THE DEATH OF ANTITRUST SAFE HARBORS: CAUSES AND CONSEQUENCES

Lindsey M. Edwards♣
Joshua D. Wright

INTRODUCTION

Substantive antitrust laws and procedural rules are endogenous to changes in economic knowledge, institutional capabilities, technological change, the expansion or contraction of related bodies of law, and the preferences of agencies and courts over time. Antitrust institutions, like all legal systems, evolve in response to external pressures. The *form* of substantive antitrust rules—particularly whether a bright line rule or a more flexible standard should govern business conduct—is no exception. Whether and when the governing antitrust rule should take the form of a presumption of legality or illegality, whether that presumption should be rebuttable, and the optimal height of the burdens of proof and production facing each party, are each the result of complex and interdependent relationships between law, institutions, and markets.

This Article focuses on the causes and consequences of the evolution and disappearance of antitrust safe harbors within the modern antitrust era. In doing so, the primary focus of this Article is to explain the rise of antitrust safe harbors in the early 1980s and 1990s following the Supreme Court's decision in *Continental Television, Inc. v. GTE Sylvania*,[1] to describe the subsequent disappearance of those safe harbors, and to explore some possible explanations as to antitrust's recent shift from bright line rules of presumptive legality. For the purposes of this Article, the term "safe harbor" does not refer exclusively to rules of per se legality, but instead encompasses presumptions of legality embedded within a structured rule of reason analysis.

The modern era of antitrust began by introducing safe harbors across the entire competition landscape: horizontal restraints, exclusionary conduct, and mergers. With respect to horizontal restraints, courts developed the single entity defense—that is, a safe harbor applicable to coordination within a single firm.[2] Similarly, courts created a de facto rule of per se legality for

♣ Lindsey M. Edwards is a J.D. Candidate at Antonin Scalia Law School at George Mason University. Joshua D. Wright is University Professor, Antonin Scalia Law School at George Mason University, Executive Director, Global Antitrust Institute, and Senior of Counsel, Wilson Sonsini Goodrich & Rosati. The authors thank Bruce Kobayashi and Keith Hylton for valuable comments. We thank Nick Ingros for excellent editorial assistance and Thomas Rucker and Kristen Harris for research assistance.

1 433 U.S. 36 (1977).

2 *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767–68 (1984).

patent settlement agreements between brand name and generic drug manufacturers within the "scope of the patent."[3]

Safe harbors were also introduced to apply to both forms of exclusionary conduct, exclusion and predation. For example, courts developed a bright line foreclosure safe harbor to analyze the reasonableness of exclusive dealing contracts[4] and a rebuttable presumption of legality to apply to short-term exclusives.[5] The Supreme Court introduced a price-cost safe harbor in predatory pricing cases to immunize above-cost pricing from antitrust liability.[6] Similarly, during the early modern antitrust era, the Supreme Court created unequivocal presumptions of legality to be applied to unilateral refusals to deal and a safe harbor for monopoly pricing.[7] Safe harbors also arose for dominant firms engaging in product innovation[8] and patent licensing.[9]

With respect to merger enforcement, the shift toward safe harbors took place not within the courts, but was instead spurred by the antitrust agencies. The 1982 Merger Guidelines introduced a safe harbor for mergers in generally "unconcentrated" markets.[10] Furthermore, the 1992 Guidelines contemplated what some interpreted to be a safe harbor for unilateral effects cases resulting in a post-merger market share of less than 35 percent.[11]

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3 *See In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1335–36 (Fed. Cir. 2008); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 213–15 (2d Cir. 2006); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065–66 (11th Cir. 2005).

4 *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984); Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 123–24 (1st Cir. 2011); B&H Med., L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 68 (1st Cir. 2004); CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74, 80 (2d Cir. 1999); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162–63 (9th Cir. 1997); Minn. Mining & Mfg. Co. v. Appleton Papers Inc., 35 F. Supp. 2d 1138, 1142–43 (D. Minn. 1999); *see also* Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 324 n.85 (2002) (collecting cases); Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163, 1178–79 (2012).

