defendants. The Division's regulations adopted new economic approaches that led the Government to approve activities previously deemed presumptively anticompetitive. But the only way to keep private plaintiffs from deterring those activities is to enter as amicus against them and convince the Court to adopt the Division's guidelines as law. The success of the 1982 and 1984 Merger Guidelines in this respect,¹¹⁵ as well as some of the Government's most notable amicus entries,¹¹⁶ may have propelled the Government to supply its amicus participation at the much higher rate it has during the past decade. The Division's regulatory stance also explains the Government's supplying the

¹¹² Kauper, *supra* note 13, at 457-58.

¹¹³ See also Waller, *supra* note 98, at 1448 (noting "the Antitrust Division's embrace of a regulatory model" of enforcement).

¹¹⁴ Kauper, *supra* note 13, at 463.

¹¹⁵ See PRIVATE LITIGATION UNDER SECTION 7, *supra* note 103, at 58-59 & nn.324-25; Steven A. Newborn & Virginia L. Snider, *The Growing Judicial Acceptance of the Merger Guidelines*, 60 ANTITRUST L.J. 849, 852-53 (1992).

¹¹⁶ *E.g.*, *State Oil v. Khan*, 522 U.S. 3 (1997). This merges the feedback story into the regulation theory.

Court with multiple uninvited amicus briefs at the petition stage in the 1980s: before the Court can overturn prior law, it must first agree to hear a case that presents that opportunity.

Indeed, statements by Antitrust Division officials from the early 1980s to the present evidence a conscious effort by the Government to regulate antitrust by amicus. William Baxter wrote in a 1982 law review article that “because so much of the body of precedent in antitrust law results from private actions, the Division is actively seeking amicus involvement in appropriate private actions to urge the adoption of rules of law and analytical approaches that will best promote consumer welfare.”¹¹⁷ Most recently, Assistant Attorney General Barnett boasted about the Division’s amicus success last Term in a newsletter recounting the year’s enforcement achievements:

The Division also supported three amicus briefs filed this term in the Supreme Court by the Solicitor General. They addressed the Robinson-Patman Act, patents and antitrust law, and the application of the per se rule to joint ventures. The Court decided all three cases in a manner consistent with the amicus filings. In addition to clarifying the laws in each context, the opinions reflect a remarkable degree of consensus among the justices on these important antitrust issues. Indeed, two of the decisions were unanimous.¹¹⁸

Understanding the Government’s amicus participation as a form of regulation fits with the Government’s stated intentions and explains its actions, especially when that understanding is combined with our other two supply stories; changed resources and emboldening successes have made amicus participation an ever more attractive regulatory tool, while political and economic forces have pushed its application toward favoring defendants.

¹¹⁷ Baxter, *supra* note 84, at 703. See also Kauper, *supra* note 13, at 463 & n.88 (citing 1981 address by Attorney General William French Smith for the claim that “[t]he Division embarked on a much publicized program of amicus participation”).

¹¹⁸ *Message from the AAG, ANTITRUST DIV. UPDATE: PROTECTING AND PROMOTING COMPETITION* (U.S. Dep’t of Justice Antitrust Div., Washington, D.C.), Spring 2006, <http://www.usdoj.gov/atr/public/216254.htm>.

III. THE AMICUS BRIEF AS REGULATORY TOOL

If the Government's amicus participation constitutes a form of regulation, as the Government's behavior in the antitrust context indicates, is it a tool that we should welcome or discourage? I address that question by considering the advantages and disadvantages of regulation by amicus, from both the Government's perspective and the Court's. The antitrust setting poses special concerns because of its common law character, but the analysis is instructive for all areas in which the Government participates as an amicus.

A. Advantages

The Government gains clear advantages by implementing its desired policies through amicus appearances before the Court. If it succeeds, those policies become the law of the land. Where the Government's interpretations contract the scope of liability relative to judicial precedents, this success means that private parties can no longer undermine the Government's policy goals by challenging in private enforcement actions conduct the Government deems efficient. Where those interpretations expand or clarify judicially established levels of liability, success sends a clear message to would-be offenders and streamlines the Government's enforcement activities with respect to the targeted offenses, or allows the Government to cut back on its enforcement entirely. Moreover, because the cost of an amicus brief is low relative to that of investigating, filing, and prosecuting an enforcement lawsuit, it is more efficient for the Government to appear as an amicus than as a party, even if, in so doing, it loses some control over the framing of issues. After all, if the Government dislikes the way the question has been framed in a particular case, it can still advise the Court to deny review and await a more suitable vehicle for deciding the issue, which the Government—whenever it has tried—has almost

always succeeded in convincing the Court to do; or, once the Court has already granted certiorari, the Government can choose not to enter its views on the merits at all.

The Court also stands to gain from the Government's amicus participation. In the antitrust realm, the Government's briefs offer economic analyses, which factor significantly into the development of antitrust law but often lie outside the Court's institutional reach. So too, information on the Government's related enforcement experiences may facilitate the Court's decision-making. Most importantly, the Court receives these benefits without actually having to follow the course the Government recommends. Amicus participation is regulation by advocacy, so that the Government still needs to be persuasive in its arguments. Therefore, regulation in the form of amicus participation preserves the courts' central decision-making role. Ordinary regulatory actions, in contrast, shape behavior *ex ante*, thus preventing certain issues from ever reaching judicial consideration. For example, even though the Merger Guidelines have no binding effect on courts, they carry so much weight in courts that they keep some private actions from being brought in the first place.¹¹⁹ When antitrust regulation is effected solely through

¹¹⁹ The weight that courts have accorded to the Merger Guidelines and other antitrust "regulations" differs formally, however, from the deference they give to agency interpretations in the ordinary administrative law context. Specifically, courts have shied away from holding that *Chevron's* deferential analysis extends to the antitrust arena. *See, e.g.,* Krzalic v. Republic Title Co., 314 F.3d 875, 883 (7th Cir. 2002) (Easterbrook, J., concurring) ("Interpretation differs fundamentally from regulation. Judges do not apply *Chevron* to the Attorney General's interpretation of the Sherman Antitrust Act, whether in public or in private litigation, although the antitrust statutes are notoriously open-ended."). The Supreme Court has, after all, explained, "Deference in accordance with *Chevron* . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 126 S. Ct. 904, 914-15 (2006) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). This precondition seems to foreclose *Chevron* analysis under the Sherman and Clayton Acts, especially if one considers it alongside the Court's statements stressing the judiciary's central role in construing the broadly-phrased antitrust laws. *See, e.g., Khan*, 522 U.S. at 20-21 (noting "the accepted view that Congress 'expected the Courts to give shape to the statute's broad mandate by drawing on common-law tradition'" (citing *Nat'l Soc'y Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978))). *But see* *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985) (citing *Chevron* and concluding "that the views of the Antitrust Division and the FTC are entitled to deference in the reading of [the Hart-Scott-Rodino Act]"). Indeed, it even remains unclear whether *Chevron* deference applies to the FTC's interpretations under the FTC Act. *See* *Cal. Dental Ass'n v. FTC* 526 U.S. 756, 765-66 (1999) ("[W]e have no occasion to review the call for deference here, the interpretation urged in respondent's brief being clearly the better reading of the statute under ordinary principles of construction."); *Trans Union Corp. v. FTC*, 81 F.3d 228, 231 (D.C. Cir. 1996) ("It turns out that we can decide this case without resolving

amicus advocacy, it does not deter private lawsuits, thereby leaving the Court in its proper place as the arbiter of antitrust liability. As described next, however, this *ex post* feature of amicus participation can also be regarded as a regulatory drawback.

B. Disadvantages

Despite its clear advantages for the Government, amicus participation as a regulatory tool also has its costs. The first has already been suggested by the *ex post* nature of amicus involvement—it can work only once an action has been brought, and until then it will not shape behavior. In addition, the unique factual setting and posture of each case may limit the future applicability of individual decisions, thus making amicus advocacy a much costlier means of regulation than it seems at first glance. But in the antitrust arena, the Government has no better choice, because its guidelines are not binding on courts.

A second cost to the Government is the possibility that it will lose on the amicus position it takes. This may either de-legitimize the Government's enforcement policies if they are more permissive than the full scope of liability allowed by the Court or undermine them entirely if they are stricter. Yet the Antitrust Division's experience in this respect with its vertical restraints guidelines has not turned out to be as damaging as once thought. Those guidelines—"controversial from the outset" for their renunciation of the controlling case law and finally withdrawn by the Division in 1993¹²⁰—were immediately attacked by Congress,¹²¹ and commentators assailed the Antitrust Division of the 1980s for its "decision not to prosecute an entire class of cases."¹²² But only a few years later in *State Oil Co. v. Khan*, even as the amici states defended the per se prohibition on maximum vertical price fixing in part based on

the level of deference due [to the FTC]."). Even without the benefit of *Chevron* deference, though, the agencies' antitrust guidelines have enjoyed broad judicial acceptance. See *supra* note 115 and accompanying text.

