TRUSTBUSTERS

Justice John Paul Stevens: Keeping the Antitrust Flame Alive

BY WILLIAM KOLASKY

WHEN JUSTICE JOHN PAUL STEVENS died last July, at age 99, his obituaries focused not only on the length of his tenure on the Supreme Court—nearly 35 years, making him the third longest-serving and second oldest justice in Supreme Court history—but also on how he had evolved over time from "a Republican antitrust lawyer into the outspoken leader of the court's liberal wing."[1] These obituaries typically cited some of his more notable opinions on civil liberties, such as his opinion in *Rasul v. Bush*,[2] and his strong dissents in two of the Court's most controversial decisions over the last two decades, *Bush v. Gore* and *Citizens United*.[3]

What the obituaries usually failed to mention was the important role Justice Stevens also played as one of the most consistent and effective advocates on the Court for strong antitrust enforcement throughout the more than three decades he served on it. Over that period, Justice Stevens wrote opinions for the Court in several of its most important decisions in favor of antitrust plaintiffs. The first of these was *National Society of Professional Engineers* in 1978,[4] and the last, shortly before his retirement, was *American Needle* in 2010.[5] Throughout his time on the Court, Justice Stevens also dissented from many of the Court's most significant decisions in favor of antitrust defendants, including *Matsushita*, *Brooke Group*, *Twombly*, and *Leegin*.[6]

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So how did Justice Stevens, who had spent his legal career mostly defending large companies against antitrust claims, become such an ardent trustbuster on the bench? To answer that question, we begin with his childhood in Chicago.

"Chicago, my home town"[7]

Justice Stevens's background could not have been more different from the man he replaced, William O. Douglas.[8] Whereas Douglas was raised by his poor widowed mother in a small town in Washington, Stevens was born into a prominent family in the country's second largest city at the time, Chicago. And whereas Douglas had always been restless in seeking to advance his career prior to his appointment to the Court, Stevens had lived in Chicago for most of his life before being appointed to the Court and had spent almost his entire career at a single law firm practicing antitrust law.

Justice Stevens's early childhood in Chicago was one of enormous privilege. His grandfather, J.W. Stevens, was a successful businessman who became extremely wealthy through real estate investments and other ventures, including several hotels in Chicago.[9] Stevens's father earned a law degree from Northwestern, but never practiced law. Instead, he managed the family's two largest hotels, one of which, the Stevens Hotel, was at the time the largest in the world.[10] One of Justice Stevens's most memorable moments while growing up in Chicago during the Jazz Age was meeting both Charles Lindbergh and Amelia Earhart in the Stevens Hotel when he was only seven. Another was watching Babe Ruth's legendary called shot in the 1932 World Series.[11]

Unfortunately, when Stevens was just nine, the 1929 stock market crash devastated the Chicago hotel business. To stay in business, the Stevens Hotel borrowed over $1 million from an insurance company the Stevens family controlled. Prosecutors charged Stevens's father, grandfather, and uncle with embezzlement. Stevens's grandfather suffered a stroke and his uncle committed suicide before they could be tried, leaving Stevens's father as the only defendant to stand trial and be convicted. Reading his memoirs, one can sense how painful this episode must have been for Stevens. He was quick to explain that his father's conviction was later overturned by the Illinois Supreme Court, emphasizing that the court found that the record did not contain even a "scintilla" of evidence of criminal intent.[12]

After high school, Stevens stayed in Chicago for college where he received his undergraduate degree from the University of Chicago in June 1941 with highest honors.[13] Shortly after graduating, Stevens enlisted in the Navy where he was commissioned as an officer on December 6, 1941. Stevens spent his Navy service stationed at Pearl Harbor breaking Japanese codes, for which he was awarded the Bronze Star.[14]

After the war, Stevens returned to Chicago for law school, and enrolled at his father's alma mater, Northwestern.[15] Stevens compiled a spectacular record there. He served as editor-in-chief of the law review. And, he graduated first in his class after just two years, with the highest grade-point average in the school's history.[16] His academic success earned Stevens a clerkship on the Supreme Court for Justice Wiley Rutledge.