5 *See CDC Techs.*, 186 F.3d at 80; *Omega Envtl.*, 127 F.3d at 1163–64; Thompson Everett, Inc. v. Nat'l Cable Advert., L.P., 57 F.3d 1317, 1326 (4th Cir. 1995); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 392–93 (7th Cir. 1984).

6 *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993).

7 *See* Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409–10 (2004).

8 *See* Cal. Comput. Prod., Inc. v. Int'l Bus. Machs. Corp., 613 F.2d 727, 741–42 (9th Cir. 1979); *see also* Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 542 (9th Cir. 1983).

9 *See* Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515, 516 (1981).

10 U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § I.A.1.a (1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,102 [hereinafter 1982 MERGER GUIDELINES].

11 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.51.a (1992, rev. 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 MERGER GUIDELINES].

The rise of safe harbors is among the most prominent features of the dramatic evolution of antitrust law and institutions in the modern era. That evolution has been well documented, and is viewed widely as evidence of the successful integration of economic analysis into antitrust and as a significant improvement in the intellectual coherence of the doctrine.[12] The shift toward safe harbors occurred quickly and is attributable to significant contributions from the Supreme Court, lower courts, and the federal antitrust agencies.

The subsequent and ongoing disappearance of antitrust safe harbors has been less well recognized and less often discussed. A primary contribution of this Article is to substantiate the claim that safe harbors have disappeared from the antitrust landscape just as quickly during the last 10 to 15 years as they emerged during the first several decades of the doctrine's modern era. Twenty-first century antitrust has seen a significant decline in the number and practical significance of safe harbors. Some safe harbors have disappeared in practice in response to lower court decisions or agency action. The Supreme Court has eliminated others.[13] Other safe harbors that have not been eliminated have been softened. For example, several of the various safe harbors within exclusionary conduct standards are now evaded more frequently and with less effort.[14] Similarly, the 2010 Horizontal Merger Guidelines' increased focus upon competitive effects rather than market definition and market shares has resulted in a decline in the practical importance of share-based safe harbors for mergers.[15]

The goal of this Article is to document the early rise and recent fall of antitrust safe harbors and to explain its causes and consequences. Part I documents the rise of antitrust safe harbors. Part II analyzes the causes of that rise, providing a framework for understanding the doctrinal and attitudinal shift in competition policy. Part III turns to the subsequent, and sudden, decline of antitrust safe harbors in the 21st century, both in the courts and in the antitrust enforcement agencies. Part IV addresses the potential causes and consequences of the modern deterioration and disappearance of antitrust safe harbors. Part IV considers the assertion that the disappearance of safe harbors is a result of a reversal of the factors that led to the rise of safe harbors discussed in Part II, and provides preliminary analysis and evidence suggesting that other factors are likely at work. Part V concludes.

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12 *See* Derek W. Moore & Joshua D. Wright, *Conditional Discounts and the Law of Exclusive Dealing*, 22 GEO. MASON L. REV. 1205, 1235 (2015).

13 *See* FTC v. Actavis, Inc., 133 S. Ct. 2223, 2230–31, 2237–38 (2013); Am. Needle, Inc. v. NFL, 560 U.S. 183, 196–02 (2010).

14 *See infra* Part III.B.

15 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010) [hereinafter 2010 MERGER GUIDELINES].

I. THE RISE OF ANTITRUST SAFE HARBORS IN THE MODERN ERA

Beginning with the rise of the Chicago School and the Supreme Court's decision in *GTE Sylvania* in 1977, the modern antitrust era was marked with a considerable increase in the development of antitrust safe harbors. To explain fully the causes and consequences of the rise of antitrust safe harbors in the modern era, it is critical to understand the point of origin for the analysis. Part I begins with a brief and stylized account of the development and state of early antitrust doctrine.

