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Economic Regulation and the Courts 1982 to 2001: Ten Cases That Made a Difference*

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Abstract
The author has selected ten "landmark" cases for their likely impact on regulation and regulatory economics. His choice is unashamedly his own personal one and he recognizes that other legal scholars would not make the identical selection. However, there is likely to be substantial agreement on the importance of a majority of the cases. The ten cases are concerned with five themes: antitrust policy, contracting around the regulatory state, constitutional and contractual limits on regulation, the distribution of regulatory authority, and economics in the courtroom.

1. Introduction

Providing a suitable account of economic regulation over the past two decades entails two basic tasks. The first is to recount the intellectual history of the era, with special attention to the work of scholars in fields such as economics, law, and political science who increased our understanding of existing regulatory mechanisms or offered paths for reform. The second is to recount noteworthy changes in the legal framework that determines the content and methodology of economic regulation.

In these pages I undertake the latter endeavor. The inspiration for this article comes from the opportunity I have been afforded since the mid-1980s by the Rutgers University Center for Research in Regulated Industries (CRRI) to survey changes in the legal framework of economic regulation. On a number of occasions at gatherings such as Annual Eastern Conference, I have made presentations on legal developments of interest to the CRRI's audience of economists.

This article examines legal developments that most shaped economic regulation from 1982 to 2001, the period of the first 20 years of CRRI's Annual Eastern Conference. To make this a manageable task, I have made three simplifying choices. First, I have focused

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mainly on how the United States' courts have influenced economic regulation.[1] Thus, my survey does not encompass the enactment of statutes, the promulgation of regulations, or regulatory measures adopted by jurisdictions outside the United States. Some of the cases I discuss involve the interpretation of statutes or regulations, and some matters have influenced regulatory developments abroad.

My second simplification is to spotlight ten influential cases. The measures of significance are my own sense of the impact of the case on the law and upon the intellectual debate about economic regulation. The larger and more powerful the ripples of a case in the jurisprudence and scholarship of economic regulation, the more likely the case is to appear on my list. A selection process of this type is admittedly idiosyncratic, and I do not expect to elicit full agreement on my choice of the ten most noteworthy cases. At a minimum, I am confident that I have chosen ten cases that serious students or casual observers of economic regulation must read to appreciate how the landscape of economic regulation changed in the past 20 years.

I have organized the ten cases around five themes: antitrust policy, contracting around the regulatory state, constitutional and contractual limits on regulation, the distribution of regulatory authority, and economics in the courtroom. These are not airtight compartments, as some of my top ten cases easily could reside in two or more categories. The themes do serve to identify the frontiers on which intellectual and legal battles about the proper content and institutional design of economic regulation were fought from 1982 to 2001 and are likely to occur in the future.

2. Antitrust Policy

Two judicial decisions in antitrust cases make the list of the top ten. The first appeared soon after the first CRRI Annual Eastern Conference in 1982, and the second emerged just after the close of the 20th conference. The decisions are bookends in a formative era of jurisprudence governing the application of antitrust law to dominant enterprises in industries characterized by significant network effects. They will long occupy discussions of competition policy and economic regulation.

2.1. United States v. AT&T Co. (1982)

In 1982 Judge Harold Greene approved the consent decree in *United States v. AT&T Co.*[2] that resolved a Department of Justice lawsuit against AT&T for illegal monopolization under the Sherman Act. Among other measures, the consent decree severed the relationship between AT&T's long distance operations and the Bell System's regional operating companies. The settlement also imposed line of business restrictions that barred the newly independent Regional Bell Operating Companies (RBOCs) from providing various products, including long distance service.

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1 One matter discussed in this survey, *Bell Atlantic/NYNEX*, is the product of the deliberations of an administrative regulatory body. See *infra* section 5.3.

2 552 F. Supp. 132 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

Judge Greene's entry of the AT&T consent decree, known as the ''Modified Final Judgment'' because it altered the terms of a previous antitrust settlement between AT&T and the Justice Department, is probably the most important judicial decision in the field of economic regulation in the past 20 years. With its structural remedy and associated controls on conduct, the consent decree routinely emerges in discussions in the United States and abroad about competition policy in sectors subject to traditional public utility oversight. A vast body of subsequent literature attests to how the case transformed, and continues to influence, the research of many commentators.