¹²⁰ Bingaman, *supra* note 106.

¹²¹ See *supra* note 106.

¹²² Litvack, *supra* note 85, at 652.

Congress's stated support for the prohibition and the Government's repeal of its own guidelines to the contrary,¹²³ the Court nonetheless replaced its precedent with a rule of reason approach. Thus, the Government's enforcement policy, previously attacked for its permissiveness, became the law of the land. The same seems likely to occur in the area of minimum vertical price fixing, as just this March the Court heard oral argument in a case to reconsider the per se illegality of such restraints.¹²⁴ Despite its initial losses, then, the Government seems to have suffered no long-lasting ill effects from its open endorsement of a more permissive antitrust policy.

For the Court, the costs of amicus participation being used as a regulatory tool loom larger. The Court risks giving, or at least appearing to give, undue weight to the views of the Government in private actions, particularly if the regulatory impulses underlying those amicus efforts go unrecognized by the Court. Although it may seem unlikely, the latter possibility should cause some concern given that the Executive's representative before the Court has such an exalted status: the Justices view the Solicitor General as a Tenth Justice and "count on him to look beyond the government's narrow interests."¹²⁵ Besides, the risk that the Court will at least appear to provide undue weight to the Government's amicus views seems especially real since the United States is the only non-party advocate regularly granted permission to participate in oral arguments. Indeed, in a recent oral argument, the Court showed just how closely the Government can come to being viewed as a party to a case in which it appears as amicus. Questioning the attorney representing the views of the United States, Chief Justice Roberts referred to the attorney whose client the Government's views supported as "your brother."¹²⁶

¹²³ See Brief of Thirty-Three States and the Territory of Guam in Support of Respondents at 20 n.21, *Khan*, 522 U.S. 3 (No. 96-871), 1997 WL 221797.

¹²⁴ Transcript of Oral Argument, *Leegin Creative Leather Prods. v. PSKS Inc.*, No. 06-480 (U.S. Mar. 26, 2007), 2007 WL 967030.

¹²⁵ CAPLAN, *supra* note 11, at 3.

¹²⁶ Transcript of Oral Argument at 20, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007) (No. 05-381), 2006 WL 3422209.

The Court jeopardizes separation of powers if it allows itself to become an instrument of government regulation. Our analysis of the Court's private antitrust decisions over the last twenty-five years shows that the Court has not abdicated its role in this way, but future decisions might indicate otherwise.

Finally, for private parties, regulation by amicus presents costs that guidelines and other forms of regulation do not if private litigants do not know the Government's position until their cases have gone as far as the Supreme Court. Greater transparency in the Government's enforcement policies may assuage any concerns about these costs, and in fact the rise of the regulatory model already appears to be meeting this need for notice. If, despite such notice, a private party wishes to pursue its claim up to the Supreme Court, the soft regulatory form of amicus participation means that it can do so and succeed even over the Government's objections by persuading the Court of the merits of its position.

All told, regulation in antitrust is not in retreat, and relative to other regulatory methods, amicus participation is preferable because the Court still ultimately decides which course is best. It is, nonetheless, important to recognize the Government's amicus participation as a form of regulation, so that the Court affords the appropriate level of scrutiny to the Government's arguments in private actions. This will help to ensure that antitrust's common law system and the Court's central role within it remain intact.

CONCLUSION

In the context of the common law tradition of antitrust recognized by the Court, Congress's provision for private enforcement offers unique benefits described well by one scholar:

[P]rivate enforcement also performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature.¹²⁷

These benefits rest on independent decision-making by a Court free from executive manipulation. If given undue weight, the Government's involvement as amicus in private antitrust actions before the Court can undo the added benefits of antitrust's common law tradition.

The responsibility for safeguarding the separation of powers and the special role that it plays in antitrust enforcement lies squarely on the Court. So long as the Court continues to provide the demand for the Government's amicus activity—whether by issuing invitations to the Solicitor General to participate or by engaging the Government's views at oral argument and in the Court's decisions—the supply of that amicus activity will remain strong. After all, from the Government's perspective as supplier, amicus participation has proved to be a low-cost, effective regulatory tool that has transformed many of its enforcement policies into law. The Government is, therefore, sure to continue employing this method of regulation to the extent the Court permits. The Court need not, however, eschew the Government's amicus assistance or disregard the federal interest that any Supreme Court antitrust decision necessarily affects—nor should it given the symbolism at stake and, as the demand stories indicate, the knowledge that the Government's participation can impart. And, in fact, the evidence of the past twenty-five years shows the Court to be interested in the Government's experience and expertise but also willing to

¹²⁷ John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983).

diverge from the Government's recommendations. Thus, despite its steady—perhaps even increasing—demand for the Justice Department's amicus participation, the Court seems to show an appropriate level of scrutiny toward the views of the Government.

Nonetheless, the remarkable consistency between the Court's decisions and the Government's advice in recent years could be viewed as a sign of judicial laxity. It could also, of course, be merely coincidental. Regardless, recognizing that the Government amicus is actually a regulator emphasizes the need for vigilance by the Court and Court watchers to preserve antitrust's common law tradition and the robustness it adds to antitrust enforcement. Further study of other areas in which the Government supplies its views as amicus to the Court, particularly areas that, like antitrust, are not tightly statutory, may yield additional insights into the amicus relationship and reinforce this need for special care from the Court.

APPENDIX A

Table A.1: Private Antitrust Cases Granted Cert. by the Supreme Court or Where the U.S. Participated at Petition Stage, Present to 1997

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Leegin Creative Leather Prods. v. PSKS Inc.</i> , 171 Fed. Appx 464 (5th Cir.), cert. granted, 127 S. Ct. 763 (2006)	No	N/A	For reversal and remand	For reversal and remand	Pending	Petitioner is antitrust defendant
<i>Credit Suisse First Boston Ltd. v. Billing</i> , 426 F.3d 130 (2d Cir. 2005), cert. granted, 127 S. Ct. 762 (2006)	Yes, on petition	For cert.	For vacatur and remand	For vacatur and remand	Pending	Petitioners are antitrust defendants
<i>Bell Atl. Corp. v. Twombly</i> , 425 F.3d 99 (2d Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006)	No	N/A	For reversal	For reversal	Pending	Petitioners are antitrust defendants
<i>Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.</i> , 127 S. Ct. 1069 (2007)	Yes, on petition	For cert.	For reversal and remand	For reversal and remand	Vacated and remanded	Petitioner is antitrust defendant
<i>FTC v. Schering-Plough Corp.</i> , 402 F.3d 1056 (2005), cert. denied, 126 S. Ct. 2929 (2006)	Yes, on petition ¹²⁸	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>Ill. Tool Works Inc. v. Indep. Ink, Inc.</i> , 126 S. Ct. 1281 (2006)	No	N/A	For reversal	For reversal	Vacated and remanded	Antitrust defendant
<i>Texaco Inc. v. Dagher</i> , 126 S. Ct. 1276 (2006)	Yes, on petition	For cert.	For reversal	For reversal	Reversed	Antitrust defendants

¹²⁸ I include this FTC case because, even though the administrative agency was petitioning for certiorari, the Court invited the Solicitor General to submit an amicus petition presenting the views of the United States as to whether that certiorari petition should be granted. *See* *FTC v. Schering-Plough Corp.*, 126 S. Ct. 544 (2005) (order inviting Solicitor General to submit views of the United States).

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.</i> , 546 U.S. 164 (2006)	No	N/A	For reversal	For reversal	Reversed and remanded (but declined to go as far as US advocated, saying it was not necessary to this decision)	Antitrust defendant
<i>McFarling v. Monsanto</i> , 363 F.3d 1336 (Fed. Cir. 2004), <i>cert. denied</i> , 125 S. Ct. 2956 (2005)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>Andrx Pharms. v. Kroger Co.</i> , 332 F.3d 896 (6th Cir. 2003), <i>cert. denied</i> , 543 U.S. 939 (2004)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>3M Co. v. LePage's Inc.</i> , 324 F.3d 141 (3d Cir. 2003), <i>cert. denied</i> , 542 U.S. 953 (2004)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust defendant
<i>Hoffman-La Roche Ltd. v. Empagran S.A.</i> , 542 U.S. 155 (2004)	No	N/A	For reversal	For reversal	Vacated and remanded	Antitrust defendant
<i>Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko</i> , 540 U.S. 398 (2004)	No	For cert.	For reversal	For reversal	Reversed and remanded	Antitrust defendant
<i>Dee-K Enters., Inc. v. Heveafil</i> , 299 F.3d 281 (4th Cir. 2002), <i>cert. denied</i> , 539 U.S. 969 (2003)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Statoil ASA v. HeereMac</i> , 241 F.3d 420 (5th Cir. 2001), <i>cert. denied</i> , 534 U.S. 1127 (2002)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>CSU, LLC v. Xerox Corp.</i> , 203 F.3d 1322 (Fed. Cir. 2000), <i>cert. denied</i> , 531 U.S. 1143 (2001)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.</i> , 185 F.3d 154 (3d Cir. 1999), <i>cert. denied</i> , 530 U.S. 1261 (2000)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>Campos v. Ticketmaster Corp.</i> , 140 F.3d 1166 (8th Cir. 1998), <i>cert. denied</i> , 525 U.S. 1102 (1999)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioners were antitrust plaintiffs
<i>Practice Mgmt. Info. Corp. v. Am. Med. Ass'n</i> , 121 F.3d 516 (9th Cir. 1997), <i>cert. denied</i> , 525 U.S. 810 (1998)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust plaintiff
<i>Nynex Corp. v. Discon, Inc.</i> , 525 U.S. 128 (1998)	Yes, on petition	Against cert.	For vacatur and remand	For vacatur and remand	Vacated and remanded	Antitrust defendant
<i>Portland Gen. Elec. Co. v. Columbia Steel Casting Co.</i> , 111 F.3d 1427 (9th Cir. 1996), <i>cert. denied</i> , 523 U.S. 1112 (1998)	Yes, on petition	Against cert.	N/A	N/A	N/A	Petitioner was antitrust defendant
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997)	No	N/A	For reversal	For reversal	Vacated and remanded	Antitrust defendant

Table A.2: Private Antitrust Cases Decided by the Supreme Court, 1996-1980¹²⁹

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Brown v. Pro Football, Inc.</i> , 518 U.S. 231 (1996)	No	For cert.	For reversal and remand	For reversal and remand	Affirmed	Antitrust defendant
<i>Hartford Fire Ins. Co. v. California</i> , 509 U.S. 764 (1993)	Yes, on petition	Against cert.	For affirmance	For affirmance	Affirmed in part, reversed in part, remanded	Mostly antitrust plaintiff (petitioners were defendants)
<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993)	No	N/A	N/A	N/A	Affirmed	Antitrust defendant
<i>Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.</i> , 508 U.S. 49 (1993)	No	N/A	For affirmance	N/A	Affirmed	Antitrust defendant
<i>Spectrum Sports, Inc. v. McQuillan</i> , 506 U.S. 447 (1993)	Yes, on petition	Against cert.	For reversal	For reversal	Reversed and remanded	Antitrust defendant
<i>Eastman Kodak Co. v. Image Technical Servs., Inc.</i> , 504 U.S. 451 (1992)	Yes, on petition	For cert.	For reversal	For reversal	Affirmed	Antitrust plaintiffs
<i>Summit Health Ltd. v. Pinhas</i> , 500 U.S. 322 (1991)	No	N/A	For affirmance	For affirmance	Affirmed	Antitrust plaintiff
<i>City of Columbia v. Omni Outdoor Advertising, Inc.</i> , 499 U.S. 365 (1991)	No	N/A	N/A	N/A	Reversed and remanded	Antitrust defendants

¹²⁹ The cases in this set were identified from Sullivan & Thompson, *supra* note 95, at 1636-40; and The Antitrust Case Browser, <http://www.stolaf.edu/people/becker/antitrust/index.htm> (last visited Jan. 25, 2007).

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Palmer v. BRG of Ga., Inc.</i> , 498 U.S. 46 (1990) (per curiam)	Yes, on petition	For cert. as to Question 1 and recommending summary reversal and remand	N/A	N/A	Reversed and remanded	Antitrust plaintiffs
<i>Kansas v. Utilicorp United, Inc.</i> , 497 U.S. 199 (1990)	Yes, on petition	For cert.	For affirmance	For affirmance	Affirmed	Antitrust plaintiff (petitioner was also antitrust plaintiff against same defendant but was suing on behalf of indirect purchasers, whereas utilities were direct purchasers)
<i>Texaco Inc. v. Hasbrouck</i> , 496 U.S. 543 (1990)	Yes, on petition	Against cert.	For reversal and remand	For reversal and remand	Affirmed	Antitrust plaintiff
<i>Atl. Richfield Co. v. USA Petroleum Co.</i> , 495 U.S. 328 (1990)	No	N/A	For reversal and remand	For reversal and remand	Reversed and remanded	Antitrust defendant
<i>California v. Am. Stores Co.</i> , 495 U.S. 271 (1990)	No	N/A	N/A	N/A	Reversed and remanded	Antitrust plaintiff

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>California v. ARC Am. Corp.</i> , 490 U.S. 93 (1989)	No	For noting probable jurisdiction	For reversal and remand	For reversal	Reversed	Antitrust plaintiffs (but respondents were antitrust plaintiffs as well – this was dispute between indirect and direct purchasers over distribution of settlement funds)
<i>Christianson v. Colt Indus. Operating Corp.</i> , 486 U.S. 800 (1988)	No	N/A	N/A	N/A (but this case was more jurisdictional than antitrust)	Vacated and remanded	Antitrust plaintiffs
<i>Allied Tube & Conduit Corp. v. Indian Head, Inc.</i> , 486 U.S. 492 (1988)	No	N/A	For affirmance	Court denied Solicitor General's motion to participate (484 U.S. 1023 (1988))	Affirmed	Antitrust plaintiff
<i>Patrick v. Burget</i> , 486 U.S. 94 (1988)	Yes, on petition	For cert. as to Question 1	For reversal	Court denied Solicitor General's motion to participate (484 U.S. 1000 (1988))	Reversed	Antitrust plaintiff
<i>Bus. Elecs. Corp. v. Sharp Elecs. Corp.</i> , 485 U.S. 717 (1988)	Yes, on petition	Against cert. on question of whether agreement required and took no position on <i>Dr. Miles</i> reversal	N/A	N/A	Affirmed	Antitrust defendant
<i>324 Liquor Corp. v. Duffy</i> , 479 U.S. 335 (1987)	Yes, on petition	For noting probable jurisdiction	For reversal	For reversal	Reversed and remanded	Antitrust plaintiff

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Cargill, Inc. v. Monfort of Colo., Inc.</i> , 479 U.S. 104 (1986)	No	For cert. limited to Question 1 (Court granted as to both Questions Presented)	For reversal	For reversal	Reversed and remanded (but “decline[d] the invitation” by US to adopt per se rule against competitor suits to challenge acquisitions on basis of predatory pricing)	Antitrust defendant
<i>Square D Co. v. Niagara Frontier Tariff Bureau, Inc.</i> , 476 U.S. 409 (1986)	No	For cert.	For reversal	For reversal	Affirmed	Antitrust defendants
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	Yes	For cert. limited to Questions 1 & 2 (Court granted limited to Questions 1 & 2)	For reversal	For reversal (Court first denied US’s request to appear in July 1985 then granted in September 1985)	Reversed and remanded	Antitrust defendants
<i>Fisher v. City of Berkeley</i> , 475 U.S. 260 (1986)	No	N/A	N/A	N/A	Affirmed	Antitrust defendant
<i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> , 472 U.S. 585 (1985)	No	N/A	N/A	N/A	Affirmed	Antitrust plaintiff

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.</i> , 472 U.S. 284 (1985)	Yes, on petition	Against cert.	For reversal and remand	For reversal	Reversed and remanded	Antitrust defendant
<i>Town of Hallie v. City of Eau Claire</i> , 471 U.S. 34 (1985)	No	N/A	For affirmance	N/A	Affirmed	Antitrust defendant
<i>NCAA v. Bd. of Regents</i> , 468 U.S. 85 (1984)	No	N/A	For affirmance	For affirmance	Affirmed	Antitrust plaintiffs
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 752 (1984)	Yes, on petition	For cert. limited to Question 1 (Court granted limited to Question 1)	For reversal	For reversal	Reversed	Antitrust defendants
<i>Hoover v. Ronwin</i> , 466 U.S. 558 (1984)	No	N/A	For affirmance	For affirmance	Reversed	Antitrust defendant
<i>Jefferson Parish Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (1984)	No	For cert.	For reversal	For reversal	Reversed and remanded	Antitrust defendants
<i>Monsanto Co. v. Spray-Rite Serv. Corp.</i> , 465 U.S. 752 (1984)	No	For cert.	For vacatur and remand	Argued appellate court applied incorrect standard, taking no position on whether evidence sufficient to reach jury anyway	Affirmed	Antitrust plaintiff
<i>Falls City Indus., Inc. v. Vanco Beverage, Inc.</i> , 460 U.S. 428 (1983)	No	For cert. limited to Question 1 (Court granted cert. limited to Questions 1 & 2)	For reversal	For reversal	Vacated and remanded	Antitrust defendant
<i>Jefferson County Pharm. Ass'n v. Abbott Labs.</i> , 460 U.S. 150 (1983)	No	N/A	N/A	N/A	Reversed and remanded	Antitrust plaintiffs

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters</i> , 459 U.S. 519 (1983)	Yes, on merits when Court granted cert.	N/A	For reversal	N/A	Reversed	Antitrust defendant
<i>Rice v. Norman Williams Co.</i> , 458 U.S. 654 (1982)	Yes, on petition	Suggested several possible dispositions, including summary reversal	N/A	N/A	Reversed and remanded	Antitrust defendant
<i>Union Labor Life Ins. Co. v. Pinero</i> , 458 U.S. 119 (1982)	No	N/A	For affirmance	For affirmance	Affirmed	Antitrust plaintiff
<i>Blue Shield of Va. v. McCready</i> , 457 U.S. 465 (1982)	No	N/A	N/A	N/A	Affirmed	Antitrust plaintiff
<i>Arizona v. Maricopa County Med. Soc’y</i> , 457 U.S. 332 (1982)	No	N/A	For reversal	For reversal	Reversed	Antitrust plaintiff
<i>Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.</i> , 456 U.S. 556 (1982)	No	N/A	For affirmance	For affirmance	Affirmed	Antitrust plaintiff
<i>Cnty. Commc’ns Co. v. City of Boulder</i> , 455 U.S. 40 (1982)	No	N/A	N/A	N/A	Reversed and remanded	Antitrust plaintiff
<i>Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross</i> , 452 U.S. 378 (1981)	No	For cert.	For reversal	For reversal	Reversed and remanded	Antitrust plaintiff
<i>H.A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n</i> , 451 U.S. 704 (1981)	No	N/A	N/A	N/A	Affirmed in part, reversed in part	Petitioner was antitrust plaintiff

Case Name & Citation	US Invited?	US on Petition	US on Merits	US in Oral Argument	Decision	Favoring
<i>Tex. Indus., Inc. v. Radcliff Materials, Inc.</i> , 451 U.S. 630 (1981)	No	N/A	For affirmance	For affirmance	Affirmed	Antitrust defendant
<i>J. Truett Payne Co. v. Chrysler Motors Corp.</i> , 451 U.S. 557 (1981)	No	N/A	N/A	N/A	Vacated and remanded	Antitrust plaintiff
<i>Catalano, Inc. v. Target Sales, Inc.</i> , 446 U.S. 643 (1980) (per curiam)	No	For cert., recommending summary reversal	N/A	N/A	Reversed and remanded	Antitrust plaintiffs
<i>Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	No	N/A	For affirmance	N/A	Affirmed	Antitrust plaintiff
<i>McLain v. Real Estate Bd., Inc.</i> , 444 U.S. 232 (1980)	No	N/A	For reversal	For reversal	Vacated and remanded	Antitrust plaintiff

APPENDIX B

List B.1: Non-Per Curiam Decisions, 1980-1985

1. *McLain v. Real Estate Bd., Inc.* (1980)
2. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* (1980)[†]
3. *J. Truett Payne Co. v. Chrysler Motors Corp.* (1981)^{*}
4. *Tex. Indus., Inc. v. Radcliff Materials, Inc.* (1981)
5. *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n* (1981)^{*}
6. *Nat'l Geromedical Hosp. & Gerontology Ctr. V. Blue Cross* (1981)
7. *Cnty. Commc'ns Co. v. City of Boulder* (1982)^{*}
8. *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.* (1982)
9. *Arizona v. Maricopa County Med. Soc'y* (1982)
10. *Blue Shield of Va. V. McCready* (1982)^{*}
11. *Union Labor Life Ins. Co. v. Pinero* (1982)
12. *Rice v. Norman Williams Co.* (1982)^{*}
13. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters* (1983)[†]
14. *Jefferson County Pharm. Ass'n v. Abbott Labs.* (1983)^{*}
15. *Falls City Indus., Inc. v. Vanco Beverage, Inc.* (1983)
16. *Monsanto Co. v. Spray-Rite Serv. Corp.* (1984)
17. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (1984)
18. *Hoover v. Ronwin* (1984)
19. *Copperweld Corp. v. Independence Tube Corp.* (1984)
20. *NCAA v. Bd. of Regents* (1984)
21. *Town of Hallie v. City of Eau Claire* (1985)[†]
22. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.* (1985)
23. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985)^{*}

^{*} No U.S. merits brief and no U.S. oral argument participation (total=7).

[†] US merits brief but no U.S. oral argument participation (total=3).

List B.2: Non-Per Curiam Decisions With No U.S. Oral Argument Participation, 1980-1996

1. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* (1980)
2. *J. Truett Payne Co. v. Chrysler Motors Corp.* (1981)
3. *H.A. Artists & Assocs. Inc. v. Actors' Equity Ass'n* (1981)
4. *Cnty. Commc'ns Co. v. City of Boulder* (1982)
5. *Blue Shield of Va. V. McCready* (1982)
6. *Rice v. Norman Williams Co.* (1982)
7. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters* (1983)
8. *Jefferson County Pharm. Ass'n v. Abbott Labs.* (1983)
9. *Town of Hallie v. City of Eau Claire* (1985)
10. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985)
11. *Fisher v. City of Berkeley* (1986)
12. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.* (1988)
13. *Patrick v. Burget* (1988)**
14. *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (1988)**
15. *Christianson v. Colt Indus. Operating Corp.* (1988)
16. *California v. Am. Stores Co.* (1990)
17. *City of Columbia v. Omni Outdoor Advertising, Inc.* (1991)
18. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* (1993)
19. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* (1993)

** The Solicitor General requested leave to participate in the oral argument but the Court denied his request (total=2).

List B.3: Cases for Which the U.S. Submitted Petition-Stage Briefs, 1980-1996

1. *Catalano, Inc. v. Target Sales, Inc.* (1980)[‡]
2. *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross* (1981)[‡]
3. *Rice v. Norman Williams Co.* (1982)
4. *Falls City Indus., Inc. v. Vanco Beverage, Inc.* (1983)[‡]
5. *Monsanto Co. v. Spray-Rite Serv. Corp.* (1984)[‡]
6. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (1984)[‡]
7. *Copperweld Corp. v. Independence Tube Corp.* (1984)
8. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.* (1985)[•]
9. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (1986)
10. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.* (1986)[‡]
11. *Cargill, Inc. v. Monfort of Colo., Inc.* (1986)^{‡•}
12. *324 Liquor Corp. v. Duffy* (1987)
13. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.* (1988)
14. *Patrick v. Burget* (1988)
15. *California v. ARC Am. Corp.* (1989)[‡]
16. *Texaco Inc. v. Hasbrouck* (1990)[•]
17. *Kansas v. Utilicorp United, Inc.* (1990)
18. *Palmer v. BRG of Ga., Inc.* (1990)
19. *Eastman Kodak Co. v. Image Technical Servs., Inc.* (1992)
20. *Spectrum Sports, Inc. v. McQuillan* (1993)[•]
21. *Hartford Fire Ins. Co. v. California* (1993)[•]
22. *Brown v. Pro Football, Inc.* (1996)[‡]

[‡] Submitted without the Court's invitation (total=9).

[•] Failed to convince the Court to deny or limit review (total=5).

List B.4: U.S.'s Failures To Persuade the Court on the Merits, 1980-1996

1. *Monsanto Co. v. Spray-Rite Serv. Corp.* (1984)^{††}
2. *Hoover v. Ronwin* (1984)^{††}
3. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.* (1986)^{††}
4. *Texaco Inc. v. Hasbrouck* (1990)^{††}
5. *Eastman Kodak Co. v. Image Technical Servs., Inc.* (1992)^{††}
6. *Hartford Fire Ins. Co. v. California* (1993)
7. *Brown v. Pro Football, Inc.* (1996)^{††}

^{††} The Court's ultimate disposition of the case departed substantially from the Government's recommendation (total=6).