A. *A Brief Primer on the Pre-Chicago Antitrust Era*

The first several decades following the enactment of the Sherman Act consisted largely of courts attempting to identify conduct that fell within the statute's vague prohibition against "restraints of trade."[16] Courts generally enforced the antitrust laws leniently for their first fifty years.[17] Near the end of the Great Depression, courts shifted antitrust jurisprudence toward a more aggressive and interventionist position. In particular, the courts established and increasingly applied per se rules of illegality.[18] This trend continued until the advent of the modern antitrust era, when enforcement shifted again toward the creation of wide safe harbors within the rule of reason framework.[19] In order to set the table for a historical narrative surrounding the rise and fall of safe harbors, it is useful to identify categories of business conduct that antitrust rules seek to regulate and briefly summarize the early state of play within each.

1. Horizontal and Vertical Restraints

In the twenty years immediately following the passage of the Sherman Act, courts struggled with the implications of a literal reading of Section 1's categorical ban of "every" contract in restraint of trade.[20] Initially, courts were extremely critical of both horizontal and vertical agreements among competitors, and nearly always found such agreements to be per se illegal.[21]

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16 William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 44 (2000).

17 *See id.* at 48.

18 *Id.* at 49–52.

19 *See id.* at 53–55.

20 *Id.* at 44. *See also* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 312–13 (1897).

21 *See* Kovacic & Shapiro, *supra* note 16, at 44–45.

The Supreme Court led the evolution of antitrust rules, but maintained the position that naked restraints on price warranted summary condemnation.[22] However, the Court eventually began to show greater tolerance toward cooperation among firms shy of an agreement to fix prices. For example, in *Board of Trade of the City of Chicago v. United States*,[23] the Court held blanket restrictions on after-hours trading on a commodities exchange to be reasonable.[24] The Court reasoned that agreements or regulations relating to competition should be analyzed under the rule of reason, taking account of the nature, scope, and effect of the restraint.[25] This analytical approach came to be known as the "full blown" or "unstructured" rule of reason.[26]

Just one year after *Chicago Board of Trade*, the Supreme Court also limited the reach of the per se rule as applied to vertical agreements. In *United States v. Colgate & Co.*,[27] the Court allowed a firm to unilaterally impose resale price maintenance, provided that it was not a monopolist.[28] The *Colgate* decision created precedential tension that continues to exist today, as it came only eight years after *Dr. Miles Medical Company v. John D. Park & Sons*,[29] in which the Court held vertical price restraints, such as resale price maintenance, to be per se unlawful.[30]

These exceptions notwithstanding, prior to the advent of the modern era of antitrust, the general trend in jurisprudence was construction of strict rules of per se illegality and summary condemnation of most horizontal and vertical agreements. In *Interstate Circuit, Inc. v. United States*,[31] the Supreme Court held that circumstantial evidence was sufficient to prove an unlawful

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22 United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927) ("The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.").

23 246 U.S. 231 (1918).

24 *Id.* at 241.

25 *Id*. at 238 ("[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

26 Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law, in* 1 ISSUES IN COMPETITION LAW AND POLICY 125, 137 (2008).

27 250 U.S. 300 (1919).

28 *Id*. at 307 ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.").

29 220 U.S. 373 (1911).

30 *See id.* at 409.

31 306 U.S. 208 (1939).

horizontal conspiracy.[32] The next year, in *United States v. Socony-Vacuum Oil Co.*,[33] the Court definitively categorized horizontal price fixing as per se illegal, regardless of the market power of firms involved or the actual effect of the agreement.[34] Following *Socony-Vacuum*, the Court extended per se condemnation to various additional forms of business conduct, including tying,[35] non-price vertical restraints,[36] group boycotts,[37] and horizontal agreements to allocate markets, customers, or sales territories.[38]