The 1982 consent decree also generated huge aftershocks in the law. The settlement spawned numerous litigated disputes about the interpretation of the line of business restrictions. Through the Telecommunications Act of 1996, Congress displaced the Modified Final Judgment and created a new framework for determining when the RBOCs could provide long distance services. The new Telecommunications Act itself has generated extensive litigation over the distribution of power between federal and state telecommunications regulators and has added new vigor to existing academic debates, first inspired by the 1982 consent decree, about the appropriate policies for entry and interconnection. The intellectual and policy ferment initiated by the 1982 decree will continue well into the future.

2.2. *United States v. Microsoft Corp.* (2001)

For over a decade after the AT&T break-up, U.S. government enforcement of antitrust prohibitions against monopolization virtually lapsed. Despite the stunning remedial accomplishment in the AT&T case, the 1982 consent decree was a rare success in a litigation portfolio filled with failed efforts to challenge dominant firms and, in many cases, to restructure concentrated industries. The poor litigation track record, an increasing antitrust conservatism in the judiciary, and the more cautious enforcement preferences of Ronald Reagan's and George Bush's appointees to the Justice Department's Antitrust Division and the Federal Trade Commission (FTC) combined to discourage the pursue of new monopolization initiatives.

After several skirmishes with the computer software giant in the early and mid 1990s, federal prosecutors dramatically revisited the monopolization arena in 1998. Joined by 19 state attorneys general, the Justice Department accused Microsoft of using improper means to protect its dominance as the world's largest supplier of operating systems for personal computers. The proceedings attracted extraordinary levels of attention in the business and popular press and engaged the energies of numerous economists as academic commentators or advisors to the parties.

The lawsuit culminated in July 2001 with the decision of the U.S. Court of Appeals for the District of Columbia in *United States v. Microsoft Corp.*[3] A unanimous seven-judge panel of the D.C. Circuit endorsed the trial court's ruling that Microsoft illegally had maintained a monopoly over operating systems software. The court of appeals reversed the district court's finding that Microsoft had illegally attempted to monopolize the market for internet browsers and remanded the case to the lower court for reconsideration of the

3 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

district court's decision that Microsoft had improperly forced purchasers of its operating system to buy its internet browser, as well. The appeals court also required reconsideration of the district court's original remedy, which had required the splitting up of Microsoft into two successor companies. Before the resumption of proceedings before the lower court, the Justice Department announced that it had abandoned its request for a break-up and would seek conduct remedies exclusively.

Unlike *United States v. AT&T Co.*, the Microsoft litigation did not involve claims against a traditional public utility. Nonetheless, the case forced the courts to confront issues concerning the bounds on the discretion of a dominant enterprise in a sector characterized by powerful network effects in making product design and marketing decisions. The court of appeals decision devoted considerable effort to developing a comprehensive framework for evaluating claims of unlawful exclusion by a dominant firm and to defining when the bundling of discrete capabilities into a single product offering is appropriate. In light of the prestige, ideological diversity, and unanimity of the authors, the opinion's extensive treatment of these issues is likely to approach the stature of a Supreme Court decision in its influence over antitrust doctrine.

Measured by its impact on intellectual debates about regulation, the Microsoft litigation has become a central focal point for discussion about network effects, the measurement of market power, exclusionary practices, and remedies. The case has raised larger issues about the efficacy of existing judicial and enforcement institutions to develop and apply competition policies in industry sectors marked by rapid technological change.

3. Contracting Around the Regulatory State: *Gilmer v. Interstate/Johnson Lane Corp.* (1991)

Can private contracts override or delimit public regulatory statutes? One's first intuition might be to answer this question negatively. A general statutory command might seem to reflect a universal public policy and, as such, would trump private ordering that appear to contradict the terms of the universal command.

Robert Gilmer was the manager for financial services of Interstate/Johnson Lane Corp. (Interstate). Interstate fired Gilmer, who filed a suit in federal court alleging that his termination was based on age-related factors prohibited by the federal Age Discrimination in Employment Act (ADEA). Interstate sought to dismiss Gilmer's lawsuit on the ground that his employment agreement committed Gilmer to submit claims of this nature to arbitration. Gilmer argued that private employment contracts could not override the ADEA's statutory scheme of rights and remedies by compelling arbitration.

In *Gilmer v. Interstate Securities*,[4] the Supreme Court enforced the arbitration provision. Observing that the Federal Arbitration Act, a statute enacted in 1925, established a preference for honoring arbitration agreements, the Court emphasized that the ADEA did not by its terms preclude arbitration as an alternative dispute resolution technique. If Congress wished to preserve the aggrieved party's right to recourse in federal

4 500 U.S. 20 (1991).

court, it could do so by drafting the statute to expressly foreclose the use of arbitration as an alternative.