Stevens's Career as an Antitrust Litigator

Following his clerkship, Stevens returned to Chicago. Aside from one brief stint in Washington, D.C. in the early 1950s, Stevens would remain in Chicago until he was appointed to the Supreme Court in 1975. During that period, Stevens would develop a national reputation as a leading antitrust litigator.

Justice Stevens says he first became interested in antitrust while in law school. He was taught antitrust by James Rahl, a young first-year professor who had himself been out of law school for only a few years and who became a life-long friend. Stevens credits Rahl with teaching him two "fundamental lessons" about antitrust. The first was that the text of the Sherman Act could not be read literally as condemning all restraints of trade because that would destroy the entire body of contract law. The courts, therefore, needed to apply a rule of reason in determining whether any particular restraint was unlawful.[17] The second was that the rule of reason is narrower than its name might suggest: It "does not protect any rule that a judge might consider reasonable, but only those rules that do not have an adverse effect on competition in a free market."[18] Both principles figured prominently in Justice Stevens's antitrust opinions while on the Supreme Court.

Justice Stevens's appetite for antitrust law was further whetted by his clerkship with Justice Rutledge.[19] During his clerkship, he heard Attorney General Tom Clark argue the *Paramount Pictures* antitrust case and worked on several important antitrust opinions, including *FTC v. The Cement Institute*[20] and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[21] both of which the Court decided for the plaintiffs.

Returning to Chicago after his clerkship, Stevens joined the firm that is now Jenner & Block. There, Stevens worked with a partner who had earned a nationwide reputation as an antitrust litigator, Edward Johnston.[22] The two worked together on several major antitrust cases and co-authored an article on the Supreme Court's decision in *American Tobacco Co. v. United States*,[23] in which the Court found the major tobacco companies guilty of violating Section 2 of the Sherman Act by conspiring to raise prices for cigarettes during the Great Depression.

When the ABA formed a new Section of Antitrust Law in 1951, Johnston became its first chairman.[24] Not long after, Johnston recommended Stevens to be associate counsel to the House Judiciary Committee's newly formed Subcommittee on the Study of Monopoly Power. It was in that role that Stevens first met Edward Levi, who had taught antitrust law at the University of Chicago, served as the dean of the law school and president of the university, and later became Attorney General under President Gerald Ford.

Shortly after Edward Levi left the subcommittee staff, Stevens returned to Chicago, where he started a new law firm with two former associates from his prior firm. As a member of this new firm, Stevens spent the next 15 years litigating antitrust cases. He also spent two years serving on the Attorney General's Committee to Study the Antitrust Laws, a blue ribbon committee of antitrust practitioners and scholars whose final report recommended continued strong enforcement of the antitrust laws.[25]

The last 16 years of the period in which Stevens was practicing antitrust law, from 1953 to 1969, coincided with what we now call the Warren Court era. In his book *Five Chiefs: A Supreme Court Memoir*, Justice Stevens recalls the only time he argued a case in the Supreme Court while Earl Warren was Chief Justice.[26] The case was *FTC v. Borden Co.*,[27] a Robinson-Patman case Stevens had won below, but lost in the Supreme Court by a 6-to-3 vote. In discussing this experience, Stevens is particularly critical of a concurring opinion by Justice Douglas suggesting that his client had a monopoly it was using "to breed more monopoly."[28] Pointing out that the FTC had accused his client neither of having a monopoly nor of using it to breed any other monopolies, Stevens complains that Douglas's opinion "represented an approach to the antitrust laws that was characteristic of the work of the Court as a whole when Earl Warren was the chief"—an approach with which he wrote, "I did not—and do not—agree."[29]

This disagreement, Justice Stevens explains, stemmed, in part, from what he learned as a young lawyer teaching a course in antitrust law at the University of Chicago with the economist Aaron Director, who was one of the founders of the Chicago School and who Stevens describes as "a brilliant teacher whose protégés included Bob Bork and Dick Posner."[30] He then lists three "fundamentals" he learned from Director. One was that "price concessions by competitors in free markets are more likely to benefit consumers than is rigid enforcements of rules prohibiting sellers from charging different customers different prices for similar goods."[31] A second was that "the sale of one product on condition that the buyer accept another is sometimes a form of beneficial price cutting, rather than an abuse of market power often condemned by characterizing it as an illegal 'tying arrangement.'"[32] A third was that patents do not always give their holder market power.[33] These three "fundamentals" later figured prominently in Justice Stevens's decisions while on the Supreme Court.

Appointment to the Bench

In his memoirs, Stevens credits Senator Charles Percy—a friend and classmate from the University of Chicago—with recommending to Richard Nixon's Justice Department that he be appointed to the Seventh Circuit in 1970.[34] Stevens writes that while he was initially reluctant, he later never regretted letting Senator Percy persuade him, even though it meant giving up his summer home on Lake Michigan, although not the second-hand single-engine Cessna 172 he had purchased a few years earlier for $10,500 and loved flying on weekends well into his tenure on the Supreme Court.[35]

As a Seventh Circuit judge, Stevens continued to show a "special interest" in antitrust. In his five years on the court of appeals, he sat on 15 of the 32 antitrust cases the court heard.[36] Of those 15 cases, Stevens was the author of nine majority opinions and only one dissent.

When Justice Douglas announced his retirement from the Supreme Court in November 1975 due to his declining health, President Ford, who was facing a challenging election campaign the next year, wanted to act quickly to appoint a replacement who

would not be a source of controversy, as President Nixon's first two nominees had been.[37] Ford asked his attorney general, Edward Levi (whom you recall Stevens knew from the House Judiciary Committee), to find a nominee who would win easy approval. Levi recommended Stevens.

On Levi's recommendation, Ford invited Stevens to a White House dinner he hosted on the Monday before Thanksgiving, honoring a select group of federal judges, several of whom were potential candidates for the Supreme Court. After conversing briefly with Stevens at the dinner, Ford called Stevens just four days later.[38] He told Stevens that he had decided to name him to the Court, but wanted to be sure Stevens would accept the nomination. Stevens gave Ford what he says was "probably an incoherent affirmative and enthusiastic response."[39] Unlike Dwight Eisenhower's feelings about having nominated both Earl Warren and William Brennan to the Court, Ford never regretted his decision to place Stevens on the Court. Thirty years later, Ford wrote: "I am prepared to allow history's judgment of my term in office to rest (if necessary, exclusively) on my nomination 30 years ago of Justice John Paul Stevens to the U.S. Supreme Court."[40]

Justice Stevens's Antitrust Legacy[41]

One measure of a Supreme Court justice's legacy in any area of law is how many of his or her opinions appear in the leading casebooks in that field. By that measure, Justice Stevens's antitrust legacy seems secure. Of the 14 majority opinions he wrote for the Court, a dozen can now be found in most antitrust casebooks. The names of these cases should be familiar to anyone who has studied or practiced antitrust law. They include:

- Four opinions in cases that helped shape how the courts now apply Section 1 of the Sherman Act to alleged horizontal restraints: *National Society of Professional Engineers*, *Maricopa County Medical Society*, *NCAA v. Board of Regents*, and *Superior Court Trial Lawyers Association*.[42]
- The opinion in *American Needle. Inc. v. NFL*,[43] in which the Court held that the conduct of a joint venture among firms that maintain their distinct economic identities and that are potential competitors is subject to Section 1 of the Sherman Act.
- Three opinions in cases that now control how the courts apply the antitrust laws to the tying or bundling of products: *Jefferson Parish*, *Independent Ink*, and *Fortner II*.[44]
- The opinion in the only monopolization case under Section 2 that the Court has decided in favor of the plaintiff since Earl Warren retired a half-century ago, and which is now viewed as defining "the outer boundary" of the law under Section 2: *Aspen Skiing Co. v. Aspen Highlands*.[45]
- The opinion in the case that established the five factor test the courts now apply to determine whether an antitrust plaintiff has standing to seek damages or injunctive relief: *Associated General Contractors*.[46]
- The opinion in the last Robinson-Patman case—nearly 30 years ago—that the Court has decided in favor of the plaintiff: *Texaco, Inc. v. Hasbrouck*.[47]
- An opinion in which the Court applied the "affecting commerce" test to hold that the federal courts had jurisdiction under the Sherman Act to hear a single doctor's claim that he was the victim of a boycott by rival doctors in the same city: *Summit Health, Ltd. v. Pinhas*.[48]

Two things are striking about this list. First, all but four of these cases were decided in favor of the plaintiffs—the main exceptions being the three tying cases in which Justice Stevens wrote opinions ruling in favor of the defendants, all of which reflected lessons he learned from Aaron Director.[49] Second, all but one of these cases were decided before the Court began its 17-year long string from 1993 until 2010 of ruling in favor of the defendants in 20 straight antitrust cases. Stevens dissented in seven of these cases.[50]

That string of 20 straight cases decided for the defendants was not broken until later in 2010, when the Court finally ruled unanimously in favor of a plaintiff in an antitrust case in *American Needle v. NFL*.[51] In an opinion by Justice Stevens, the Court rejected an argument that the NFL and its teams were incapable of conspiring within the meaning of Section 1 of the Sherman Act because they acted as a single entity with respect to the licensing of their team logos and other trademarks. In rejecting that argument, the Court held that because the individual NFL teams were separate economic entities that were "potentially competing suppliers of valuable trademarks" their decision to license their trademarks through a single joint sales agent was concerted action subject to review under Section 1. Justice Stevens added, however, that this did not mean that the NFL and its teams were "trapped by antitrust law."[52] He explained that because sports teams need to cooperate in creating and marketing their product (i.e., NFL football), the per se rule would not apply to their agreement to license their trademarks through a single joint agent, citing his earlier decision in *NCAA v. Board of Regents*. Their licensing agreement would, therefore, have to be reviewed under the rule of reason and might be found not to violate Section 1 without the need for a detailed analysis, perhaps even in "the twinkling of an eye."[53]

Justice Stevens's opinions in the first two groups of the cases listed above all reflect the fundamental lessons he says he learned from Professors James Rahl and Aaron Director.

The first group of cases involved alleged horizontal restraints. In these cases, Justice Stevens applied one of the "fundamentals" he had learned from Rahl, namely, that the courts' inquiry under the rule of reason should be strictly limited to the effect of an alleged restraint on competition. Applying that principle, Justice Stevens's opinions in these cases all rejected arguments by the defendants seeking to justify what appeared to be a naked horizontal restraint of trade with claims that by restricting competition they could benefit the public in some other way—for example, by controlling health care costs in *Maricopa* or by providing better legal representation for indigent criminal defendants in *Superior Court Trial Lawyers*. In each case, Justice Stevens, in holding the restraints illegal, rejected these proposed justifications because they were at odds with the fundamental policy of the Sherman Act, which reflected "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[54]

In his opinion for the Court in *Jefferson Parish*, Justice Stevens likewise sought to apply one of "fundamentals" he had learned from Aaron Director, namely, that "the sale of one product on the condition that the buyer accept another is sometimes a form of beneficial price-cutting rather than an abuse of market power."[55] Stevens felt constrained, however, by prior decisions of the Court that had held certain tying arrangements to be "per se illegal."[56] Justice Stevens, therefore, reformulated the test for per se illegality by requiring that a plaintiff, in order to prove that a tying arrangement was per se illegal, would need to prove that: (1) there was separate demand for the tying and tied products, (2) the defendant had market power with respect to the tying product which it was using to force buyers to take the tied product from it rather than from another supplier, and (3) the alleged tying arrangement would foreclose a substantial amount of commerce in the market for the tied product. While Justice Stevens characterized these three requirements as a test of per se illegality, they plainly moved the analysis of tying arrangements toward something more closely resembling a rule-of-reason analysis.[57]

In addition to the majority opinions they write for the Court, the other way in which justices can leave their mark on an area of law is through their dissenting opinions, which may help influence how courts decide similar issues in the future. Keenly aware of the ability to influence future decisions through dissenting opinions, Justice Stevens was not shy about expressing his disagreement with the Court when he felt it had erred in ruling for an antitrust defendant. During his 35 years on the Court, Justice Stevens wrote 17 dissenting opinions in antitrust cases—all but one in cases where the Court had ruled for the defendant.[58]

Several of Justice Stevens's dissenting opinions were in cases in which the Court had held that the alleged anticompetitive conduct was exempt from the antitrust laws under the state action doctrine.[59] Several others were in cases in which the Court had denied antitrust plaintiffs access to the courts, either by requiring that they arbitrate their antitrust claims or by denying them standing.[60] Another was in *Brooke Group*, where the Court reversed a lower court decision finding that the defendant had set below-cost prices on its generic cigarettes to pressure the plaintiff to raise its prices as well.[61]

Justice Stevens's most passionate dissenting opinion in an antitrust case, however, came in *Bell Atlantic Corp. v. Twombly*.[62] In that case, the Court had affirmed the dismissal of an antitrust claim against Bell Atlantic and the other former Bell Operating Companies for allegedly colluding to stay out of one another's territories and to block entry by other competitive local exchange carriers. In doing so, the Court held that the "no set of facts" notice pleading standard from *Conley v. Gibson*[63] had "earned its retirement," and replaced it with a new "plausibility" standard requiring that a plaintiff allege sufficient facts to state a plausible claim for relief.[64]

As he wrote in his memoirs 12 years later, Justice Stevens viewed the Court's decisions in *Twombly* and, two years later, in *Iqbal*,[65] as "profoundly misguided."[66] Quoting one of the country's preeminent experts on civil procedure, Professor Arthur Miller, Stevens argued that these were "the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits."[67] This trend, he argued (again quoting Miller), "marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth."[68] These are the words of a justice who cared passionately both about equal justice for all citizens and about the importance of the antitrust laws in maintaining competitive markets and in preventing undue concentrations of wealth.

Justice Stevens, in short, was, during his three decades on the Court, one of the Court's most ardent and effective trustbusters. His death earlier this year was a sad moment for all who believe in the importance of the antitrust laws as the Magna Carta of our free enterprise economy. ■

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1 *See, e.g.*, Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. Times (July 16, 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html; Charles Lane, *John Paul Stevens, Longtime Leader of Supreme Court's Liberal Wing, Dies at 99*, Wash. Post (July 16, 2019), https://www.washingtonpost.com/local/obituaries/john-paul-stevens-longtime-leader-of-supreme-courts-liberal-wing-dies-at-99/2019/07/16/701232a2-a829-11e9-86dd-d7f0e60391e9_story.html.

2 *See* Rasul v. Bush, 542 U.S. 466 (2004) (holding that foreign nationals in prison at Guantanamo Bay could petition federal courts for writs of habeas corpus to review the legality of their detention); *see also* Atkins v. Va., 536 U.S. 304 (2002) (holding that executing people with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishments).

3 *See* Bush v. Gore, 531 U.S. 98 (2000); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

4 *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (holding that the Society's ban on competitive bidding prior to initial award of a contract was a per se illegal naked restraint of trade).

5 *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010) (holding that giving NFL Properties exclusive right to license team logos and other trademarks was concerted action subject to review under Section 1 of the Sherman Act).

6 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

7 Fred Fisher, Chicago (Capitol Records, 1922).

8 *See* William Kolasky, *The Warren Court: A Distant Mirror: Part II—The Two Most Ardent Trustbusters: Hugo Black and William O. Douglas*, Antitrust, Summer 2019, at 78.

9 John Paul Stevens, The Making of a Justice: Reflections on My First 94 Years 5–7 (2019) [hereinafter Reflections].

10 *Id.* at 6–7.

11 *See id.* at 10–11.

12 *Id.* at 24.

13 Greenhouse, *supra* note 1.

14 Lane, *supra* note 1.

15 Reflections, *supra* note 9, at 53.

16 Lane, *supra* note 1.

17 *Id.*

18 *Id.*

19 *See id.* at 61–68.

[20] 333 U.S. 683 (1948) (holding a basing point pricing system illegal as a facilitating practice for coordinating prices).

[21] 334 U.S. 219 (1948) (holding that a local restraint that affects interstate commerce was within the jurisdiction of the Sherman Act). *See* REFLECTIONS, *supra* note 9, at 64.

[22] REFLECTIONS, *supra* note 9, at 71.

[23] 328 U.S. 781 (1946).

[24] REFLECTIONS, *supra* note 9, at 73.

[25] *Id.* at 95–96.

[26] *See* JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 93–95 (2011) [hereinafter FIVE CHIEFS].

[27] 383 U.S. 637 (1966).

[28] FIVE CHIEFS, *supra* note 26, at 95.

[29] *Id.*

[30] *Id.* at 95–96.

[31] *Id.* at 96.

[32] *Id.*

[33] *See* REFLECTIONS, *supra* note 9, at 98.

[34] *Id.* at 107–08.

[35] *Id.* at 108.

[36] *See* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 S.M.U. L. REV. 693, 698 (2009).

[37] *See* Greenhouse, *supra* note 1. Nixon's first two nominees to the Court, Clement Haynsworth and G. Harold Carswell, both had to withdraw due to substantial opposition to their nominations. *See* JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 226–28 (1994).

[38] *See* REFLECTIONS, *supra* note 9, at 126.

[39] *Id.*

[40] *See* Greenhouse, *supra* note 1.

[41] For additional excellent perspectives on Justice Stevens's antitrust record, see Robert A. Skitol & Kenneth M. Vorrasi, *Justice Stevens' Antitrust Legacy*, ANTITRUST, Summer 2010, at 32, and Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 S.M.U. L. REV. 693 (2009).

[42] *See generally National Society of Professional Engineers*, 435 U.S. 679 (holding a ban on competitive bidding prior to initial award of a contract per se illegal); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332 (1982) (holding a plan to limit what physicians would be allowed to charge insurers per se illegal); NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (holding a plan that restricted the number of college football games that could be televised unlawful under the rule of reason); FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990) (holding a boycott by trial lawyers seeking high fees for their services in representing indigent criminal defendants per se illegal).

[43] 560 U.S. 138 (2010).

[44] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (holding that in order to find a tying arrangement, a court must find that the defendant has market power in the market for the tying product which it used to force the defendant to buy a tied product it might have otherwise purchased from a competitor); Illinois Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (holding that a court could not presume that a patent necessarily gave the holder market power); U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977) (overturning a lower court decision finding that U.S. Steel's program of offering cheap credit to developers who purchased its prefabricated homes was a per se illegal tying arrangement).

[45] 472 U.S. 585 (1986) (holding that a refusal by Aspen Skiing Co. to continue to offer a four-mountain pass with a smaller competitor without offering any legitimate business reason for doing so violated Section 2 of the Sherman Act).

[46] Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

[47] 496 U.S. 543 (1990) (holding that the functional discounts Texaco gave one of Hasbrouck's competitors violated the Robinson-Patman Act based on evidence showing that Texaco had encouraged its favored retailer to vertically integrate into wholesale in order to qualify for a discount while not cooperating in Hasbrouck's efforts to do likewise).

[48] 500 U.S. 322 (1990) (holding that a boycott of a single doctor in a local area was sufficient to meet the "affecting commerce" test for federal jurisdiction under the Sherman Act). The Court had first adopted its "affecting commerce" test in *Mandeville Island Farms*, 334 U.S. 219, in an opinion by Justice Rutledge that Stevens had helped write as a clerk to the justice. *See* REFLECTIONS, *supra* note 9, at 64.

[49] The only other exception is *Associated General Contractors*, 459 U.S. 519, in which the Court held that a carpenters' union had not alleged sufficiently direct antitrust to give them standing under Section 4 of the Clayton Act when they accused their employers of conspiring with other companies to steer business to nonunion carpenters.

[50] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 243 (1993) (Stevens, J. dissenting); Brown v. Pro Football, Inc., 518 U.S. 231, 251 (1996) (Stevens, J. dissenting); California Dental Ass'n v. FTC, 526 U.S. 756, 782 (1999) (Breyer, J. concurring in part and dissenting in part); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 182 (2006) (Stevens, J. dissenting); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (Stevens, J. dissenting); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 908 (2007) (Breyer, J. dissenting); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 688 (2010) (Ginsburg, J. dissenting).

[51] 560 U.S. 183 (2010).

[52] *See id.* at 202–04.

[53] *See id.* at 203 (quoting NCAA v. Board of Regents, 468 U.S. at 109 n.39).

[54] *Superior Court Trial Lawyers Association*, 493 U.S. 411 at 423 (quoting *National Society of Professional Engineers*, 435 U.S. at 695).

[55] *See* FIVE CHIEFS, *supra* note 26, at 96.

[56] As someone who deeply respected the rule of stare decisis, Justice Stevens wrote at the outset of his opinion in Jefferson Parish that, "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Jefferson Parish*, 466 U.S. at 9. Justice Stevens was therefore unwilling to go as far as the three justices who filed a concurring opinion arguing for eliminating the per se rule against tying arrangements and to instead review tying arrangements under the rule of reason. *See id.* at 32 (O'Connor, J., concurring, joined by Burger, C.J., and Powell, J.).

[57] More than a decade later, in 2006, Justice Stevens applied another "fundamental" he had learned from Aaron Director, holding in *Independent Ink* that a patent could not be presumed to give its holder market power. *See Illinois Tool Works, Inc.*, 547 U.S. at 42–43.

[58] The only exception is *Blue Shield of Va. v. McCready*, 457 U.S. 465, 492 (1982) (Stevens, J., dissenting) (objecting to the Court's decision that a consumer who could not claim reimbursement for the services of a psychologist unless prescribed by a physician had suffered injury to her property for which she could seek damages under Section 4 of the Clayton Act).

[59] *See, e.g.*, So. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 66 (1985) (Stevens, J. dissenting) (arguing that the Court should not have granted state action immunity because state legislation did not require collective rate-making, but merely permitted it); City of Columbia v. Omni Outdoor Advert., 499 U.S. 365, 385 (1991) (Stevens, J., dissenting) (arguing that the city was abusing its zoning authority by using it to limit competition, rather than to promote the "health, safety, morals, or general welfare of the community," as the zoning laws required).

[60] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (Stevens, J., dissenting) (objecting to the Court's decision to require the plaintiff to arbitrate its antitrust claims); Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 122 (1986) (Stevens, J., dissenting) (objecting to the Court's use of the antitrust injury requirement to deny a competitor standing to challenge a merger the plaintiff alleged would give the defendant the ability to engage in predatory pricing).

[61] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 258 (1993) (Stevens, J., dissenting) (arguing that the evidence was sufficient to support the jury's verdict that the defendant had engaged in a predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result).

[62] *Twombly*, 550 U.S. 544 (2007).

[63] 355 U.S. 41 (1957).

[64] 550 U.S. at 563.

[65] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[66] Reflections, *supra* note 9, at 467.

[67] *Id.* at 468 (quoting Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 10 (2010)).