2. Exclusionary Conduct

Early antitrust courts were more cautious in adopting hostile rules that would call for summary condemnation of exclusionary conduct under Section 2.[39] The Supreme Court did not directly address dominant firm conduct until 1911 in *Standard Oil Co. v. United States*.[40] There, the Court determined that the "rule of reason" would guide antitrust analysis of exclusionary conduct.[41]

Congress, viewing the introduction of the rule of reason in *Standard Oil* as an attempt by the Supreme Court to narrow the intended reach of the Sherman Act, passed the Clayton Act and FTC Act in 1914.[42] A twenty-year period of leniency in antitrust jurisprudence ensued nonetheless.[43] Professors Bill Kovacic and Carl Shapiro have described this era, spanning from 1915 to 1936, as the "longest lapse for the enforcement of antitrust controls on dominant firm behavior. . . . [where] decisions exculpating large defendants were the norm."[44]

Leniency toward exclusionary conduct alleged to violate Section 2 subsided after the New Deal. As Kovacic and Shapiro explain, "[c]ourts routinely slighted efficiency rationales for challenged behavior, revealing an implicit suspicion that superior performance never could explain dominance."[45]

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32 *Id.* at 225–27, 232.

33 310 U.S. 150 (1940).

34 *Id.* at 218, 223–24.

35 *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 8 (1958); Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).

36 United States v. Arnold, Schwinn & Co., 388 U.S. 365, 381–82 (1967).

37 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–14 (1959).

38 *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

39 *See* Kovacic & Shapiro, *supra* note 16, at 45.

40 221 U.S. 1 (1911).

41 *Id.* at 61–62.

42 Kovacic & Shapiro, *supra* note 16, at 46.

43 *See id.*

44 *Id.* at 48.

45 *Id.* at 51.

For example, in *United States v. Aluminum Co. of America*,[46] the Second Circuit held that Alcoa had illegally monopolized the market by expanding its production capacity in response to new demand for aluminum.[47] Courts were especially skeptical of dominant firms that could price below cost and in turn drive competitors out of the market. In *Utah Pie Co. v. Continental Baking Co.*,[48] the Supreme Court condemned a national bakery for charging prices "less than its direct cost plus an allocation for overhead" in local markets with the intent of driving out the leading local bakery.[49]

3. Merger Enforcement

Initially, merger enforcement was remarkably passive. The Supreme Court in 1895 allowed a series of mergers that resulted in the Sugar Trust controlling over 98 percent of the sugar refining capacity in the United States.[50] A significant increase in merger activity followed over the next ten years.[51] The Supreme Court did not use the Sherman Act to impede a merger used to create a monopoly until 1904, when it condemned Northern Pacific Railroad's merger with Great Northern Railroad.[52]

In the era following the Great Depression, strict scrutiny came to be applied to nearly every horizontal merger. In 1962, the Supreme Court held in *Brown Shoe Co. v. United States*[53] that a merger that would have resulted in a combined post-merger market share of only 5 percent was anticompetitive.[54] In 1963, the Court set forth a presumption of illegality for any transaction that would result in a post-merger market concentration of more than 30 percent in *United States v. Philadelphia National Bank*.[55] In 1966, the Court invalidated two more mergers: one between grocery stores that would have led to a post-merger market share of less than 8 percent in the defined market,[56] and one between two breweries that would have resulted in a post-merger national market share of less than 5 percent.[57] Courts gave little credit, if

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46 148 F.2d 416 (2d Cir. 1945).

47 *Id*. at 445.

48 386 U.S. 685 (1967).

49 *Id*. at 698–99.

50 Kovacic & Shapiro, *supra* note 16, at 45.

51 *See id.*

52 *See* N. Sec. Co. v. United States, 193 U.S. 197, 198 (1904). *See also* Kovacic & Shapiro, *supra* note 16, at 45.

53 370 U.S. 294 (1962).

54 *Id.* at 343, 345–46.

55 374 U.S. 321, 364–65 (1963). On the lasting and deleterious impact of the Philadelphia National Bank presumption, see generally Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).

56 United States v. Von's Grocery Co., 384 U.S. 270, 272, 278 (1966).

57 United States v. Pabst Brewing Co., 384 U.S. 546, 551–52 (1966).

any, to efficiency claims during this period. Thus, once a presumption of illegality was established, rebuttals were rarely successful.[58]

B. *The Rise of Safe Harbors in the Modern Antitrust Era*

The modern antitrust era was a product of the substantial change in economic knowledge arising from the Chicago School of Antitrust Economics. The accumulation of new economic learning during the 1960s and 1970s had a significant impact on the evolution of all aspects of antitrust doctrine and enforcement. Perhaps the two most significant intellectual developments during this period were the dismantling of the intellectual underpinnings of the market structure-conduct-performance paradigm[59] and the development of the economics of vertical restraints—particularly, the development of procompetitive explanations for various vertical restraints.[60]

From a legal standpoint, the modern antitrust era began with the Supreme Court's holding in *GTE Sylvania* that nonprice vertical restraints, which were previously categorized as per se illegal, were subject to rule of reason analysis.[61] The Court's decision, which extensively relied upon and cited to Chicago School commentators and economic analysis, emphasized the central role of economics in antitrust analysis.[62] Following *GTE Sylvania*, the Supreme Court generally analyzed Section 1 claims under the "structured" rule of reason.[63] The modern era began with a period devoted largely to the systematic elimination of rules of per se illegality that had come to dominate antitrust enforcement.[64] This historical correction sought to align modern antitrust doctrine with advances in economic theory and empirical knowledge, and initiated a movement toward substantive standards within the rule of reason framework that included broad safe harbors.

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58 Kovacic & Shapiro, *supra* note 16, at 51.

59 *See id.* at 52; Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 178–81 (Harvey J. Goldschmid, et al., eds., 1974); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 9-10 (2003).

60 For a discussion of this literature, see Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 COMPETITION POL'Y INT'L 1 (2009).

61 Cont'l T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

62 *See id.* at 54–57.

63 Kovacic & Shapiro, *supra* note 16, at 54 ("[M]ost of [the Supreme Court's] decisions in this period perceived the need for an analytical middle ground between per se condemnation and elaborate rule of reason analysis[.]"). *See, e.g.,* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–81 (1999); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 7–8 (1979); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

64 *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 460–64 (2003).

1. Horizontal and Vertical Restraints

The modern era of antitrust enforcement as applied to horizontal and vertical agreements began with the establishment of two important safe harbors. First, in 1984, the Supreme Court recognized a safe harbor from Section 1 liability for corporations coordinating with a wholly-owned subsidiary in *Copperweld Corp. v. Independence Tube Corp*.[65] The Court explained that "[i]t is not enough that a single firm appears to 'restrain trade' unreasonably," because "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization."[66] Thus, *Copperweld* established complete immunity from Section 1 liability for such dealings, but not from Section 2 liability. Lower courts extended the *Copperweld* safe harbor to the acts of corporations and their partially-owned subsidiaries,[67] sister corporations controlled by the same parent,[68] two corporations with common ownership,[69] and a corporation and its independent dealers.[70]

A second safe harbor, known as the "scope of the patent" test, was developed by the courts to address horizontal agreements relating to patent settlements.[71] In 2005, the Eleventh Circuit held that if the exclusionary effects

65 467 U.S. 752, 776 (1984).

66 *Id.* at 767–68.

67 *See, e.g.*, Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp., 849 F. Supp. 702, 706–07 (N.D. Cal. 1994); Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987); Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc., No. C85-2674A, 1986 WL 798475, at *9–10 (N.D. Ga. Dec. 23, 1986).

68 *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 138 (3d Cir. 2001); Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611 (6th Cir. 1987).

69 *See, e.g.*, Guzowski v. Hartman, 969 F.2d 211, 214 (6th Cir. 1992); Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984); D'Last Corp. v. Ugent, 863 F. Supp. 763, 768–69 (N.D. Ill. 1994), *aff'd*, 51 F.3d 275 (7th Cir. 1995); Orson, Inc. v. Miramax Film Corp., 862 F. Supp. 1378, 1385 (E.D. Pa. 1994), *aff'd in part & vacated in part*, 79 F.3d 1358 (3d Cir. 1996).

70 *See, e.g.*, Day v. Taylor, 400 F.3d 1272, 1277–78 (11th Cir. 2005) (finding no multiplicity of actors between U-Haul and its independent dealers because U-Haul owned, paid taxes on, and bore most of the risk of loss for equipment rented by the dealers).

71 *See, e.g.,* Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065–66 (11th Cir. 2005).

of a reverse settlement agreement fall within the scope of the patent's protection, it could not be held illegal under the antitrust laws.[72] The Second Circuit and Federal Circuit adopted this safe harbor in 2006 and 2008, respectively.[73]

2. Exclusionary Conduct

Courts, and primarily the Supreme Court, also created or strengthened safe harbors relating to alleged exclusionary conduct. The Supreme Court did so in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[74] reaffirming the principle that a lawful monopolist may charge the monopoly price.[75] The Court explained that "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."[76] Thus, the Court held that in order to condemn a lawful monopolist under Section 2, possession of monopoly power must be accompanied by exclusionary conduct.[77]

In *Brooke Group v. Brown & Williamson Tobacco Corp.*,[78] the Court created a safe harbor by establishing that above-cost prices could not give rise to antitrust liability on a theory of price predation.[79] The Court explained that "because 'cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[80] This safe harbor was reaffirmed in 2009 when the Supreme Court decided *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*,[81] stating that "[a]t least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost."[82]

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72 *Id.* ("By their nature, patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present. 'What is required here is an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects.' Therefore, . . . we think the proper analysis of antitrust liability requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects.") (quoting Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294, 1311 n.27 (11th Cir. 2003)).

73 *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1335–36 (Fed. Cir. 2008); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 212–13 (2d Cir. 2006).

74 540 U.S. 398 (2004).

75 *Id.* at 407.

76 *Id.*

77 *See id.*

78 509 U.S. 209 (1993).

79 *See id.* at 226.

80 *Id.* (quoting Cargill, Inc. v. Monofort of Colo., Inc., 479 U.S. 104, 122 n.17 (1986)).

81 555 U.S. 438 (2009).

82 *Id*. at 453 (citing Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993)).

Courts also began to recognize safe harbors for exclusive dealing agreements. Several courts created a safe harbor for exclusive dealing arrangements that were either short in duration or terminable at will.[83] A leading treatise on antitrust law explains "even a high foreclosure percentage will not exclude competition if the period covered by the exclusive-dealing arrangement is short *and* there are no other impediments to switching."[84] For example, the Seventh Circuit held in *Roland Machinery Co. v. Dresser Industries, Inc.*[85] that exclusive dealing contracts less than a year in duration are presumptively lawful.[86] The First, Second, Fourth, and Ninth Circuits have since endorsed this notion.[87] Regarding the ease of termination of exclusive contracts, the First Circuit has held that "an exclusivity clause terminable on 30 days' notice would be close to a *de minimus* constraint."[88]

Yet another safe harbor presumed lawful exclusive dealing arrangements foreclosing a sufficiently small fraction of the distribution market was also established. In *Jefferson Parish Hospital District No. 2 v. Hyde*,[89] the Supreme Court held that an exclusive dealing agreement between a hospital and a firm of anesthesiologists that foreclosed 30 percent of the relevant market did not meet Section 2's requirement of substantial foreclosure.[90] In a concurring opinion, Justice O'Connor emphasized that "[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."[91] Several courts have interpreted *Jefferson Parish* as creating a presumption of legality

83 *See, e.g.,* CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74, 80 (2d Cir. 1999); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162–63 (9th Cir. 1997); Thompson Everett, