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# **The Supreme Court and Private Law: A Thirty-Year Retrospective of Economic Regulation in Securities and Antitrust**

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Robert B. Thompson

*Note to Berkeley Workshop participants: I plan to talk only about the securities part (pp. 1-30) so that it is not necessary for participants to read the last part, but I have enclosed it in case the larger project is of interest to anyone.*

# The Supreme Court and Private Law: A Thirty-Year Retrospective of Economic Regulation in Securities and Antitrust

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## Introduction

At its core the United States Supreme Court is a constitutional law court. It decides the relative rights of citizens and government within the framework set by the constitution and related questions of public law that arise under statutes and administrative rules. Changes in the court's approach generate great attention and multiple theories.<sup>1</sup> As the nation's highest judicial body, the Supreme Court also is the final arbiter of private law—relations of individuals one to another where the interest of government do not predominate.<sup>2</sup>

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<sup>1</sup> See generally STEPHEN GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* (2000); LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* (2001); DAVID SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003); Lawrence E. Mitchell, *No Business Like No Business*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 227 (Herman Schwartz ed., 2002); David Vladeck & Alan B. Morrison, *The Roles, Rights, and Responsibilities of the Executive Branch*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 169 (Herman Schwartz ed., 2002).

<sup>2</sup> See Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Reasoning* (Cambridge 2003) at 1 "Blackstone did not offer a definition of private law, nor is such a definition to be found in any authoritative sources....Private law, as the term is used in this study, is concerned principally with the mutual rights and obligations of individuals. Like other legal concepts, the

We seek to explore this area of private law that has not received the attention of its public law counterparts. We use Supreme Court cases in securities and antitrust to explore how the court's private law jurisprudence differs from its more well-know output related to public law. In contrast to the somewhat standard sequence describing the last half-century in public law jurisprudence that starts with the pro-plaintiff Warren Court followed by the middle-of-the-road Burger Court and then the pro-defendant Rehnquist Court,<sup>3</sup> we find an expansive period as to both securities and antitrust during the Warren court, followed by a distinct correction period after Justices Powell and Rehnquist join the Court in 1972 followed by a third period, after Powell's retirement and with Rehnquist as Chief Justice, in which the results are more balanced, but the cases are few and far between. This pattern reveals the importance of a subject matter entrepreneur on matters of private law, Justice Powell, in these two subject matters.

## **I. Private law disputes before the Supreme Court.**

Private law makes up only a small part of the Supreme Court's docket. Using the Harvard annual statistics as a base, the Court, during the last decade has decided between 16 and 25 cases per term in the private litigation category (versus habeas corpus claims, federal or state criminal cases, federal government litigation and other public law categories).<sup>4</sup> These cases arise mostly as a result of the Court's jurisdiction over federal

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term takes its meaning partly from what it excludes, notably public international law, constitutional law, local government law, administrative law, criminal law, military law, and taxation."

<sup>3</sup> See, e.g. *The Burger Court: the Counter Revolution that Wasn't* (Vincent Blasi ed. 1987).

<sup>4</sup> For the last decade, the private law cases made up about 25% of the court's docket for 1993-2002. as follows: 1993, 23 of 114 cases; 1994, 22 of 87; 1995, 23 of 86; 1996, 25 of 79; 1997 17 of 86; 1998. 26 of 93, 1999, 25 of 81; 2000, 15 of 77, 2001, 19 of 86, 2002, 19 of 81. See *The Term in Review*, volumes xx-yy *Harv. L. Rev.* (1993-2002). Securities and antitrust cases make up about 5% of this total on a yearly basis.

questions.<sup>5</sup> Since *Erie*, federal courts no longer hear questions of common law that §traditionally made up much of the law of private relations such as questions arising out of contracts, property, tort or corporations law.<sup>6</sup> Diversity jurisdiction offers an avenue for a court to hear questions of private law, but this route has narrowed considerably in recent decades.<sup>7</sup> Yet the relentless growth in federal statutes has brought a wide array of private relations within the Court's federal question jurisdiction.<sup>8</sup>

Securities and antitrust cases illustrate such private law issues on the Court's docket. Both require courts to resolve disputes among private parties arising out of commercial relations. Both originate from federal statutes, but in each the most recurring issues have a common law feel that requires judges ex post to decide how to fill gaps consistent with broad statutory policy. For antitrust cases, courts often are applying the rule of reason to new factual setting.<sup>9</sup> In securities law, the most common setting requires interpretation of the common law elements of fraud as applied within the judicially implied cause of action under rule 10b-5.<sup>10</sup>

Securities and antitrust share other common characteristic in terms of how litigation is brought. In each there is possible overlap of private and government

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<sup>5</sup> 28 U.S.C. §1331.

<sup>6</sup> 304 U.S. 64 (1938). See also Edward A. Powell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Powers and the Politics of the Federal Courts in Twentieth Century America* (2000).

<sup>7</sup> 28 U.S.C. §1332

<sup>8</sup> Only 20 private law cases came to the Court from state courts over the 1993-2002 period, less than 3% of the cases decided by the Court during that period. See the data described in footnote 3. above.

<sup>9</sup> Compare *Standard Oil Co. v. United States*, 271 U.S. 1 (1911) and *Chicago Bd. of Trade v. United States*, 246 U.S. 271 (1918) with *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979).

<sup>10</sup> 17 C.F.R. §240.10b-5 (2002).

litigation for the same alleged violation by a defendant.<sup>11</sup> In each there are class actions involving questions of representative litigation and damages.<sup>12</sup>

Both securities and antitrust differ from the constitutional cases that make up the bulk of the Court's docket in that Congress can step in and overrule decisions the Court might make that seem incorrect. That difference has led some to think that justices approach statutory questions differently from constitutional and may hold back on overturning constitutional doctrine.<sup>13</sup> There is reason to think the private law questions that arise in securities and antitrust might look differently than constitutional decisions given that the dominant career pattern of the current sitting justices has not included long interaction with private law, a pattern will affect both the expertise that the justices bring to these topics and the interest that can impact how often certiorari is granted in these cases.<sup>14</sup>

## **II. Securities Law 1933-2003**

### ***A. Three Distinct Movements***

There have been ninety decisions on securities law decided by the Supreme Court since the enactment of the first federal securities laws in the early 1930s.<sup>15</sup> For this article, we evaluated each holding as to whether the result reflected an expansive

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<sup>11</sup> See generally, E. Thomas Sullivan and Herbert Hovenkamp, *Antitrust Law: Policy and Procedure*, 65-72 (5<sup>th</sup> ed. 2003).

<sup>12</sup> Rule 23, Federal Rules of Civil Procedure.

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<sup>15</sup> The complete list is in Appendix A. It does not include *SEC v. Edwards* decided January 13, 2004. It includes cases arising under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940 and the Securities Investor Protection Act of 1970. This list tracks lists in two earlier works, Alfred F. Conard, *Securities Regulation in the Burger Court*, 56 U. Col L. Rev. 183 (1985) reporting cases through 1984 and A.C. Pritchard, Justice Lewis F. Powell Jr. and the Counterrevolution in the Federal Securities Laws, 52 Duke L. J. 841 (2003) (discussing cases between 1972 and 1987). Professor Pritchard also shared his own list of cases before and after Justice Powell's tenure. This list tracks that with minor differences. The list does not include reported decisions denying certiorari (for example *Kaplan v. Lehman Brothers*) or decision in which the Court, by an equally divided vote, affirms an opinion below. See *Carpenter v. United States*, 484 U.S. 19 (1987).

interpretation of the law that was presented or a restrictive interpretation of the issue presented.<sup>16</sup> For the entire history of the Court in deciding securities issues, the count ends up split about equally, with 38 expansive decisions and 42 restrictive decisions.<sup>17</sup> But that cumulative report masks significant differences in the Court’s view over time and in particular two dramatic shifts in its approach.

When broken down by the date of decisions and whether the result was expansive or restrictive, Supreme Court interpretations reflect three distinct stages. In the first period, from the 1930s through 1972, the Court almost always chose an expansive reach of the statutes over a more restrictive interpretation. With the appearance of two new justices on the same day in 1972, Supreme Court jurisprudence took a dramatic turn; restrictive interpretations became the order of the day. Since Lewis Powell left the court in June 1987 at the end of William Rehnquist’s first term as chief justice, the court’s securities decision have been much more evenly balanced than either of the earlier periods, but the number of cases has dropped dramatically. Table 1 presents the cumulative results.

**Table 1: Securities Cases decided by the Supreme Court: Expansive or Restrictive**

Time period	# cases	# expansive	# restrictive	# neither
1936-1972	28	21 (75%)	4 (14.2%)	3 (10.7%)
1973-1987	46	10 (21.7%)	29 (63%)	7 (15.2%)
1988-2003	16	7 (44%)	9 (56%)	0

<sup>16</sup> Professor Conard made a similar analysis for his article. There were 10 cases in the entire period in which the distinction between expansive or restrictive could not support further analysis without an unusual stretch. Particularly relevant for this article three of those 10 were antitrust cases in which plaintiffs sought to bring antitrust claims which were blocked because of application of the securities laws. Those outcomes were recorded as “neither” and not included in most of the analysis that follows.

<sup>17</sup> There were ten decisions that were not classified as either expansive or restrictive.

## 1. Period 1 -- 1936-1972: Securities Law as the Savior of all Humanity<sup>18</sup>

The first securities case reached the Supreme Court in 1936, just three years after passage of the Securities Act of 1933.<sup>19</sup> By the time Earl Warren joined the court as chief Justice in 1954 there had been 11 securities case decided by the court with an additional dozen or so decided during his tenure as chief justice.<sup>20</sup> There was a consistent tenor to the Supreme Court jurisprudence during this time and in the two terms that followed his retirement---almost every decision provided an expansive approach to the securities laws. Of the decisions handed down through the end of the 1971 term, the Court took an expansive view in 21 of 25 cases. This group includes the Court's now classic cases finding an implied private right of actions under the proxy provisions of the federal securities laws (*J.I. Case v. Borak*<sup>21</sup> decided in 1964 and *Mills v. Electric Auto-Lite Co.*<sup>22</sup> decided in 1970) and the Court's first cases upholding an implied private cause of action under Rule 10b-5, ending with the 1971 decision in *Superintendent of Insurance v. Bankers Life* that remains as the apogee of the reach of rule 10b-5 as a private cause of action.<sup>23</sup>

In *Borak*, the Court referred to the "broad remedial purposes" of the Act and observed, "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damages litigation, the possibility of civil

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<sup>18</sup> The title refers to David Ratner's description using an opera context to describe the Supreme Court's changing epochs in securities cases, David Ratner, Securities Regulation (19xx) at.

<sup>19</sup> The first case was *Jones v. SEC*, 298 U.S. 1 (1936) a restrictive interpretation that perhaps by itself makes up a separate period. The result in that case was restrictive, at a time when the Court was hostile to the economic regulation of the New Deal. By the time the second securities case got to the court four years later, four New Deal economic liberals had joined the court and the expansive period had begun.

<sup>20</sup> See Appendix A.

<sup>21</sup> 377 U.S. 436 (1964).

<sup>22</sup> 396 U.S. 375 (1970).

<sup>23</sup> 404 U.S. 6 (1971).



damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.”<sup>24</sup> In *Bankers Life*, Justice Douglas’s opinion for the Court paints with a broad brush over a very complex transaction, emphasizing that the statute must be read “flexibly, not technically and restrictively”<sup>25</sup> and extends to corporate managers misuse of their fiduciary positions since “disregard of trust relationships by those whom the law should regard as fiduciaries are all a single seamless web” with manipulation and other actions prohibited by the federal securities laws.<sup>26</sup>

## **2. Period 2- 1973-1987: The Counterrevolution<sup>27</sup>**

The arrival of Lewis Powell and William Rehnquist in January 1972<sup>28</sup> marks an easily identifiable fulcrum in the securities jurisprudence of the Supreme Court. In contrast to the 21 of 25 expansive opinions described in the previous section, 24 of the next 25 securities opinions from 1973-1980 take the restrictive view of the issue being litigated.<sup>29</sup> This is an era of broad retrenchment in the reach of federal securities laws. In 1975 in *Blue Chip Stamps v. Manor Dug Stores*<sup>30</sup> the Court reversed the appellate court and adhered to a narrow definition of purchaser and seller for purposes of defining who can bring a suit under 10b-5. The Court wrote of the implied private right of action for

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<sup>24</sup> 377 U.S. 426 (1964).

<sup>25</sup> This language is from the Court’s 1963 opinion in *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963) although the opinion in *Bankers Life* makes no reference to the earlier opinion. Justice Powell considered *Capital Gains* as part of what he sought to change. See Pritchard at 884 (SEC’s use of the broad language of *Capital Gains* given as an example of an interpretive style that Powell was anxious to expunge from the securities laws.)