Gilmer has triggered a revolution in the administration of laws that regulate the relationship between employers and employees. Subsequent decisions of the Supreme Court and the lower federal courts have concluded that the principal of *Gilmer* applies to claims prosecuted under state law and under federal statutes other than the ADEA.[5] Crucial to *Gilmer* is the view that private parties have some measure of freedom to modify remedial solutions specified by federal or state legislation, and that individual employees who sign arbitration agreements are not necessarily the victims or overreaching or oppression by the seemingly more power business institutions with whom they deal. *Gilmer* may foreshadow future efforts by sellers of commercial goods and services to compel consumers, as part of routine purchase agreements, to submit disputes over statutorily-created rights (such as certain warranties) to arbitration.

4. Constitutional and Contractual Limits on Regulation

The 1980s and 1990s witnessed a significant revival of efforts by parties subject to various forms of regulation to use provisions of the United States' Constitution to delimit the reach of the regulatory process. In this period, the litigation of constitutional claims became an increasingly important supplement to such common tactics for opposing regulatory measures as attempting to shape legislation or to influence the content of regulations issued by administrative bodies. Although the outcomes of constitutional challenges to economic regulation in the past two decades are mixed, regulated parties achieved some noteworthy successes in curbing the reach of regulatory controls.

4.1. *Nollan v. California Coastal Commission* (1987)

It has long been established that the physical occupation of one's land by the government or its agents is a taking that requires the payment of just compensation under the 5th Amendment to the United States' Constitution.[6] But how should the 5th Amendment regard a regulatory measure that does not physically seize an economically valuable asset but nonetheless reduces the asset's worth?

For much of the 20th century, courts answered the latter question by stating that only a dramatic reduction in the asset's worth attributed to regulation—in most of the relevant cases, a nearly complete wipe-out of value—constituted an event mandating payment of compensation. This pattern had obvious implications for legislators and other government officials. The state could use its eminent domain authority to seize control of an asset (an unmistakably compensable event), or it could merely ''regulate'' the asset by restricting its use or imposing affirmative obligations upon the owner (often a non-compensable

5 See, for example, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (relying on *Gilmer* to permit enforcement of contract requiring arbitration of employment claims based on state statute).

6 See, for example, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical occupation of an owner's property authorized by state statute deemed to be compensable taking).

event). Given a choice between raising tax revenues to exercise eminent domain authority or levying less observable regulatory ''taxes'' on the owners of specific assets, government officials preferred to take the latter course when they could do so.

In *Nollan v. California Coastal Commission*,[7] the Supreme Court shifted the balance of power between asset owners and regulators. The California Coastal Commission established regulations that sought to preserve public access to the state's beaches by, among other means, requiring private property owners to allow access across their parcels to the beach. Nollan objected to the Coastal Commission's efforts to condition the construction of a new beach house upon his willingness to grant a public easement across his land to the beach. Nollan asserted that Coastal Commission's conditional grant of a building permit constituted a taking for which the state must pay just compensation.

The United States' Supreme Court agreed with Nollan's argument that the challenged application of the state's land use regime constituted a taking. The *Nollan* decision was soon followed by a series of other rulings that closely scrutinized land use controls that previously had seemed immune from constitutional attack.[8] *Nollan* and its progeny have emboldened regulated parties to use takings arguments to challenge a host of other regulations.

4.2. *United States v. Winstar Corp.* (1996)

For well over a century, U.S. courts have wrestled uneasily with the question of how to treat the promises that government bodies give to regulated enterprises. One tradition of thought has viewed the government as bound by the same principles of contract doctrine that govern promising by private parties. A second tradition has given the government distinctive rights to repudiate its promises without the consequences (e.g., payment of damages for breach) that ordinarily attend reneging in commercial relationships.

For firms engaged in long-standing relationships with government regulators, the second tradition predominated. Reputation and the repeated nature of regulatory interactions were the main inducements for government bodies to fulfill their promises. Possibilities for a regulated firm to recover damages for a breach of promise concerning ''regulatory contracts'' seemed remote.

In *United States v. Winstar Corp.*,[9] the Supreme Court dramatically changed these perceptions by breathing life into prospects for enforcing regulatory promises under traditional concepts of contract law. In *Winstar* the Supreme Court endorsed a bank's argument that it might recover damages for legislation that upset promises made to the bank by one of the federal government's financial services regulators. The Court found that the regulator had created a contract with the claimant by promising favorable balance sheet treatment if the bank acquired a failed savings and loan company. A subsequent congressional move to forbid the regulator to deliver on its promises about the accounting for the acquisition breached the agreement and entitled the bank to damages that it could prove had flowed from the reneging.

7 483 U.S. 825 (1987).
8 See, for example, Dolan v. City of Tigard, 512 U.S. 374 (1994) (applying *Nollan* in finding that city's land dedication requirements for private property owners constituted taking).
9 518 U.S. 839 (1996).

Winstar has moved commentators and courts to rethink the nature of the government's relationship with those it regulates. A number of subsequent cases have applied the decision to hold the government accountable for broken regulatory promises,[10] and many companies have threatened to bring *Winstar* claims against government bodies for retreating from various commitments. The prospect of *Winstar* cases, for example, has been an important factor in shaping state government decisions about allowing recover for stranded costs as part of deregulatory measures in the electric power sector. *Winstar* is certain to cast a long shadow over the future evolution of agreements that regulators strike with the regulated.

4.3. *44 Liquormart v. Rhode Island* (1996)

Political speech stands atop the pyramid of expression subject to protection by the 1st Amendment. Courts traditionally have subjected government efforts to restrict political speech to exacting scrutiny. By contrast, ''commercial speech'' ordinarily has enjoyed lesser protection. A government body would have an especially difficult time forbidding the publication of a political statement, but it might succeed in justifying a limits on the publication of truthful advertisements for commercial products.

Since the 1970s, business interests have devoted extensive effort to persuade the courts that government regulatory controls that affect commercial speech deserve greater attention. Although the courts have continued to rule that curbs on political speech warrant greater scrutiny, a number of decisions in the past 20 years have shown greater regard for the benefits of an uninhibited flow of commercial messages.

44 Liquormart illustrates the greater solicitude for a robust flow of commercial information. In *44 Liquormart v. Rhode Island*,[11] the Supreme Court struck down a state law that barred the publication of prices in print advertising for alcoholic beverages. The state failed to persuade the Court that the restriction was warranted because it depressed price competition that otherwise might lead to an increase in demand for beer, wine, and spirits. This measure, the state argued, advanced the state's legitimate interest in controlling the consumption of alcoholic beverages.

44 Liquormart does not suggest that the Court is embarked on a journey toward unifying the standards governing commercial and political speech. In a number of recent cases, companies have failed to persuade the Court to strike down regulatory schemes because they impermissibly limited (or compelled certain types of) commercial speech.[12] However, even within a framework that gives the government more freedom to regulate commercial speech than to control political speech, *44 Liquormart* indicates that the courts are more willing than before to apply existing standards of scrutiny more robustly. Decisions such as *44 Liquormart* also are likely to spur commentators to debate the basic

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10 See, for example, Mobil Oil Exploration & Production Southeast, Inc. v. United States, 530 U.S. 604 (2000) (enactment of statute that prevented United States from fulfilling contractual promise entitled private firm to remedy of restitution).

11 517 U.S. 484 (1996).

12 See, for example, Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997) (1st Amendment not violated by federal agriculture statute that forced private firms to contribute for generic advertising to promote various agricultural products).

question of whether commercial speech, given its contributions to market processes that have important political implications, is itself a form of ''political'' expression that deserves greater protection.

5. The Distribution of Regulatory Authority

Regulation routinely involves participation by a variety of government actors. In a simple model of government regulation, the legislature enacts statutes that establish substantive regulatory commands and specify mechanisms for implementation. The statute dedicates implementation tasks to a public regulatory body, which has power to issue rules and decisions that interpret statutory regulatory authority. The executive branch appoints the members of regulatory commissions and may have authority to prosecute violations of certain regulatory commands. The courts review appeals from the decisions of regulatory tribunals or in hearing cases brought by prosecutors to correct infringements of regulatory commands. The contributions of each institution determine the ultimate significance of a regulatory system.

In practice, the distribution of authority can be more complex. At any single level of government, two or more government regulatory bodies may share authority for enforcing a specific statute and for executing other policy making functions. A political system may dictate a sharing of powers between the national government and various political subdivisions. In a federal system, the institutions of government at the national level may have state and local counterparts which exercise independent regulatory prerogatives for the same subject matter.

A crucial factor in determining the effect of any program of regulation is how the regulatory system distributes authority among government decision makers. The institutional design for implementing substantive commands is no less important than the commands themselves. For example, the location of various decision making tasks across national and state government bodies—legislatures, regulatory commissions, executive officials, and courts—can affect the outcomes of the regulatory system. Different actors may resolve individual issues differently, given the variation in incentives and institutional constraints that govern their behavior.

Because institutional design choices influence outcomes, it is no surprise that the participants in the regulatory process—those who create or exercise regulatory power, and those who are regulated—pay close attention to how regulatory power is distributed. The 1980s and 1990s featured a number of contentious battles over the allocation of regulatory tasks. Three landmarks in the struggle are noted below.

5.1. *Chevron v. Natural Resources Defense Council* (1984)

In the 1977 Amendments to the Clean Air Act, Congress required any company that proposes to create a significant new source of air pollutants to obtain approval from the Environmental Protection Agency through a ''new source review'' procedure. At first EPA interpreted the term ''source'' to mean any major addition or modification of facilities that yielded emissions above a relatively low threshold. In 1981, EPA introduced the ''bubble concept'' for regulating emissions of air pollutants. The bubble concept interpreted ''source'' to refer to an entire plant. The agency's new interpretation of the 1977 Amendments sought to give companies greater flexibility to alter existing facilities by permitting a range of adjustments so long as the overall effect of modifications did not increase emissions levels.

In *Chevron v. Natural Resources Defense Council,*[13] the Supreme Court considered whether EPA's bubble concept properly interpreted the term ''source'' within the meaning of the 1977 Amendments. In affirming the EPA's interpretation, the Supreme Court announced a new standard for assessing when courts should defer to a government agency's construction of a statute it administers:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[14]

Chevron substantially has increased the level of deference courts now afford agency constructions of the statutes assigned by Congress for their supervision. Although the exact application of the *Chevron* formula has varied from case to case, the decision has entailed an important increase of authority within federal regulatory bodies with economic regulation responsibilities.

5.2. *AT&T Corp. v. Iowa Utilities Board* (1999)

In the Telecommunications Act of 1996, Congress fundamentally changed the regulatory framework for telecommunications that took shape as a result of the entry of the Modified Final Judgment in *United States v. AT&T,* discussed in section 2.1 *supra*. The Act sought to restructure local telephone markets by increasing competition. Congress entrusted the Federal Communications Commission (FCC) with broad authority to implement the Act, and in 1996 the Commission issued a rule design to execute the Act's local competition requirements.

Numerous state utility commissions and incumbent local telephone exchange carriers (LECs) challenged the FCC's rules. The states and the LECs argued that the FCC rule improperly had assumed decision making duties that the 1996 Act had allocated to state jurisdictions. A number of LECs also asserted that the FCC's specific choice of regulatory tools in the implementing rule were unreasonable. At issue in the case was not only the locus of regulatory authority—federal or state—but also the content of the rules that would

13 467 U.S. 837 (1984).
14 Id. at 842-43.

govern interconnection and other key terms of the transition to competition in local telephony.

In *AT&T Corp. v. Iowa Utilities Board*,[15] the Supreme Court rejected the states' and LECs' challenges to the FCC's exercise of authority to issue rules to carry out the provisions of the 1996 Act. For the most part, the Court vindicated the FCC's assertion of authority vis-à-vis the states. The Court affirmed some of the FCC's specific policy choices in the implementing rule and remanded others for further consideration by the Commission. The Court deemed the FCC's ''pick and choose'' rule to be reasonable, and upheld the Commission's application of the statute's ''network element'' definition in the rule's primary unbundling requirement. The Court found that the FCC had not adequately considered the 1996 Act's ''necessary and impair'' standards when giving blanket access to network elements in the primary unbundling provision of the rule.

Iowa Utilities Board represented a substantial victory for the FCC in asserting authority to set standards for the progression toward competition in local telephone markets. Although decisions of state public utility commissions will remain important in determining whether the conditions for local competition have been satisfied, the FCC has emerged from the *Iowa Utilities Board* dispute with greater capacity to determine the content of regulation affecting local telephone services.

5.3. *Bell Atlantic/NYNEX* (1997)

In 1997, Bell Atlantic and NYNEX announced the merger of their telecommunications companies and set in motion a sequence of moves that has reduced the number of RBOCs from seven to four. The merger was reviewed by the Justice Department's Antitrust Division, the FCC, the state public utility commissions of each state in which the parties did business, and the state attorneys general of several states. The Justice Department allowed the transaction to proceed without restrictions, but the FCC imposed various competition-related restrictions in reaching a settlement with the parties.[16]

The review of the merger made clear that transactions involving firms subject to traditional public utility regulation, such as electric power and telecommunications companies, would be subject to review by multiple gatekeepers with competition policy functions. The competition policy mandates of the federal antitrust regulators (the Justice Department and the FTC), the federal sectoral regulators (the FCC and the Federal Energy Regulatory Commission), and the state regulators (the state public utility commissions and the antitrust enforcement units of the attorneys general) are not identical. As many subsequent transactions would make clear, the range of overseers for certain transactions would include foreign jurisdictions, such as the European Union.

The fragmentation of decision making authority within the United States and across borders is forcing the competition policy and regulatory communities to assess whether such a distribution of regulatory power is a sensible strategy for controlling transactions,

15 525 U.S. 366 (1999).

16 In the Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-1, Memorandum Opinion and Order, 12 FCC Rcd 19,985, 20,013 § 35 (August 14, 1997).

especially in network industries in which a regulatory decision affecting one element of the network necessarily influences the performance of the entire network. For the moment, there is no mechanism other than voluntary cooperation and discussion for reconciling the preferences of the various gatekeepers. For the foreseeable future, each regulatory gatekeeper is likely to maintain independent power to determine the minimum conditions that parties must satisfy to complete their transactions.

6. Economics in the Courtroom: *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993)

For at least the past quarter-century, economists have become increasingly instrumental in shaping the outcomes of regulatory proceedings before courts and administrative tribunals. Expert economic testimony is virtually a necessity for the resolution of complex issues involving such matters as the identification of market power and evaluation of competitive effects in antitrust cases and in setting rates or interconnection terms in regulatory agency proceedings.

Since the early 1990s, the courts have subjected the contributions of economists and other experts in litigation to greater scrutiny. The landmark in this development is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[17] where the Supreme Court considered challenges to the introduction of expert scientific testimony in a tort liability case. The Court ruled that the opinion of an expert witness should be admitted only if the expert developed the opinion using generally recognized scientific principles. Opinions failing to satisfy this standard were to be excluded as ''junk science.''

Lower court decisions have extended the principal of *Daubert* to the testimony of economists and a wide range of other experts. *Daubert* challenges to the admission of expert economic testimony are commonplace in antitrust litigation and in other matters in which economists play a crucial role in analyzing the consequences of challenged behavior. The decision has provoked an extensive debate about how a court should determine whether an opinion is consistent with generally recognized principles in the field, and how a court is to assess contrarian expert views that are not currently held in high regard but might ultimately become orthodoxy.

7. Conclusion

Taken as a group, the top ten cases underscore the powerful role that judicial tribunals have exercised since the inaugural CRRI Eastern Conference in determining the content and process of economic regulation. In twenty years, the judicial tribunals have restructured industries (*AT&T*), redefined the competitive rules of the game for dominant firms (*Microsoft*), permitted parties to opt out of certain remedial systems imposed by regulatory statutes (*Gilmer*), expanded the use of constitutional commands and contractual theories to

17 509 U.S. 579 (1993).

limit the scope of regulation (*Nollan, Winstar, and 44 Liquormart*), defined new boundaries in the relationships among participants in the regulatory process (*Chevron, Iowa Utilities Board, and Bell Atlantic/NYNEX*), and toughened standards than expert economic testimony, a staple of the process of devising and interpreting regulation, must meet to influence litigation (*Daubert*).

As a group they highlight important features of the legal process going forward. Antitrust courts will continue to play a pivotal role in setting behavior rules for business enterprises, including firms emerging from long periods of comprehensive regulation. The efforts of regulators to expand their authority will confront challenges that specific measures violate constitutional controls or contradict previous agreements between regulators and the regulated. Regulated parties will seek to contract around features of the regulatory process unless the statutes creating the framework expressly forestall such measures. Courts will continue to be prime battlegrounds in the contest among government participants in the regulatory process to determine which institutions control and implement the regulatory agenda. Judges will look for ways to increase their confidence in the reliability of expert advice offered about regulatory programs. These developments ensure that the intersection of economics and law involving economic regulation in the judicial process will grow ever more congested in the next 20 years.