<sup>26</sup> 404 U.S. 6 (1971) quoting H.R. Rep # 1383, 73d Cong., 2d Sess. 6.

<sup>27</sup> The title is taken from Adam Pritchard’s recent work, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 *Duke L. J.* 841 (2003).

<sup>28</sup> The first securities opinions including Powell and Rehnquist were published in 1973.

<sup>29</sup> See Appendix A for the chronological list. There are a handful of cases not characterized as either expansive or restrictive, including three antitrust cases, but these do not alter the basic trend of an abrupt reversal in the Court’s approach to securities law.

<sup>30</sup> 421 U.S. 723 (1975).

securities fraud as a “judicial oak which has grown from little more than a legislative acorn” and warned of the “dangers of vexatious litigation.”

A year later in *Ernst & Ernst v. Hochfelder*,<sup>31</sup> the Court again reversed an appellate court and the views of the Securities and Exchange Commission and expressly rejected what had been a dominant approach of its prior precedent that the securities statute should be interpreted “flexibly to effectuate its remedial purpose.”<sup>32</sup> The Court insisted upon a scienter standard for liability under 10b-5 higher than many appellate courts had been using.<sup>33</sup> The following year, in a third opinion reversing an expansive appellate court decision, the Court in *Santa Fe v. Green* reined in the use of securities law that could intrude into the area traditionally regulated by state corporate law.

“Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.”<sup>34</sup> In a subsequent case the Court was clear about its change in direction, “To the extent our analysis in today’s decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action.”<sup>35</sup>

This change can be seen in viewing the outcome of these cases against the placement of the justices on the Court during this period along a spectrum based on the same expansive/restrictive categorization used for the cases outcome described earlier.

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<sup>31</sup> 425 U.S. 185 (1976).

<sup>32</sup> The court here references three opinions from Period 1, *Tcherepin v. Knight*, 389 U.S. 332, 336 (1967), *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) and *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963).

<sup>33</sup> 425 U.S. at xxx.

<sup>34</sup> 430 U.S. at xxx.

<sup>35</sup> *Touche Ross v. Redington*, 442 U.S. 560, 578 (1979).

Figure 1 aligns the 10 justices who served on the court during this period (pairing Douglas and his replacement Steven,<sup>36</sup> a change that occurred in 1975) based on the percentage of securities cases during their career in which they took an expansive versus a restrictive view.

**Figure 1: Votes in Securities Cases by Supreme Court Justices Serving in Early Period 2:**

Douglas/Stevens	Brennan	Marshall	White	Blackmun	Burger	Stewart	Rehnquist	Powell
.675	.58	.49	.43	.42	.31	.28	.24	.18
<most expansive				>least restrictive				

Powell and the other justices at the most restrictive end of the spectrum win more often than those on the opposite end. Justice Powell was in the majority in all but one of the securities cases in which he participated (97.5%), just ahead of Chief Justice Burger and Justices Rehnquist and Stewart. Justices Douglas, Brennan, Marshall and Stevens have the lowest percentage of time in the majority.

**Table 2: Percentage of Cases When Justices Voted in Majority 1973-1987.**

Justice	% in Majority
Powell	97.5
Burger	95.3
Rehnquist	95.3
Stewart	93.5

<sup>36</sup> Douglas' expansive figure was .81 and Stevens .59, but since they anchor the expansive end of the scale the cumulative pairing does not change the results if 10 were displaced instead of nine. These ten justices comprise the Court in the 1973-80 period described at the beginning of this section. Justice O'Connor replaced Justice Stewart in 1981, the only other change prior to Chief Justice Burger's retirement in 1986

White	84.4
Blackmun	82.2
Stevens	73.3
Marshall	70
Brennan	60
Douglas	18.1

There is no doubting the conservative direction taken by the Court in reforming the securities laws. Of 68 total dissents filed in securities cases in Period 2, more than 90% were filed by justices normally placed on the Court's liberal wing: Brennan (19 dissents), Marshall (13 dissents) Douglas (9), Stevens, Blackmun and White (7 each). In contrast Powell and Rehnquist dissented in one and two cases respectively.<sup>37</sup>

### 3. Period 3-- 1988-2003: The Twilight Zone

The period after Rehnquist became chief justice and Powell retired has a much different feel to it.<sup>38</sup> First, the number of cases dropped dramatically, only 16 cases in 16 years in contrast to the almost three cases per term during the counterrevolution period.<sup>39</sup> Even more arresting is the fact that there have been only two securities cases in the last six years, a dearth of decisions in securities that has not been seen since the 1950s.<sup>40</sup> At the same time that there has been a dramatic reduction in the total number of case in all areas that the court takes each term, the number of securities cases has dropped even

<sup>37</sup> These differences are also statistically significant.

<sup>38</sup> Rehnquist became chief justice prior to the beginning of the 1986 term, which was Powell's last term on the Court, so period 3 begins with decisions of the 1987 term which were decided in early 1988.

<sup>39</sup> See Appendix 1. For Period 2 there were 47 cases heard in 15 terms (including *Carpenter* that resulted in a 4-4 vote) or an average of 3.13 securities case per term.

<sup>40</sup> The Court's decision in early 2004 in *S.E.C. v. Edwards* breaks this drought. There were no securities cases decided between 1953 and 1959 and only three for the entire decade.

more—the percentage of the docket that is securities cases dropped in half—from almost 2% of the docket during the second period to about 1% in the period beginning in 1988.<sup>41</sup> Second, the split between expansive and restrictive decisions swung back toward the middle and is closer to 50/50 split with a slight advantage to restrictive interpretations.<sup>42</sup>

It is notable that for the first time since the end of period 1, the Court took expansive positions in important securities case. For example, the Court's holding in *Basic, Inc. v. Levinson* eased the burden of plaintiffs in a class action by enabling them to take advantage of the fraud on the market presumption of reliance.<sup>43</sup> Also in *U.S. v. O'Hagan*, the Court approved misappropriation as a basis for insider trading liability, an expansion that almost surely would have been rejected by the court in Period 2.<sup>44</sup> Yet these decisions are intermixed with others that are decidedly restrictive. For example in *Central Bank*, the Court reached out to end aiding and abetting as a form of liability, an issue that had not originally been presented to the court and which had been accepted by lower federal courts for many years.<sup>45</sup> Also in *Gustafson v. Alloyd Co.* the Court gave a

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<sup>41</sup> The total number of cases heard by the Supreme Court has dropped dramatically in this period from 140 to 150s in the 1980s to under 80 in recent years. See Harv. L. Rev., But the number of securities cases has declined at a much larger rate. The securities share of the docket however, remains above the share of the docket in the pre 1973 period that was less than one half of one percent.

<sup>42</sup> See Table 1, 7 of 16 cases were expansive for 44%.

<sup>43</sup> 485 U.S. 224 (1988). The decision was made by a 4-2 vote with a majority made up of the most expansive justices and three more restrictive justices not sitting on the case, Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy.

<sup>44</sup> 521 U.S. 642 (1997). See the discussion in A.C. Prichard, *United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 Boston College L. Rev. 13, 55 (1998) describing how Justice Powell in his last term on the court drafted a dissent to the court's denial of certiorari in the *Carpenter* case in which the appellate court had approved of misappropriation. As a result of that draft dissent, which took a restrictive view of insider trading liability, two justices switched positions so that there were sufficient votes to hear the case. However, when the case came before the Court the following term, Justice Powell had retired and, following the Senate rejection of the nomination of Robert Bork, his successor Justice Kennedy had not yet been confirmed. The remaining 8 members split 4-4 leaving the issue undecided by the Court for another nine years. It seems likely had *Carpenter* been decided by nine that included Powell, misappropriation would not have survived.

<sup>45</sup> *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

restrictive interpretation to the antifraud provisions under the Securities Act of 1933.<sup>46</sup> The result is a pattern that is much more random than in either of the earlier periods.

This tendency toward randomness is reinforced by the pattern of dissents in this period. The Court is less unanimous than before and the dissents are spread across the Court. In this period there are many more decisions with three or four negative vote than occurred in previous securities decisions. A majority of the decisions, or 9 of 16 (56%) show this level of disagreement; indeed, half of all securities decisions that have been decided at 5-4 have occurred since 1989 (6 of 12). But the greater number of dissents lacks the compatibility among dissenters shown in the prior period. There are some dissents during this period that would fit neatly within the division found in the Period 2 in which the dissenting group was made up only of justices at the expansive end, for example, Stevens, Brennan, Marshall and Blackmun in *Rodriguez de Quijas v. Shearson American Express Inc.* in 1988.<sup>47</sup> There are also patterns of dissents that did not show up in the previous period such as dissents by a group of only conservative justices, who simply did not lose during Period 2.<sup>48</sup> But more of the dissents are among justices who are further away on the compatibility scale than occurred during period 2. For example, there are dissents joined by Thomas, Scalia, Ginsberg & Breyer<sup>49</sup> and O'Connor, Kennedy, Stevens & Souter.<sup>50</sup>

### ***B. Explaining the Change***

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<sup>46</sup> 513 U.S. 561 (1995)

<sup>47</sup> 490 U.S. 477 (1989).

<sup>48</sup> See e.g. *Reeves v. Ernst & Young*, 494 U.S. 56 (1990) (Rehnquist, Scalia, O'Connor & White dissenting).

<sup>49</sup> *Gustafson v. Alloyd Co., Inc.*, 513 US 561 (1995).

<sup>50</sup> *Lampf v. Gilbertson*, 501 US 530 (1991).

The data presented above show clear differences among the three periods. Our search for an explanation requires a theory that can explain two changes in opposite directions. We discuss several here. First we explore whether the attitudinal model, borrowed from political science, can explain each of the changes. Then we explore a more specific hypothesis, that one justice, Lewis Powell, explains the changes, and third we look at other factors such as the role of the SEC and various agenda-setting theories.

### **1. Using An Attitudinal Model**

Political scientists have long-studied judicial decision-making, particularly at the Supreme Court.<sup>51</sup> Much of the recent debate about decision-making on the Court has been structured around an attitudinal model centered on an expectation that votes of judges on the merits of cases will reflect their ideological attitudes.<sup>52</sup> Changes in outcome in such a world would turn on the change of personnel of the court and the preferences of its justices.

As early as the Court's second securities decision, there already were five justices appointed by President Roosevelt,<sup>53</sup> these appointments coming after the "Court Packing" struggle of the late 1930s provoked by the Court's striking down many of the legislative programs of the New Deal.<sup>54</sup> Thus it should not be surprising that a Court picked with upholding economic regulation in mind would be single-minded in providing expansive

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<sup>51</sup> See Supreme Court Decision-Making: New Institutional Approaches (Cornell W. Clayton & Howard Gillman eds 1999).

<sup>52</sup> See Lee Epstein, Jack Knight & Andrew D. Martin, The Political (Science) Context of Judging, 47 St. Louis U. L. J. 783, 794 (2003.) Compare H. W. Perry, Taking Political Science Seriously, 47 St. Louis U. L. Rev. 889, 891 (2003) (most political scientist would not believe that attitudes are the sole determinant, or that they play as singular a role as propounded by the so-called "attitudinal model.")

<sup>53</sup> Between the Court's decision in *Jones v. SEC*, 298 U.S. 1 (1936) and *SEC v. U.S. Realty & Impr. Co.*, 310 U.S. 434 (1940), Justices Black, Reed, Frankfurter, Douglas & Murphy joined the Court. Justice Douglas, having come to the Court from the SEC, recused himself in many of the early securities cases. By the end of 1941, President Roosevelt had appointed replacements for two of the remaining holdover justices. Data on individual service may be found at Epstein et al, *The Supreme court compendium Data, Decisions and developments* (1994).

<sup>54</sup>

results for decisions related to securities regulation. Yet this trend did not slow down after Eisenhower had appointed a majority of the justices<sup>55</sup> and was resupplied with judicial appointments made by Presidents Kennedy and Johnson.<sup>56</sup> This expansive period even extended into the early years after Chief Justice Burger and Justice Blackmun joined the court.<sup>57</sup>

With the simultaneous appearance of Justice Powell and Rehnquist in January 1972, there was for the first time since the late 1930s a majority of justices who would take a strict construction view of securities law, if not law more generally.<sup>58</sup> So it should not be surprising that there is some change in the court's approach. The paired voting records shows the high degree of affinity of this new majority as identified on this spectrum described in Figure 1 displayed above. Justices Powell and Stewart voted together in more than 96% of securities cases, the highest percentage of any pair of judges who had more than 10 decisions together. Next highest pairs are Burger/Powell, Powell/Rehnquist, Burger/Rehnquist, Stewart/Rehnquist and Stewart/Burger all over

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<sup>55</sup> At the time of Chief Justice Warren's appointment, all members of the court had been appointed by Franklin Roosevelt or Harry Truman. The five Eisenhower appointments included two, Warren and Brennan, who became a regular part of a liberal majority and regularly expansive on securities cases, and Whittaker, Harlan and Stewart who did not make a notable difference on economic issues. There were only two decisions made by the Court when there were five sitting justices appointed by Eisenhower, *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, (1959) a 5-4 expansive interpretation of the definition of a security and *Blau v. Lehman*, 368 U.S. 403 (1962), a 7-2 decision written by Justice Black that was one of the rare restrictive holdings by the Supreme Court in period 1.

<sup>56</sup> President Kennedy's appointments of Justices White and Goldberg in 1962 to replace Justices Whittaker and Frankfurter reinforced the expansive economic regulating views of the court, with Frankfurter being less expansive than his successor and Whittaker deciding only a few cases. The substitution of Justice Fortas for Goldberg in 1965 and Marshall for Clark in 1967 reflected similar views about economic regulation for each justice in the pair.

<sup>57</sup> Chief Justice Burger and Justice Blackmun both joined in the Court's expansive decisions in *Affiliated Ute* and *Bankers Life*.

<sup>58</sup> Powell and Rehnquist replaced Justices Black and Harlan respectively. Even after the appointments of Chief Justice Burger and Justice Blackmun, sometimes dubbed the Minnesota twins at that point, for their perceived tendency to vote together for restrictive interpretations, there was still a majority of justices who took an expansive view toward securities laws: Douglas, Black, Marshall, Brennan and White.



88% agreement. At the other end, the least agreeing pairs are Douglas/Blackmun, Douglas/Burger and Douglas/Stewart, each at 44% or less.

The second change in the direction of the Court’s decisions presents something of a challenge to what might be expected, at least initially from an attitudinal model. After the four appointments by President Nixon already discussed (Burger, Blackmun, Powell and Rehnquist), Republican presidents made the next six appointments to the Court carrying all the way through until 1994 (Stevens, O’Connor, Scalia, Kennedy, Souter and Thomas). Why should there be any change from the pattern begun in 1973? Under an attitudinal model where all justices vote in line with their policy preference, the outcome of the case should reflect the preference of the median justice. If there is a change in the median justice, that could explain a change in results as we see between Period 2 and Period 3.<sup>59</sup> Figure 1 presented the votes of individual justices during the core part of period 2.

**Figure 1 (Repeated):**

<u>Douglas/Stevens</u>	<u>Brennan</u>	<u>Marshall</u>	<u>White</u>	<u>Blackmun</u>	<u>Burger</u>	<u>Stewart</u>	<u>Rehnquist</u>	<u>Powell</u>
.675	.58	.49	.43	.42	.31	.28	.24	.18
<most expansive							>least expansive	

Figure 2 presents a similar spectrum for the current Court using votes in all securities cases over a justice’s tenure.

**Figure 2: Votes in Securities Cases by Supreme Court Justices Currently Serving**

<u>Ginsberg</u>	<u>Stevens</u>	<u>Breyer</u>	<u>Souter</u>	<u>Kennedy</u>	<u>Thomas</u>	<u>Scalia</u>	<u>O’Conner</u>	<u>Rehnquist</u>
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<sup>59</sup> Political scientists have developed a modeling strategy of using median voter data as explanatory of outcomes. See Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U. S. Supreme Court, 1953-1999, 10 Pol. Analysis 134 (2002). Their estimates for the policy preferences of each justice are available electronically at <http://adm.wustl/supct.html>.

1.00	.875	.66	.66	.575	.375	.33	.315	.266
7/7	4/2	4/6	4/6	8/14	3/8	5/15	5/16	4/15
<most expansive							least expansive>	

As in Figure 1 there are four justices clearly taking restrictive views in securities cases, but the gap between those four and the median justice is much larger in period 3 where the median justice is Kennedy than in Period 2 where the median justice is Blackmun (and White.)

During the early part of Period 3 the Court went through four changes in a fairly short period of time. Figure 3 presents the lineup for Period 3 using seats instead of individual justices thus presenting the court as it looked at the time of each decision. The result shows an even larger difference between the conservative justices (of which there were only three consistently through this transitional period) and the median voter. As the personnel of the court changed without a clear majority for either side, it is less surprising that we see the random nature of the third period.

**Figure 3: Votes in Securities Cases in Period 3 (Combining Seat holders)**

Stevens	Souter/Brennan	Breyer/Blackmun	Kennedy	Ginsberg/White	Thomas/Marshall	Scalia	O'Connor	Rehnquist
.875	.68	.625	.57	.56	.56	.33	.315	.266
most expansive						least expansive>		

The result may not only be due to a change in the Court's personnel but also to a way that an individual justice votes over time. In securities case over the last 30 years there have been two notable evolutions in the approach of a justice but they occurred in opposite directions, tending to cancel out their effect on the court as a whole. Justice Byron White's voting pattern tracks the Court as a whole. His voting record is a perfect

9-0 for the expansive view through 1971, turns decidedly restrictive in the 1973-80 period and then is about 50/50 until he left the court in 1993 (although his last nine votes include only two expansive votes.) Justice Blackmun's records show a decided change from a 6-21 restrictive tilt in his first eight terms<sup>60</sup> to 19-7 for the expansive view in his last 13 terms.<sup>61</sup> White and Blackmun voted together about three-quarters of the time, putting them in the middle of judicial pairs as to agreement. They voted together 14 times on the expansive side and 21 times on the restrictive side. More interesting are the 18 cases in which they disagreed.<sup>62</sup> In eight of these cases, White was on the expansive side and Blackmun on the restrictive side and all but one of these occurred in the 1970s. In 10 of these cases in which they differed, White took the restrictive side and Blackmun the expansive side and all of these cases come after all but two of the previous group. These two justices appear to be moving in opposite directions in their views of the securities laws. Certainly Blackmun's pointed dissents in the Court's most important restrictive cases interpreting Rule 10b-5 during the late 1970s firmly established his move to the expansive wing of the court.<sup>63</sup>

## **2. Beyond an attitudinal approach: The central role of Lewis Powell.**

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<sup>60</sup> [1970-1977]

<sup>61</sup> Blackmun served for 24 terms. The 1978, 1979, & 1980 terms are not included in either grouping reported in the text. During these three terms, the Court was 50/50 in terms of restrictive versus expansive interpretation.

<sup>62</sup> There are a total of 20 instances when White & Blackmun disagreed. Two cases are excluded from analysis because these opinions cannot be classified as either restrictive or expansive.

<sup>63</sup> See e.g. *Ernst & Ernst v. Hochfelder*, "Perhaps the Court is right but I doubt it." 425 U.S. at 216 And *Blue Chip Stamps*, "the Court exhibits a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public, quite out of keeping with our own traditions and the intent of the securities laws." 421 U.S. at 762 and *U.S. v. Chiarella* "The Court continues to pursue a course, chartered in certain recent decisions, designed to transform §10b from an intentionally elastic "catchall" provision to one that catches relatively little of the misbehavior that all too often makes investment in securities a needlessly risky business for the uninitiated investors."

The change in preferences among the justices as shown in the data in the previous part would support a change in the direction of the Court as we have seen twice in the last 30 years but it does not explain all of the results. Something more seemed to be occurring. The change in the court did not occur until Justice Powell arrived and dissipated after his departure even though Rehnquist continued with a similar approach to securities cases but not the same effect on results.

It was not just the addition of Powell's and Rehnquist's votes, but it was the change in the agenda that Powell particularly helped shape. After all, Justice Stewart had taken an expansive position in 10 of 16 cases<sup>64</sup> prior to 1973 and the addition of Burger and Blackmun had not prevented the expansive decisions in *Affiliated Ute* and *Bankers Life*. Professor Adam Pritchard has detailed the influence of Lewis Powell and his conclusions fit within the larger data set presented here. Powell wrote 12 of 40 securities decisions issued by the Court during his tenure, more than double the number of securities opinions written by any other justice over the entire period. Pritchard reports that Powell was active in persuading colleagues to grant certiorari to a case that otherwise would not have made the court's docket. Recall that the numbers of securities cases tripled during the period and its percentage of the court's docket likewise increased.

During this period Powell wrote leading opinions for the court in several areas of securities law:

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<sup>64</sup> There are three cases during this period that cannot be classified as expansive or restrictive. These are omitted from analysis. See *Silver v. New York Stock Exchange*, 373 US 341 (1963); *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 US 414 (1968); *SEC v. Medical Committee for Human Rights*, 404 US 403 (1972).

- *Insider trading.* In *Chiarella*<sup>65</sup> and then in *Dirks*,<sup>66</sup> opinions for the court by Powell reversed the expansive direction of previous federal court decisions as to the reach of insider trading;
- *Definition of security.* Powell's opinions in *United Housing Inc. v. Forman*<sup>67</sup> and *International Brotherhood of Teamsters v. Daniel*<sup>68</sup> ended an unbroken string dating back to the 1940s of expansive interpretations by the Supreme Court of transactions that are subject to the federal securities laws;<sup>69</sup>
- *Implied private cause of action under rule 10b-5.* Powell's opinion in *Ernst & Ernst v. Hochfelder* closed off lower court interpretations that permitted private recover with nothing more than negligence by the defendant<sup>70</sup> Powell's subsequent opinion in *Chiarella* included the clarion call that what 10b-5 catches must be fraud.<sup>71</sup>

As the first two groupings illustrate, Powell often wrote more than one case in a particular area, a willingness over time to help shape the development of a body of law that gave the Supreme Court's pronouncements in securities cases more coherence. Powell's interest and his ability to influence his colleagues undoubtedly reflected his background prior to joining the court. As the only member with extensive experience in

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<sup>65</sup> *Chiarella v. United States*, 445 U.S. 222 (1980).

<sup>66</sup> *Dirks v. Securities and Exchange Commission*, 463 U.S. 646 (1983)

<sup>67</sup> 421 U.S. 837 (1975).

<sup>68</sup> 439 U.S. 551 (1979).

<sup>69</sup> Powell also wrote the opinion in *Landreth Timber Co, v. Landreth*, 471 U.S. 681 (1985) a definition approach that took an expansive view and a companion case *Gould v. Rufenacht*,, 471 U.S. 701 (1985) that is Powell's most glaring inconsistency in securities decisions during his time on the court.

<sup>70</sup> On this topic, opinions written by other justices were as important, for example, Rehnquist wrote *Blue Chip Stamps* and White wrote *Santa Fe*.

<sup>71</sup> *Chiarella v. US*, 445 US 222, 235 (1980) (stating that "[s]ection 10(b) is aptly described as a catchall provision, but what it catches must be fraud.")

private practice and recurring transactional work, Powell's practice informed his and derivatively the Court's understands of these cases.<sup>72</sup>

Perhaps the most telling sign of Powell's influence is what happened after he left. Securities cases now seldom make it to the court's docket. The current members of the court, who have now served together longer than any court since 1825, have decided only 6 securities cases in nine years and only two (both seemingly minor issues) in the last five years.<sup>73</sup>

Although there were several examples where a new justice had a different view about securities law than his or her predecessor, it is likely relevant to the change reflected during Powel's tenure and thereafter that his successor, Anthony Kennedy, not only has displayed a voting record that is much more expansive than Powell, but that it seems to demonstrate the random nature of the court's decisions in the Period 3. Kennedy joins a five person majority for a expansive definition in *Reeves* and he writes an impassioned dissent for an expansive view of implied rights of action in *Virginia Bancshares*, but he also joins the majority in the other four 5-4 decisions that take a restrictive view, *Central Bank*, *Lampf*, *Rodriquez* and *Gustafson*. *Gustafson* remains one of the most perplexing decisions for academics who teach securities law to figure out the Court's reasoning. The Court blocked application of the antifraud provision of the 1933 Act to sales in the secondary market or initial offerings not done through a public offering using an analysis that seemed strange to many securities professors.<sup>74</sup> Reeves

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<sup>72</sup> See Pritchard (describing Powell's transactional experience in Richmond.)

<sup>73</sup> With SEC v. Edwards decided January 13, 2004 the numbers will be updated to three cases in the last six years, but that eight page opinion by a unanimous court is indicative of the relatively less important impact of that opinion as well.

<sup>74</sup> The approach of the 1933 Act was to start with a "global" provision (§5) extending regulation to all securities sales and then to provide exceptions, such as §4(1) which in effect excludes the application of the Act to most secondary sales of securities. Consistent with that global approach, Section 2)3) of the Act

comes out with an expansive result but has attracted similar criticism,<sup>75</sup> contributing to a sense that the securities law jurisprudence of the Court during this most recent period is not particularly clear.

### **3. Other Factors that may explain results:**

Are there factors other than the change in justices that might contribute to the changes in the outcome of securities decisions reflected in the data? We generated several hypotheses and collected data on our sample of cases for use in a multivariate regression in which the dependent variable was whether the decision was expansive or restrictive. We examined several possible independent variables and looked for correlations with an expansive or restrictive decision.

*Hypothesis 1: If the SEC is a party to the litigation or offers its views to the Court, a restrictive holding is less likely.* Although most of the securities law cases are private law, between a quarter and third involve the Securities and Exchange Commission or occasionally the United States prosecutor as a party. In addition to those cases in which the government is a party, the Solicitor General, on behalf of the United States (and, for the most part, for the SEC), was granted permission to argue in another 12 cases and filed amicus briefs in an additional 37 cases so that there were only 11 of 90 cases in which the SEC had no stated opinion.<sup>76</sup> The SEC position (usually expansive,

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broadly defines "offer" to include every attempt to dispose of a security. Ignoring this core structure, the Court's opinion begins with Section 10 which defines what must be in a final statutory prospectus, a small subsection of transactions covered by the Act. See Louis Loss, *The Assault on Securities Act Section 12(2)*, 105 Harv. L. Rev. 908 (1992). But see Elliott J. Weiss, *The Courts Have it Right: Securities Section 12(2) Applies only to Public Offerings*, 48 Bus. Law. 1, 40 (1992) (faulty remains in the earlier opinions reading 12(2) expansively) and Peter Letsou, *The Scope of Section 12(2) of the Securities Act of 1933: A Legal and Economic Analysis*, 45 Emory L. J. 95, 112 (1996) (Justice Kennedy's definition... is difficult to reconcile with the words of the statute.)"

<sup>75</sup> See e.g. Gordon, *Interplanetary Intelligence about Promissory Notes as Securities*, 69 Tex. L. Rev. 383 (1990).

<sup>76</sup> See *infra* Table 3.

but not always) was the prevailing view in 64% of the cases in which the government was a party,<sup>77</sup> although there was a marked difference between its 13-2 record through 1972 and its 5-5 record after 1975. In cases in which the Solicitor General sought to argue a position of the SEC even though it was not directly a party, the SEC’s view prevailed in 76% of cases. In those decisions when an amicus brief was filed but not argued, the SEC’s winning percentage dropped to 48%, and when there was no SEC position articulated in the case, the Court took an expansive view in only one of eleven cases.<sup>78</sup>

**Table 3: SEC Participation**

SEC Role	# case	Outcome (SEC view prevails/ doesn't prevail/ views missing)	SEC prevailing rate given whether it argued expansive or restrictive
<b>Government as Party</b>	<b>28</b>	17-9-2	
Criminal prosecution	5	4-1	
SEC plaintiff	15 <sup>79</sup>	11-4	
SEC defendant	3	1-1-1	
SEC administrative proceeding	5	1-3-1	
<b>SEC as Amicus</b>	<b>52</b>	28-18-6	

<sup>77</sup> The government was a party in 28 cases. In 18 instances, the Court followed the SEC's expansive view (18/28 = 64%).

<sup>78</sup> *Deckert v. Independence Shares Corp.*, 311 US 282 (1940) was the only exception.

<sup>79</sup> We include in our analysis *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) where the SIPC brought the action rather than the SEC.



Amicus and Argued	14	10-3-1	Expansive 7-3 Restrictive 3-0
Amicus filed, but not argued	38	18-15-5	Expansive 16-14 Restrictive 2-1
No SEC role	11		

Thus in 86% of the securities cases decided by the Supreme Court, (77 of 90 cases) the SEC views were presented to the court either because the SEC was a party or because it submitted an amicus brief in the case.<sup>80</sup> Those eleven cases in which there was no SEC view recorded are different in that in 10 of the eleven the court took a restrictive view, a substantially more restrictive outcome than in any other group of cases. The SEC usually took an expansive view for the cases in which it was not a direct party-- 88 per cent of cases (40 of 45)<sup>81</sup> and the Supreme Court took the expansive side in about half of those cases.<sup>82</sup> With the SEC absent as a party, the fraction of the results that reflect a restrictive position increases to 91%.<sup>83</sup> While we cannot be entirely sure whether the SEC has influenced the court to be less restrictive or rather that it has chosen carefully the cases it joins, the results suggest that the SEC is a pivotal player in the making of securities law at the Supreme Court level.

*Hypothesis 2: If the litigation is class action as opposed to a derivative, direct or government action, the result is more likely to be restrictive.*

<sup>80</sup> See *infra* Table 3 (summing 'Government as a party' + 'SEC Amicus').

<sup>81</sup> See *infra* Table 3 (deriving figure from SEC as Amicus, SEC took expansive position in 39 instances).

<sup>82</sup> The SEC expansive view prevailed 22 out of 39 times (56%).

<sup>83</sup> Court took a restrictive view 10 out of 11 times (91%).

As described above, about one-third of the cases involved the SEC (or the Department of Justice in the case of a criminal prosecution) as a party and those cases were more likely to produce an expansive interpretation, even after the counterrevolution. In contrast, class actions have been an area of particular concern to judges such that we might expect to see more restrictive holdings in class actions. The data show that in all categories of cases not involving the government as a party (except those involving trustees) the outcome has been restrictive, usually by a substantial margin. Class actions have become the most common context in which securities cases come to Court in the last three decades and the results are restrictive by a 2-1 margin.<sup>84</sup> The class actions actually produce more expansive results than do the individual cases when measured for the entire time period, but of the nine expansive decisions in individual cases, there are only two after 1973.

**Table 4: Type of Action.**

Type of Case	#	# restrictive	# expansive	# neither
SEC/US	28	9	17	2
Trustee/Committee	4	1	2	1
Class Action	19	10	7	2
Derivative	3	2	1	
§16 derivative	4	3	1	
Direct by Corp.	4	3	1	
Direct Tender Offer	4	3	0	1

<sup>84</sup> There are 16 class action cases in periods 2 and 3. An expansive view prevailed in 5 instances, while the Court took a restrictive view in 9 instances (almost 2 to 1). In two instances, the Court's view is neither expansive nor restrictive.

Individual	24	12	9	3
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*Hypothesis 3: A restrictive result is more likely if the decision below was expansive.* Studies by political scientists, law professors and others have suggested various hypotheses for the court's actions including a tendency toward reversal of the court below.<sup>85</sup> If combined with the Court's leaning toward restrictive interpretations after 1973, we might expect that restrictive decisions by the Supreme Court are more likely when the decision below was expansive. Consistent with other findings of the Supreme Court's tendency to reverse other courts, more than two-thirds of securities cases are reversals of the court below (60 of 90).<sup>86</sup> The Second Circuit has sent more cases to the Supreme Court than any other circuit, consistent with its location to receive cases from the country's commercial center. Its reversal rate, however, is no different from the remaining cases.<sup>87</sup>

*Hypothesis 4: The outcome of a case as expansive or restrictive will not be correlated to when certiorari is granted because of conflicts in the circuits.* The Court has almost complete control of its docket but may offer different explanations for why it takes a case, for example because of a conflict of the circuits or to resolve an important legal issue.<sup>88</sup> If resolving conflicts is an independent ground of the court's approach in taking case, those cases would be independent of any trends toward restrictive or

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<sup>85</sup> Charles M. Cameron et al, Strategic Auditing in a Political Hierarchy: an Informational Model of the Supreme Court's Certiorari Decisions, 94 Am. Pol. Sci. Rev. 101 (2000) (Developing model that an ideological court would grant review and reverse divergent opinions in lower courts).

<sup>86</sup> Sixty cases have either been reversed or vacated. Twenty-eight were affirmed. In *SEC v. Chenery*, 318 US 80 (1943), the Court sent the case back on remand. In *Bankers Trust Co. v. Mallis*, 435 US 381 (1978), the court revoked certiorari.

<sup>87</sup> Out of 90 cases, 26 were sent by the Second Circuit. Seventeen cases were either reversed or vacated by the Court equating to 65% (17/26) compared to two-thirds for all circuits...

<sup>88</sup> In two cases the court's jurisdiction arose from a lower court declaring a federal statute unconstitutional.

expansive decisions for attitudinal reasons. A conflict is given by the Court as a reason for granting certiorari in 23 of the 90 cases. Those cases almost evenly split between expansive results (11) and restrictive results (10) although there are some temporal trends. All five of the cases for which conflict was given as a reason during the 1970s and one more in 1980<sup>89</sup> lead to a restrictive result. At that point the trend changes dramatically for the remainder of the 1980s. The conflict cases which the court heard produced expansive results with results in the 1990s split evenly between 3 expansive results and 3 restrictive results for cases where the court cited a conflict in the circuits.<sup>90</sup> For 27 cases where the Court cited the importance of the case, as opposed to conflict,<sup>91</sup> there were 15 expansive outcomes (all but one prior to 1973<sup>92</sup>) and 12 restrictive outcomes (all between 1972 and 1991). Overall, the two types of cases do not seem to show any difference during the expansive era and the beginning of the counterrevolution period. It may be that the existence of circuit conflict contributed to a softening of the Court's restrictive approach during the later part of the Burger court era.

Because securities laws involve sometimes complicated and specialized questions of statutory construction, it is possible that the court's docket could be influenced by the opinion of the United States (speaking through the Solicitor General) as to whether the Court should grant certiorari to a case raising a difficult statutory question. Of 796 cases since 1958 in which the Court requested the views of the United States prior to granting

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<sup>89</sup> *Aaron v. SEC*, 446 US 680 (1980).

<sup>90</sup> See *U.S. v. O'Hagan*, 521 US 642 (1997) (expansive); *Garrett v. Employers Ins. of Wausau*, 508 US 286 (1993) (expansive); *Gollust v. Mendell*, 501 US 115 (1991) (expansive); *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 US 367 (1996) (restrictive); *Gustafson v. Alloyd Co., Inc.*, 513 US 561 (1995) (restrictive); *Petigrow v. Gilbertson*, 501 US 350 (1991) (restrictive).

<sup>91</sup> There are a total of 29 cases where the Supreme Court has granted cert. due to the importance of the issue rather than due to a conflict between circuits. Two cases are not subject to analysis because the Court has neither taken an expansive or restrictive view. See *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 US 414 (1968); *Gordon v. New York Stock Exchange*, 422 US 659 (1975).

<sup>92</sup> *SEC v. O'Brien*, 467 US 735 (1984).

certiorari securities cases made up 14 or 1.75%.<sup>93</sup> Of those in which the Solicitor General recommended certiorari, the Court granted certiorari in eight and did not hear six (57%) a ratio that is below the Solicitor General's success rate once certiorari has been granted and the Solicitor General argues a position in a case or files an amicus brief in favor of one side.

*Regression Results.* We use logistic regression analysis with the outcome of the case (expansive=1 or restrictive=0) as our dependent variable. Consequently, positive regression coefficients are correlated with expansive rulings and negative coefficients correlate with restrictive rulings. The independent variables are the absences of the SEC as a party (SECNO), the proceeding brought as a class action, (Class Act), whether the decision below was expansive (LoCtExp), whether certiorari was granted because of a conflict between the circuits (CertCon) and whether Justice Powell was a member of the court (CPowell). Our hypotheses are that the absences of the SEC, a class actions, an expansive lower court decision and the presence of Justice Powell should all be more associated with restrictive results and that certiorari being described as to resolve a conflict should less likely to be associated with a restrictive result. The regression results are reported in Table 5. They show that that sign of each variable is in the expected direction (negative for all but Cert for conflict) and that all but the class action are statistically significant at an .01 level. The absences of significance for class actions may be due to the small number of cases.

### **Table 5: Regression Results**

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<sup>93</sup> A Westlaw search of "The Solicitor General is invited" w/ 10 "views of the United States" produced 798 cases back to 1958. Court A cross check against the cases in Appendix A and a survey of other cases produced the numbers of securities cases included.

<b>Paramemter</b>	<b>Estimate</b>	<b>PR&gt;ChiSq</b>
Intercept	1.6467	0.0018*
SecNo	-2.8590	0.0201*
ClassACt	-1.0601	0.1994
LoCtExp	-1.8134	0.0040*
CertCon	1.5993	0.0337*
CPowell	-1.7870	0.0072*

\*=significant at .01

#### **4. Summary**

The Supreme Court jurisprudence in securities law of the last 60 years demonstrates three distinct periods. Through 1972, the Court almost always took an expansive view of the securities laws. Most of these cases involved the SEC as a party and most of them involved the 1933 Act. With the arrival of Lewis Powell and William Rehnquist in 1972, the Court's jurisprudence entered a second or counterrevolutionary phase. The number of cases increased dramatically and the court almost always took a more restrictive view, particularly during the first six terms. This corresponds to the period when Supreme Court overrulings of prior decisions were at their highest for all cases.<sup>94</sup> The Court seemed determined to change the law, particular in reining in the reach of the implied private cause of action under Rule 10b-5. Professor Tom Merrill has recently written of the likely dynamic characteristics of a court in stasis versus a court in flux.<sup>95</sup> The bulk of the Supreme Court's change occurred in more than 30 cases between 1973 and 1982 in which the only change in the court's makeup was Stevens for Douglas in 1975. Yet the immediately prior change of the addition of Powell and Rehnquist likely

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<sup>94</sup> Jim Chen, *Judicial Epochs in Supreme Court History: Sifting Through the Fossil Records for Stitches in Time and Switches in Nine*, 47 St Louis U. L. Rev. 677, 722-731 (2003) (Overruling is primarily a 20<sup>th</sup> century phenomenon with Burger Court's rate higher than those before or after.)

<sup>95</sup> Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis U. L. J. 569 (2003).

dominates the stasis theory. In the years after Lewis Powell left the court and William Rehnquist became Chief Justice, the outcome of the decisions have become much more evenly balanced, but the number of decisions has almost dried up. Even the cases that the court takes do not seem that important and those that they do write have a random air about them.

Two decades ago when the first change was just becoming visible, Professor David Ratner described the Court's jurisprudence as an opera in three acts with Dieci Becinque (10b-5) as the heroine.<sup>96</sup> In the first act, the nine high priests sing her praises. After a three year intermission, the curtain rises on the second act in which the mood has changed drastically. Written in the early 1980s, Ratner did not yet know whether the heroine would be banished from the temple or restored to her former position of glory. The results suggest an outcome different than might have been predicted. With the departure of Powell, there is no longer the unrelenting attack on securities laws, but the theater is getting a bit shabby and the high priests seldom visit. The current Court seems to have little background in securities law and little interest in it and is content to

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<sup>96</sup> Here is Ratner's creative note: "The heroine of the opera is Dieci Becinque (10b-5), a beautiful 30 year old rule, much beloved by securities lawyers everywhere. In the first act, we find her in a marble temple surrounded by nine high priests who sing her praises. First Willio, the eldest priest sings his famous patter song, "Il Sovrintendente d'Assicurazione" ("The Superintendent of Insurance"), in which he eulogizes 10b-5 as the solution to all the wrongs of mankind. The act closes with Blackmunio's aria, "I Uti Affiliati", in which he lauds her as the savior of the oppressed Indian tribes of the American West.

"After a three-year intermission, the curtain rises on the second act. We find our heroine in the same marble temple, but the mood has changed dramatically. Two new priests, Paolo and Rehnquistio, are sworn to destroy her. In the opening aria, "La Scheggia Azzurra" ("The Blue Chip) Rehnquistio tells her that only one who has paid the price may enjoy her affections. This is followed by the rousing "Ride of the Hochfelder" in which Paolo tells her that she was born in manipulation and deception and may only deal with wicked people. Next, in the haunting aria "O Santa Fe" ("Oh Holy faith"), Bianco declares that she must have nothing to do with corporate managers, no matter how wicked they are. Finally in "La Chiarella" ("The Little Printer"), sung again by Paola, she is told that nobody must have anything to do with her unless he first breached a specific duty top his fellow man.

"We do not know how the second act will end, but despite Blackmunio's cry of protest, "Dissentio" at the end of each aria, it appears that the heroine will finally be banished from the temple. However, they may yet be a third act in which she is restored to her former position of glory. Time will tell."

leave the law where it currently is.<sup>97</sup> Much more so than in its earlier period, it refers the opinion writing to the more junior justices, and takes very few cases.<sup>98</sup>

### III. Antitrust Cases

One critic has written of the Rehnquist Court as “unleashing the giant corporation.”<sup>99</sup> However, the trend in antitrust law suggests a richer explanation. The shift toward a prodefendant jurisprudence occurs during the Burger Court, largely due to the influence of Justice Powell, who was influenced by the Chicago School of Economics form of antitrust interpretation. Once Justice Powell retires after the first session of the new Rehnquist Court, the Court shifts toward a more even-handed approach.<sup>100</sup>

This strangely counterintuitive movement may be due to the differing economic and jurisprudential viewpoints of Justices Rehnquist and Powell. Justice Rehnquist appears to follow an older form of economic conservatism, one which is more in tune with the antitrust law’s emphasis on unfettered competition. The Chicago School, on the other hand, is more likely to favor economies of scale and the efficiencies that are assumed to flow from them. Also, Justice Rehnquist’s view of judicial restraint may

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<sup>97</sup> Of the current justices, private practice was the dominant experiences of the justice prior to joining the court... Chief justice Rehnquist practiced law in Phoenix for 16 years and was active politically during that time; Justice Kennedy practiced law in Sacramento with a small firm in that state capital and taught constitutional law as an adjunct at McGeorge Law School. Justice Stevens practiced in Chicago was active in antitrust law. The prior legal professional experiences was almost entirely in government for justices Souther, Thomas and O’Connor and in academics for Justices Ginsberg and Scalia, and combined in academics and government for Justice Breyer.

<sup>98</sup> Of the 90 cases decided by the Supreme Court, the mean seniority of the opinion writer is 5.5. For this computation, the chief justice is designated 1 and the most senior justice as 2 and on down to the most junior justice which is a 9. The current post-94 court has a mean seniority of 5.8 for the writer of the court’s opinion, in contrast to the counterrevolution court (1973-80) mean of 5.2 even with Powell writing many opinions from a very low spot in the order.

<sup>99</sup> Eleanor M. Fox, *Antitrust and Business Power*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 213, 213 (Herman Schwartz ed., 2002).

<sup>100</sup> See Appendix B.



cause him to follow precedent in antitrust, rather than create economic justifications for avoiding precedent.<sup>101</sup>

In examining this shift, this essay will look at two periods of Court activity, Justice Powell's tenure and the Rehnquist Court since his retirement. This periodization differs from the standard tendency to look at Court eras in relation to chief justiceships,<sup>102</sup> although the Rehnquist chief justiceship is very important in our analysis. By reconfiguring the time periods, we hope to make this unexpected shift in jurisprudence more apparent, and more readily understandable.

The antitrust story underlying the Supreme Court's economic regulation of private law is similar to that described in this article regarding corporate and securities cases. A significant shift was underway soon after Justices Powell and Rehnquist joined the Court on the same day on January 7, 1972. This new direction became apparent when *United States v. General Dynamics Corp.*<sup>103</sup> provided the Court with the opportunity to revisit the question of the continued utility of a market concentration analysis in merger cases under § 7 of the Clayton Act.

Writing for the majority, Justice Stewart addressed whether the Court would continue to find *prima facie* violations of § 7 from aggregate statistics showing an increase in market concentration. The Court made clear in *General Dynamics* that statistical evidence of concentration would no longer enjoy the presumption it once

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<sup>101</sup> SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 23-24 (1989); H. Jefferson Powell, *Symposium: The Rehnquist Civic Tradition: Reviving Republicanism*, 97 YALE L.J. 1703-04 (1998).

<sup>102</sup> See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

<sup>103</sup> 415 U.S. 486 (1974).

held.<sup>104</sup> Rather, market concentration would be viewed as one of many factors the Court would consider.

Clearly, the Court in *General Dynamics* placed far less emphasis on concentration statistics and signaled the importance of nonmarket factors. The consequence of the *General Dynamics* decision is that the plaintiff, in this case the federal government, has a heavier burden in proving a *prima facie* case under § 7, as the Court considerably weakened the traditional use of structural data as the primary enforcement evidence in a merger challenge.<sup>105</sup> The ability of defendants to broaden their defenses in a § 7 case was greatly enhanced by the *General Dynamics* decision. Justices Powell and Rehnquist were both in the majority in *General Dynamics*.

Decided only three years after *General Dynamics*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>106</sup> is perhaps the most sweeping and important antitrust case within the last thirty years. Justice Powell wrote the opinion, in which Justice Rehnquist joined. In *Sylvania* the Court, by a 6-2 margin, held that the ancient property rule against restraints on alienation did not justify the *per se* approach in a nonprice vertical restraint case. Embedded in the *Sylvania* rationale was economic efficiency as the principal good of

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<sup>104</sup> United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

<sup>105</sup> See, e.g., United States v. Baker Hughes, 908 F.2d 981, 991-92 (D.C. Cir. 1990):

A defendant can [rebut a presumption of anticompetitive effect] by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor. However, [i]mposing a heavy burden of production on a defendant would be particularly anomalous where ... it is easy to establish a *prima facie* case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. [Concentration data] cannot guarantee litigation victories.

See also F.T.C. v. Freeman Hosp., 69 F.3d 260 (8th Cir. 1995); F.T.C. v. Univ. Health, 938 F.2d 1206; United States v. Mercy Health Servs., 902 F.Supp. 968 (N.D. Iowa, 1995); N.Y. v. Kraft General Foods, Inc., 926 F.Supp. 321 (S.D.N.Y. 1995). But see F.T.C. v. Heinz, 246 F.3d 708 (D.C. Cir. 2001).

<sup>106</sup> 433 U.S. 36 (1977). See generally, E. THOMAS SULLIVAN AND HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS (5th ed. 2003). See also Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

antitrust law and the promotion of interbrand competition, at the expense of intrabrand competition and small business.<sup>107</sup> Further, *Sylvania* indicated that courts should use a rule of reason approach to weigh whether the challenged “[v]ertical restriction [will] promote interbrand competition by allowing the manufacturer to achieve certain efficiencies.”<sup>108</sup> The breadth of *Sylvania*’s preferred rule of reason analysis covers all nonprice vertical restrictions, with the exception of tying arrangements, including territorial, customer, and location clause restrictions. Such restraints might be required, the Court reasoned, for economic reasons such as economies of scale, distribution efficiencies, dealer good will and avoiding “free rider” problems. No antitrust opinion in the last thirty years invited as broad an array of business justifications as did *Sylvania*.

Of the 63 antitrust cases decided by the Supreme Court during Justice Powell’s tenure from 1972 to 1987, *Matsushita Electric Co. v. Zenith Radio Corp.*<sup>109</sup> stands out as the most important opinion involving crucial procedural issues. *Sylvania* and *Matsushita* together represent, arguably, the two paradigm cases of the last thirty years in antitrust. Each demonstrates a significant, sharp shift in antitrust jurisprudence. While *Sylvania* recast the substantive law governing vertical restraints, *Matsushita* set new standards for summary judgment, including burdens of proof, evidentiary rules and inferences.<sup>110</sup> Each

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<sup>107</sup> See *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (Douglas, J.); *Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293 (1949) (Douglas, J., dissenting).

<sup>108</sup> 433 U.S. at 54.

<sup>109</sup> 475 U.S. 574 (1986).

<sup>110</sup> See also Justice Powell’s opinion for a unanimous Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), where the Court also increased the burden of proof on plaintiffs when the claim for relief is based on a conspiracy theory. The Court in *Monsanto* said:

“On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, then there is considerable danger that the doctrines enunciated in *Sylvania* ... will be seriously eroded .... There must be evidence that tends to exclude the possibility that the manufacturer and the non-terminated distributors were acting independently .... The antitrust plaintiff should present direct or circumstantial evidence

opinion by Justice Powell favored a restrictive approach to antitrust enforcement, at the expense of plaintiffs.<sup>111</sup> Each is a strong policy statement embracing nonintervention in antitrust matters.

*Matsushita* involved an allegation of a horizontal conspiracy to engage in predatory pricing—normally, if proved, a *per se* antitrust violation under § 1 of the Sherman Act. When the case reached the Supreme Court, the issue was whether the plaintiffs “adduced sufficient evidence [during the pretrial] in support of their theory to survive summary judgment.”<sup>112</sup>

In answering that question, the Court appreciably increased a plaintiff’s burden in avoiding summary judgment. In a 5-4 split unusual for antitrust cases,<sup>113</sup> Justice Powell, writing for the majority, held that when a defendant files a motion for summary judgment the burden shifts to the plaintiff to demonstrate that there exists a dispute as to a material fact, and that the burden is increased when the court determines that the plaintiff’s underlying theory is “implausible.”<sup>114</sup> The Court advances that this burden of persuasion requires more evidence than is normally required for a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure.<sup>115</sup> In short, a plaintiff must demonstrate

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that reasonably tends to prove that the manufacturer and others “had a conscious commitment to a common scheme designed to achieve an unlawful objective.””  
465 U.S. at 763, 764. *But see* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992) (decided after Justice Powell retired).

<sup>111</sup> This should be viewed in contrast to the expansive interpretations of antitrust that were favorable to plaintiffs during Chief Justice Earl Warren’s tenure and to a lesser extent during Chief Justice Burger’s term. *See* E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court’s Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1 (1982).

<sup>112</sup> 475 U.S. at 585 (1986).

<sup>113</sup> There were 12 of 63 cases (20%) during this time that were decided by a 5-4 margin. *See* Appendix A.

<sup>114</sup> *See* Sullivan and Hovenkamp, *supra* note 4, at 340.

<sup>115</sup> *Id.*

that “the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.”<sup>116</sup>

Importantly, *Matsushita* approved the use of summary judgment by defendants as a device for disposing of complex antitrust cases in contrast to well-established Supreme Court precedent.<sup>117</sup> But the *Matsushita* opinion would seem to be limited to cases in which the plaintiff’s allegations rest on circumstantial evidence—the norm in antitrust cases—as opposed to those in which there is direct, unambiguous evidence.<sup>118</sup> It is the quality of the evidence, not the quantity, to which this new standard of evidence and burden of proof speaks.<sup>119</sup> Nevertheless, *Matsushita* has proven to be the watershed procedural case that has transformed scores of cases into summary judgments in defendants’ favor.<sup>120</sup> And it is Justice Powell’s economic analysis that motivated and justified this shift.

During the time Justices Powell and Rehnquist served together on the Court, from 1972 to 1987, Justice Powell’s view was more representative of the Court as a whole than Justice Rehnquist’s. Justice Powell wrote four times more antitrust opinions for the majority than Justice Rehnquist, who was more often in dissent.<sup>121</sup> Justice Powell wrote

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<sup>116</sup> 475 U.S. at 588 (1986).

<sup>117</sup> *Poller v. Columbia Broad. Sys.*, 368 U.S. 464 (1962) (where the Court said that summary judgment “should be used sparingly in complex antitrust litigation where motive and intent play leading roles....” *Id.* at 473) *See also*, Steve Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

<sup>118</sup> *See generally*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990); *Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990).

<sup>119</sup> *Matsushita*, 475 U.S. at 587; *See* Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 925 (2001).

<sup>120</sup> *See, e.g.*, *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028 (8th Cir. 2000); *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37 (7th Cir. 1992); *Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317 (7th Cir. 1991); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988).

<sup>121</sup> *See* Appendix A.

13 majority opinions<sup>122</sup> and voted in the dissent 10 times.<sup>123</sup> During the same time, Justice Rehnquist wrote 3 majority opinions<sup>124</sup> in antitrust and voted with the dissent 16 times.<sup>125</sup> Justice Powell agreed with Justice Rehnquist 77% of the time in antitrust cases.<sup>126</sup> Three other justices, Stewart, O'Connor, and Burger, were more in agreement with Justice Rehnquist, 84.6%, 92% and 81.2% respectively.<sup>127</sup> Of the 10 dissents that Justice Powell voted with, six included Justice Rehnquist.<sup>128</sup> But in the landmark decisions, *Sylvania* and *Matsushita*, Justice Rehnquist joined the Powell majority opinions. And of the 63 antitrust cases over this 15-year period, Justices Rehnquist and

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<sup>122</sup> 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Hallie v. Eau Claire, 471 U.S. 34 (1985); S. Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150 (1983); Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378 (1981); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

<sup>123</sup> Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Fed. Mar. Comm'n v. Pac. Mar. Ass'n, 435 U.S. 40 (1978); Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); United States v. ITT Cont'l Baking Co., 420 U.S. 223 (1975); Ricci v. Chi. Mercantile Exch., 409 U.S. 289 (1973).

<sup>124</sup> Rice v. Norman Williams Co., 458 U.S. 654 (1982); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).

<sup>125</sup> 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150 (1983); Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Blue Shield of Va. v. McCready, 457 U.S. 465 (1982); Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982); Cmty. Communications Co. v. Boulder, 455 U.S. 40 (1982); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978); Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); United States v. ITT Cont'l Baking Co., 420 U.S. 223 (1975); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973).

<sup>126</sup> See Appendix A.

<sup>127</sup> See Appendix A.

<sup>128</sup> Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); United States v. ITT Cont'l Baking Co., 420 U.S. 223 (1975).

Powell were in disagreement only 13 times.<sup>129</sup> During this period, Justice Douglas disagreed with Justice Rehnquist in 69.8% of the 13 antitrust cases in which both participated.<sup>130</sup> Justices Marshall and Brennan disagreed with Justice Rehnquist approximately half the time.<sup>131</sup> Justice White agreed with Justice Rehnquist in 63.9% of their cases, and Justice Stevens in 65.8%.<sup>132</sup>

The period before Justice Powell's retirement, while both he and Justice Rehnquist served together on the Court, also saw the Court interpret the antitrust law restrictively in favor of defendants 38 times, compared to 27 holdings that could be considered pro-plaintiff or claim expansive in nature.<sup>133</sup> This trend changed after Justice Powell retired from the Court, with a more evenly balanced pro-plaintiff, pro-defendant record emerging. And, remarkably, during Powell's tenure the Court chose, through its discretion, to decide 47 antitrust procedural issues compared with only 21 substantive issues.<sup>134</sup> Unlike the restrictive/expansive pattern, this pattern of selecting more

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<sup>129</sup> 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150 (1983); Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Blue Shield of Va. v. McCready, 457 U.S. 465 (1982); Cmty. Communications Co. v. Boulder, 455 U.S. 40 (1982); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978); Fed. Mar. Comm'n v. Pac. Mar. Ass'n, 435 U.S. 40 (1978); United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973); Ricci v. Chi. Mercantile Exch., 409 U.S. 289 (1973).

<sup>130</sup> See Appendix A.

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

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

<sup>133</sup> *Id.* Two cases can be characterized as both restrictive and expansive: J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Ricci v. Chi. Mercantile Exch., 409 U.S. 289 (1973). These cases have been included in the appendix as both restrictive and expansive decisions.

<sup>134</sup> See Appendix A. The numbers in the appendix include five cases that are counted as both substantive and procedural: F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

procedural cases persisted after Justice Powell retired.<sup>135</sup> Also, 12 cases during this first period were 5-4 decisions, representing 20%, while 19 were unanimous opinions.<sup>136</sup>

The antitrust cases decided during the Powell era were predominantly private cases with only 11 cases having been brought by the federal government,<sup>137</sup> and one having been brought by the state of Illinois.<sup>138</sup> The federal government won of these cases, while Illinois lost its case in a landmark decision that greatly restricted the use of the federal claim in price-fixing cases.<sup>139</sup>

After Justice Rehnquist became chief justice in the fall of 1986, Justice Powell served only one more term, retiring from the Court in the summer of 1987. During Justice Powell's final term, the Court decided *324 Liquor Corp. v. Duffy*.<sup>140</sup> Justice Powell wrote the majority opinion for the 7-2 Court; Chief Justice Rehnquist, along with Justice O'Connor, dissented. The issue before the Court was whether the *Parker v. Brown*<sup>141</sup> "state action" exemption applied to the facts of the case. The Court found that the exemption was not available because the challenged conduct of liquor pricing was not "actively supervised by the State," as required. Said Justice Powell for the majority of the Court, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing

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<sup>135</sup> See Appendix B. In the post-Powell period, there were 15 procedural decisions and 10 substantive. Both of these totals include three cases that can be classed as both substantive and procedural: *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *F.T.C. v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

<sup>136</sup> See Appendix A.

<sup>137</sup> cite case

<sup>138</sup> cite case

<sup>139</sup> cite case

<sup>140</sup> 479 U.S. 335 (1987).

<sup>141</sup> 317 U.S. 341 (1943).



arrangement.”<sup>142</sup> The O’Connor and Rehnquist dissent was mostly motivated by federalism concerns.<sup>143</sup> In contrast, the majority opinion was centered more in an efficiency analysis.<sup>144</sup> Also during Justice Powell’s final term and after Justice Rehnquist became chief justice—during the 1986-87 term—the Court decided *Cargill v. Monfort of Colo*, an antitrust injury case in the context of a merger under § 7 of the Clayton Act. Both justices were in the majority for this case that restricted a plaintiff’s claim for relief under § 7.

An interesting question, after Justice Powell’s retirement, is whether the Court under Chief Justice Rehnquist continued the dramatic turn toward a pro-defendant, restrictive approach to antitrust analysis that characterized the Court from 1982 to 1987 during Justice Powell’s tenure. Although the Court is generally perceived as becoming more conservative at this time,<sup>145</sup> the aggregate empirical evidence<sup>146</sup> suggests that the pro-defendant trend ceased after Justice Powell’s retirement.

From the time Justice Powell retired to the present, the Supreme Court has decided 22 antitrust cases. This represents, on average, only slightly more than one case per term for the last 16 years.<sup>147</sup> The infrequency of antitrust review by the Court is even

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<sup>142</sup> 479 U.S. at 345 (1987). (Quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)).

<sup>143</sup> See generally, E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism’s Triumph Over Competition, the Last Fifty Years*, 3 J.L. & POL’Y 473 (2000). See also E. Thomas Sullivan, *Judicial Sovereignty: The Legacy of the Rehnquist Court*, 20 CONST. COMMENT. (forthcoming 2002).

<sup>144</sup> See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979); *Cont’l T.V. v. G.T.E. Sylvania*, 433 U.S. 36 (1977).

<sup>145</sup> *Supra* note.

<sup>146</sup> See Appendixes A & B.

<sup>147</sup> Interestingly, the Court decided five antitrust cases in the 1989-1990 term (*Kan. v. Utilicorp United, Inc.*, 497 U.S. 199 (1990); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cal. v. Am. Stores Co.*, 495 U.S. 271 (1990); *F.T.C. v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990)), which is the year the Court wrote the second most antitrust opinions in thirty years (next to 1978). There were four cases in the 1992-1993 term (*Hartford Fire Ins. v. Cal.*, 509 U.S. 764 (1993); *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Prof’l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49 (1993); *Spectrum Sports, Inc. v.*

more startling when it is noted that the last antitrust case decided was *California Dental Ass'n v. Federal Trade Comm'n*<sup>148</sup> in 1999. Moreover, *California Dental* is only the third enforcement case brought by the federal government to reach the Court during this long period of time.<sup>149</sup> Three cases were brought by states,<sup>150</sup> two of which were brought by the state of California. The decline in federal antitrust enforcement has been well documented previously,<sup>151</sup> but the fact that only three cases brought by the federal government has been decided by the Court in the last 16 years should raise public policy concerns. And even in *California Dental*, the last antitrust case decided by the Court, the Court was perplexed, after 109 years of Sherman Act analysis, about how broad the antitrust analysis should be. On this crucial interpretive point, the Court split 5-4.

Unlike the marked increased trend in public law cases resulting in 5-4 decisions,<sup>152</sup> only four of the 22 antitrust cases (20%) were decided 5-4,<sup>153</sup> and one of

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McQuillan, 506 U.S. 447 (1993)) and three in 1987-1988 (*Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Patrick v. Burget*, 486 U.S. 94 (1988); *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988)).

<sup>148</sup> 526 U.S. 756 (1999). The Court in *California Dental* held that the Federal Trade Commission had jurisdiction over the dental association, a nonprofit professional association, but that the Ninth Circuit's analysis of the case was too much of a "quick look." Justice Souter's opinion for the Court criticized the Court of Appeals for not "scrutiniz[ing] the assumption of relative anticompetitive tendencies" more thoroughly. *Id.* at 781. On the scope of this analysis, the Court split 5-4. Four of the justices, led by Justice Breyer, would have upheld the Ninth Circuit on its analysis and found a violation without further consideration.

The Court has granted petitions for certiorari in two antitrust cases for the 2003 term: *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 and *U.S. Postal Serv. v. Flamingo Indus. (U.S.A.) Ltd.*, No. 02-1290.

<sup>149</sup> Cite two cases

<sup>150</sup> *Kan. v. Utilicorp United, Inc.*, 498 U.S. 46 (1990); *Cal. v. Am. Stores, Colo.*, 495 U.S. 271 (1990); *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989).

<sup>151</sup> E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINN. L. REV. 565 (2002); Bill K., *supra*

<sup>152</sup> See 72 U.S. LAW WEEK 3078-79 (BNA July 15, 2003).

2002 – 15 of 73 cases (21%)  
2001 – 21 of 76 cases (28%)  
2000 – 26 of 79 cases (33%)  
1999 – 21 of 74 cases (28%)  
1998 – 19 of 80 cases (24%)  
1997 – 16 of 96 cases (17%)  
1996 – 17 of 91 cases (19%)

those, *California Dental*, also had a unanimous decision on one of its two issues. Nine of the 22 cases were unanimous.<sup>154</sup> Five of the 22 were decided by a vote of 6-3,<sup>155</sup> and the majority had only one or two dissenters.<sup>156</sup> Thus, one can see more agreement among the justices in antitrust cases than in public law cases in general.<sup>157</sup>

One member of the Court, Justice Stevens, stands out during this period as having written more antitrust cases than any other justice. With the exception of Justice Ginsburg, however, all the justices actually authored at least one opinion.<sup>158</sup> Four of the 22 antitrust decisions were written by Justice Stevens,<sup>159</sup> who also wrote five dissents.<sup>160</sup> Justice Kennedy followed Justice Stevens in quantity of majority opinions with three.<sup>161</sup> Justice Powell wrote only one antitrust majority opinion<sup>162</sup> for the 1986-87 term after

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1995 – 16 of 85 cases (19%)

<sup>153</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999); *Hartford Fire Ins. v. Cal.*, 509 U.S. 764 (1993); *Summit Health v. Pinhas*, 500 U.S. 322 (1991); *Kan. v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). This is the same percentage of 5-4 opinions that the Court filed during the Powell tenure from 1972 to 1987.

<sup>154</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128; *State Oil Co. v. Kahn*, 522 U.S. 3 (1997); *Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Cal. v. Am. Stores Co.*, 495 U.S. 271 (1990); *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989); *Patrick v. Burget*, 486 U.S. 94 (1988).

<sup>155</sup> *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *F.T.C. v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

<sup>156</sup> See Appendix B.

<sup>157</sup> See *supra* note Over the last eight years, 24% of all cases have been decided by a 5-4 margin. *Id.* at

<sup>158</sup> Justices Thomas, O'Connor and Blackmun each had one opinion.

<sup>159</sup> *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Cal. v. Am. Stores Co.*, 495 U.S. 271 (1990); *F.T.C. v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

<sup>160</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988). Justice Stevens also joined in the dissent in *Cal Dental*, 526 U.S. 756 (1999), for a total of 6 dissenting votes in the 22 cases.

<sup>161</sup> *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Kan. v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

<sup>162</sup> *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). In that case, the Court held that the defendant was not exempt from antitrust liability under the state action immunity because the state (New York) was not actively supervising the defendants' conduct as required by *Parker v. Brown*, 317 U.S. 341 (1943); See also *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

Justice Rehnquist became chief justice and before Justice Powell's retirement in the summer of 1987.

Although the Court was not sharply divided in antitrust cases the last 16 years, Justice White tied Justice Stevens with six dissenting votes.<sup>163</sup> Interestingly, Chief Justice Rehnquist dissented less frequently than any other justice, doing so only once since Justice Powell retired.<sup>164</sup> Justices Scalia and Thomas each had three dissents in the period.<sup>165</sup> Chief Justice Rehnquist's dissent came in an antitrust procedural case that was decided in the plaintiff's favor.<sup>166</sup> He did not dissent in any of the antitrust substantive law cases during this period.

This record reveals that Chief Justice Rehnquist is in the majority more often in antitrust cases than any other justice since Justice Powell retired.<sup>167</sup> Justice Kennedy agreed with the chief justice in antitrust cases, in this second period, more often than any other justice at an 86.2% rate, followed by Justice Thomas at 86%.<sup>168</sup> Justices White, Stevens and Ginsburg disagreed with Chief Justice Rehnquist most often, with an agreement rate of only about 60%.<sup>169</sup> Justice Breyer, the other antitrust lawyer on the

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<sup>163</sup> *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Kan. v. Utilicorp United, Inc.*, 497 U.S. 199 (1990); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

<sup>164</sup> *F.T.C. v. Tigor Title Ins. Co.*, 504 U.S. 621 (1992).

<sup>165</sup> Justices Scalia and Thomas both dissented in *Hartford Fire Insurance. v. California*, 509 U.S. 764 (1993) and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Justice Scalia also dissented in *Summit Health v. Pinhas*, 500 U.S. 322 (1991), and Justice Thomas dissented in *F.T.C. v. Tigor Title Insurance Co.*, 504 U.S. 621 (1992).

<sup>166</sup> *F.T.C. v. Tigor Title Ins. Co.*, 504 U.S. 621 (1992).

<sup>167</sup> See Appendix B.

<sup>168</sup> *Id.* This pattern of Justice Kennedy agreeing with Chief Justice Rehnquist more often than any other justice holds true for all cases decided by the Court the last term—October Term 2002—as well. For all cases decided during the 2002-2003 term, Justice Kennedy agreed with Chief Justice Rehnquist 91% of the time, followed by Justice O'Connor at 87% and Justice Thomas at 76%. 72 U.S. LAW WEEK 3080 (BNA July 15, 2003).

<sup>169</sup> See Appendix B.

Court besides Justice Stevens, agreed with Chief Justice Rehnquist 75% of the time,<sup>170</sup> but this included only the four cases since his appointment in 1994, including his partial, very thorough dissent in the most recent antitrust case, *California Dental*.<sup>171</sup>

At the beginning of the Rehnquist Court, in the last year of Justice Powell's tenure, Justice Powell was in agreement with Chief Justice Rehnquist in one of two cases. As noted above, Justice Powell wrote the majority opinion in *324 Liquor*,<sup>172</sup> while the chief justice dissented. However, both were in the majority in the first antitrust case to come before the Rehnquist Court, *Cargill v. Monfort*.<sup>173</sup>

Many antitrust scholars have written that the Supreme Court under Chief Justices Burger<sup>174</sup> and Rehnquist<sup>175</sup> has transformed into a pro-business court that promotes efficiency at the expense of other policy values. One well regarded, progressive antitrust scholar has called the antitrust jurisprudence of the Rehnquist Court, "The unleashing of the Giant Corporation."<sup>176</sup> When one considers the totality of the Rehnquist Court's antitrust opinions and the methodology employed, however, this characterization may seem too harsh.

A review of the 24 antitrust decisions during the 17 years of the Rehnquist Court, including Justice Powell's last year, demonstrates that the Court's antitrust jurisprudence is neither settled nor monolithic. Seventeen of the 24 cases can be considered procedural,

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<sup>170</sup> *Id.*

<sup>171</sup> 526 U.S. 756, 781-794 (1999).

<sup>172</sup> 479 U.S. 335 (1987).

<sup>173</sup> 479 U.S. 104 (1986).

<sup>174</sup> Sullivan, *supra* note 43. *See generally* Broad. Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

<sup>175</sup> Eleanor Fox, *Antitrust and Business Power*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 214 (Herman Schwartz ed., 2002). *See generally* State Oil Co. v. Kahn, 522 U.S. 3 (1997); Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988).

<sup>176</sup> Fox, *supra* note 69 at 224.

that is they were not decided primarily on substantive law grounds.<sup>177</sup> Ten of the cases were substantive in nature.<sup>178</sup> Remarkably, the cases are evenly divided between 12 cases that can be characterized as requiring a pro-defendant, restrictive interpretation or outcome,<sup>179</sup> and 13 cases that yield a pro-plaintiff, expansive interpretation of the antitrust laws.<sup>180</sup> This finding of a more expansive or pro-plaintiff Court surely will be seen as counterintuitive by many.<sup>181</sup> Three of the 24 cases predominantly have an overlap of both substantive and procedural law issues.<sup>182</sup> Of the ten substantive law

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<sup>177</sup> Cal. Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Hartford Fire Ins. v. Cal., 509 U.S. 764 (1993); Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993); F.T.C. v. Tior Title Ins. Co., 504 U.S. 621 (1992); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Kan. v. Utilicorp United, Inc., 497 U.S. 199 (1990); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Cal. v. Am. Stores Co., 495 U.S. 271 (1990); F.T.C. v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Cal. v. ARC Am. Corp., 490 U.S. 93 (1989); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Patrick v. Burget, 486 U.S. 94 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986). Three of the above cases also include substantive holdings and are listed again in the following note.

<sup>178</sup> Cal. Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); State Oil Co. v. Kahn, 522 U.S. 3 (1997); Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990); Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990); F.T.C. v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988). Three of the above cases also include procedural holdings and were listed in the previous note as well.

<sup>179</sup> Cal. Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); State Oil Co. v. Kahn, 522 U.S. 3 (1997); Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Kan. v. Utilicorp United, Inc., 497 U.S. 199 (1990); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986). The first of these cases, *Cal. Dental*, also includes an expansive holding, and is listed again in the following note.

<sup>180</sup> Cal. Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); Hartford Fire Ins. v. Cal., 509 U.S. 764 (1993); F.T.C. v. Tior Title Ins. Co., 504 U.S. 621 (1992); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991); Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990); Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990); Cal. v. Am. Stores Co., 495 U.S. 271 (1990); F.T.C. v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Cal. v. ARC Am. Corp., 490 U.S. 93 (1989); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Patrick v. Burget, 486 U.S. 94 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987). The first of these cases, *Cal. Dental*, also includes a restrictive holding, and was listed in the preceding note as well.

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<sup>182</sup> Cal. Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); F.T.C. v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).

holdings, six of the cases interpreted § 1 of the Sherman Act<sup>183</sup> (three were vertical cases and three were horizontal). Two of the cases involved § 2;<sup>184</sup> one was a price discrimination case<sup>185</sup> and one was a claim under the Federal Trade Commission Act.<sup>186</sup>

In contrast to the substantive law cases, of the 17 procedural holdings by the Rehnquist Court in antitrust cases, five cases concerned the *Noerr-Pennington* doctrine;<sup>187</sup> four dealt with the state action doctrine under *Parker v. Brown*;<sup>188</sup> two were antitrust injury cases<sup>189</sup> under *Associated General*<sup>190</sup> and *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*;<sup>191</sup> and two cases involved statutory exemptions.<sup>192</sup> Further, the following areas each had one case: summary judgment,<sup>193</sup> commerce clause,<sup>194</sup> direct purchaser rule,<sup>195</sup> divestiture,<sup>196</sup> preemption,<sup>197</sup> and jurisdiction under the FTC Act.<sup>198</sup> In many respects these cases present a pattern in which the Rehnquist Court has adopted certain rules and standards, including evidentiary standards, that avoid making significant changes to the substantive law of antitrust, but which also, in certain respects, create barriers to litigation that impede litigants from moving their cases forward on the substantive issues.

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<sup>183</sup> cite

<sup>184</sup> *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

<sup>185</sup> *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

<sup>186</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999).

<sup>187</sup> cite

<sup>188</sup> cite

<sup>189</sup> cite the cases.

<sup>190</sup> 459 U.S. 519 (1983).

<sup>191</sup> 429 U.S. 477 (1977).

<sup>192</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Hartford Fire Ins. v. Cal.*, 509 U.S. 764 (1993).

<sup>193</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

<sup>194</sup> *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991).

<sup>195</sup> *Kan. v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

<sup>196</sup> *Cal. v. Am. Stores Co.*, 495 U.S. 271 (1990).

<sup>197</sup> *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989).

<sup>198</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999).

Significantly, Chief Justice Rehnquist was in the majority in all 12 cases that can be characterized as pro-defendant or restrictive of antitrust enforcement.<sup>199</sup> This is not surprising, though, since he was in the majority in all 24 antitrust decisions except two,<sup>200</sup> both of which resulted in an expansive interpretation of the antitrust laws.<sup>201</sup>

For the approximately thirty-year period studied, a pattern of case selection and decision-making emerges. First, the Court decided far more antitrust cases during Justice Powell's tenure than afterward,<sup>202</sup> although the two time periods are roughly the same length. Second, defendants won more often during the Powell era than since his retirement.<sup>203</sup> Third, for both periods, the Court used its case selection to shape antitrust doctrine far more through procedure than through substantive decision-making. Fourth, Chief Justice Rehnquist, as in other Supreme Court jurisprudence, clearly is in the majority in antitrust cases far more often than in dissent and certainly more so since Justice Powell has retired.<sup>204</sup> Fifth, during the first period studied, 1972 through 1987, the federal government was a party plaintiff in eight out of the 63 antitrust cases or about 13% of the time, while in the period since Justice Powell's retirement, the federal government brought only three cases out of the 22 that were decided (14%), one of which was the last antitrust case decided by the Supreme Court, in 1999.<sup>205</sup> Finally, although almost three times more antitrust cases were decided while Justice Powell was on the Court than since his retirement, antitrust is still not a settled jurisprudence.<sup>206</sup> For

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<sup>199</sup> See *supra* note 73.

<sup>200</sup> *Hartford Fire Ins. v. Cal.*, 509 U.S. 764 (1993); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

<sup>201</sup> See Appendix B.

<sup>202</sup> 63 cases from 1972-87; 22 cases from 1987 to the present. See Appendixes A & B.

<sup>203</sup> 38 of 63 cases (60%) were decided in defendants' favor during Justice Powell's tenure. See Appendix A. 11 of 22 (50%) were decided in defendants' favor since his retirement. See Appendix B.

<sup>204</sup> See Appendixes A & B.

<sup>205</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999).

<sup>206</sup> See, e.g., *Id.*



example, the Court has taken only one § 7 case<sup>207</sup> on substantive grounds since *General Dynamics* in 1974,<sup>208</sup> only three under § 2 of the Sherman Act regarding monopolization claims,<sup>209</sup> and it was divided 5-4 in its most recent interpretation of the rule of reason under § 1 of the Sherman Act.<sup>210</sup>

**Figure 4: Antitrust Votes of Justices on the Court in early period 2**

Douglas	Stevens	Brennan	Marshall	White	Blackmun	Burger	Stewart	Rehnquist	Powell
.69	..594	..567	.577	.605	.465	.266	.342	.256	.285
<most expansive								least expansive>	

**Figure 5: antitrust Votes of the Current Justices**

Ginsberg	Stevens	Breyer	Souter	Kennedy	Thomas	Scalia	O’Conner	Rehnquist
.00	.594	.00	.25	.42	.00	.375	.195	.256
0/4	41/69	0/4	3/12	9/21	0/10	9/24	9/46	14/58
<most expansive								least expansive>

<sup>207</sup> See *Md. v. United States*, 460 U.S. 1001 (1983); *aff’g United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.C.D.C. 1982). Cite the two cases that were on procedural grounds.

<sup>208</sup> 415 U.S. 486 (1974).

<sup>209</sup> *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1996); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

<sup>210</sup> *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756 (1999).

Appendix A: Securities Cases

<b>Main Table</b>						
<b>Case Name</b>	<b>Citation</b>	<b>Year</b>	<b>Expansive/ Restrictive</b>	<b>Substantive Context</b>	<b>Vote</b>	<b>Majority Writer</b>
Jones v. SEC	298 US 1	1936	Restrictive	1933 Act	6-3	Sutherland
SEC v. United States Realty & Improv. Co.	310 US 434	1940	Expansive	Bankruptcy	5-3	Stone
Deckert v. Independence Shares Corp.	311 US 282	1940	Expansive	1933 Act	8-0	Murphy
A. C. Frost & Co. v. Coeur D'Alene Mines	312 US 38	1941	Expansive	1933 Act	8-0	McReynolds
Edwards v. United States	312 US 473	1941	Expansive	1933 Act/criminal	8-0	Reed
SEC v. Chenery	318 US 80	1943	Restrictive	1935 Act	5-3	Frankfurter
SEC v. C.M. Joiner Leasing Corp	320 US 344	1943	Expansive	Definition	7-1	Jackson
SEC v. W. J. Howey Co.	328 US 293	1946	Expansive	Definition	7-1	Murphy
Penfield Co. of California v. SEC	330 US 585	1947	Expansive	1933 Act	7-2	Douglas
SEC v. Ralston Purina	346 US 119	1953	Expansive	Exemption	6-2	Clark
Wilko v. Swan	346 US 427	1953	Expansive	1933 Act/Arbitration	7-2	Reed
SEC v. Variable Annuity Life Ins.	359 US 65	1959	Expansive	Definition	5-4	Douglas
Blau v. Lehman	368 US 403	1962	Restrictive	16b	6-2	Black
Wolf v. Weinstein	372 US 633	1963	Expansive	Insider Trading/Bankruptcy	7-2	Brennan
Silver v. New York Stock Exchange	373 US 341	1963	Neither	Anti-Trust	7-2	Goldberg
SEC v. Capital Gains Research Bureau	375 US 180	1963	Expansive	1940 Act	7-1	Goldberg
J. I. Case Co. v. Borak	377 US 426	1964	Expansive	Proxy	9-0	Clark
SEC v. American Trailer Rentals	379 US 594	1965	Expansive	Bankruptcy	9-0	Goldberg
SEC v. United Ben. Life Ins. Co.	387 US 202	1967	Expansive	Definition	9-0	Harlan
Tcherepnin v. Knight	389 US 332	1967	Expansive	Definition	8-0	Warren
Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson	390 US 414	1968	Neither	Bankruptcy	5-3	White

### Main Table

Case Name	Citation	Year	Expansive/ Restrictive	Substantive Context	Vote	Majority Writer
SEC v. National Secur.	393 US 453	1969	Expansive	10(b)5	6-3	Marshall
Mills v. Electric Auto-Lite Co.	396 US 375	1970	Expansive	Proxy	8-0	Harlan
Investment Co. Institute v. Camp	401 US 617	1971	Expansive	Banking; 1940 Act	6-2	Stewart
SEC v. Medical Committee for Human Rights	404 US 403	1972	Neither	Proxy	6-1	Marshall
Reliance Electric Co. v. Emerson Electric Co.	404 US 418	1972	Restrictive	16b	4-3	Stewart
Superintendent of Ins. v. Bankers Life & Casualty Co.	404 US 6	1971	Expansive	10(b)5	7-0	Douglas
Affiliated Ute Citizens v. United States	406 US 128	1972	Expansive	10(b)5	7-0	Blackmun
Kern County Land Co. v. Occidental Petroleum	411 US 582	1973	Restrictive	16b	6-3	White
Merrill Lynch, Pierce, Fenner & Smith v. Ware	414 US 117	1973	Restrictive	Arbitration	8-0	Blackmun
Scherk v. Alberto-Culver Co.	417 US 506	1974	Restrictive	Arbitration	5-4	Stewart
Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.	417 US 703	1974	Restrictive	10(b)5; Anti-trust	5-4	Powell
Eisen v. Carlisle & Jacquelin	417 US156	1974	Restrictive	Anti-Trust	6-3	Powell
Securities Investor Protection Corp. v. Barbour	421 US 412	1975	Restrictive	Other	8-1	Marshall
Blue Chip Stamps v. Manor Drug Stores	421 US 723	1975	Restrictive	10(b)5	6-3	Rehnquist
United Housing Foundation v. Forman	421 US 837	1975	Restrictive	Definition	6-3	Powell
Rondeau v. Mosinee Paper Co.	422 US 49	1975	Restrictive	Tender Offer	6-3	Burger
Gordon v. New York Stock Exchange	422 US 659	1975	Neither	Anti-Trust	9-0	Blackmun
United States v. National Association of Securities Dealers	422 US 694	1975	Neither	Anti-Trust; 1940 Act	5-4	Powell
Foremost-McKesson, Inc. v. Provident Sec. Co.	423 US 232	1976	Restrictive	16b	8-0	Powell
Ernst & Ernst v. Hochfelder	425 US 185	1976	Restrictive	10(b)5	6-2	Powell
Radzanower v. Touche Ross & Co.	426 US 148	1976	Restrictive	10(b)5	8-1	Stewart

### Main Table

Case Name	Citation	Year	Expansive/ Restrictive	Substantive Context	Vote	Majority Writer
TSC Industries, Inc. v. Northway, Inc.	426 US 438	1976	Restrictive	Proxy	8-0	Marshall
Piper v. Chris-Craft Indus., Inc.	430 US 1	1977	Restrictive	Tender Offer	7-2	Burger
Sante Fe Indus., Inc. v. Green	430 US 462	1977	Restrictive	10(b)5	8-1/6-3	White
E.I. duPont de Nemours and Co. v. Collins	432 US 46	1977	Neither	Inv. Co. Act	7-1	Burger
Bankers Trust Co. v. Mallis	435 US 381	1978	Neither	10(b)5	8-0	
SEC v. Sloan	436 US 103	1978	Restrictive	Enforcement	9-0	Rehnquist
Coopers & Lybrand v. Livesay	437 US 463	1978	Restrictive	10(b)5; 1933 Act	9-0	Stevens
Parklane Hosiery Co. v. Shore	439 US 322	1979	Neither	10(b)5/Proxy	8-1	Stewart
International Brotherhood of Teamsters v. Daniel	439 US 551	1979	Restrictive	Definition	8-0	Powell
Burks v. Lasker	441 US 471	1979	Restrictive	Inv. Co. Act	8-0	Brennan
United States v. Naftalin	441 US 768	1979	Expansive	1933 Act	8-0	Brennan
Touche Ross & Co. v. Redington	442 US 560	1979	Restrictive	17(a)	7-1	Rehnquist
Leroy v. Great Western United Corporation	443 US 173	1979	Restrictive	Tender Offer	6-3	Stevens
Transamerica Mortgage Advisors, Inc. v. Lewis	444 US 11	1979	Restrictive	Inv. Advisers	5-4	Stewart
Chiarella v. United States	445 US 222	1980	Restrictive	Insider Trading	6-3	Powell
Aaron v. SEC	446 US 680	1980	Restrictive	10(b)5	6-3	Stewart
Rubin v. United States	449 US 424	1981	Expansive	1933 Act	9-0	Burger
Steadman v. SEC	450 US 91	1981	Expansive	Inv. Co. Act	7-2	Brennan
Marine Bank v. Weaver	455 US 551	1982	Restrictive	Definition	9-0	Burger
Edgar v. MITE	457 US 624	1982	Neither	Tender Offer	6-3	White
Herman & MacLean v. Huddleston	459 US 375	1983	Expansive	10(b)5	8-0	Marshall
Dirks v. SEC	463 US 646	1983	Restrictive	Insider Trading	6-3	Powell
Daily Income Fund v. Fox	464 US 523	1984	Expansive	Inv. Co. Act	9-0	Brennan

### Main Table

Case Name	Citation	Year	Expansive/ Restrictive	Substantive Context	Vote	Majority Writer
SEC v. O'Brien	467 US 735	1984	Expansive	Enforcement	9-0	Marshall
Landreth Timber Co. v. Landreth	471 US 681	1985	Expansive	Definition	8-1	Powell
Gould v. Rufenacht	471 US 701	1985	Expansive	Definition	8-1	Powell
Schreiber v. Burlington Northern, Inc.	472 US 1	1985	Restrictive	Tender Offer	7-0	Burger
Lowe v. SEC	472 US 181	1985	Restrictive	Inv. Adv. Act	8-0	Stevens
Bateman Eichler, Hill Richards, Inc. v. Berner	472 US 299	1985	Expansive	Insider Trading	8-0	Brennan
Randall v. Loftsgaarden	478 US 647	1986	Expansive	10(b)5/12(2)	8-1	O'Connor
CTS Corp. v. Dynamics Corp. of Am.	481 US 69	1987	Restrictive	Tender Offer	6-3	Powell
Shearson/American Express, Inc. McMahon	482 US 220	1987	Neither	Arbitration	5-4	O'Connor
Carpenter v. United States	484 US 19	1987	Neither	Insider Trading	4-4	
Basic, Inc. v. Levinson	485 US 224	1988	Expansive	10(b)5	4-2	Blackmun
Pinter v. Dahl	486 US 622	1988	Restrictive	1933 Act	7-1	Blackmun
Rodriguez de Quijas v. Shearson/American Express, Inc.	490 US 477	1989	Restrictive	Arbitration	5-4	Kennedy
Reves v. Ernst & Young	494 US 56	1990	Expansive	Definition	5-4	Marshall
Kamen v. Kemper Financial Services, Inc.	500 US 90	1991	Restrictive	Inv. Co. Act	9-0	Marshall
Virginia Barkshares, Inc. v. Sandberg	501 US 1083	1991	Restrictive	Proxy	5-4	Souter
Gollust v. Mendell	501 US 115	1991	Expansive	16b	9-0	Souter
Lipkind, Prupis & Petigrow v. Gilbertson	501 US 350	1991	Restrictive	10(b)5	5-4	Blackmun
Musick, Peeler & Garrett v. Employers Ins. of Wausau	508 US 286	1993	Expansive	10(b)5	6-3	Kennedy
Central Bank of Denver N.A. v. First Interstate Bank of Denver	511 US 164	1994	Restrictive	10(b)5	5-4	Kennedy
Gustafson v. Alloyd Co., Inc.	513 US 561	1995	Restrictive	1933 Act	5-4	Kennedy
Plaut v. Spendthrift Farm, Inc.	514 US 211	1995	Restrictive	10(b)5	7-2	Scalia

**Main Table**

<b>Case Name</b>	<b>Citation</b>	<b>Year</b>	<b>Expansive/ Restrictive</b>	<b>Substantive Context</b>	<b>Vote</b>	<b>Majority Writer</b>
Matsushita Elec. Indus. Co. Ltd. v. Epstein	516 US 367	1996	Restrictive	Other	6-3	Thomas
U.S. v. O'Hagan	521 US 642	1997	Expansive	Insider Trading	6-3	Ginsburg
Wharf (Holdings) Ltd. v. United Intern. Holdings, Inc.	532 US 588	2001	Expansive	10(b)5	9-0	Breyer
SEC v. Zandford	535 US 813	2002	Expansive	10(b)5	9-0	Stevens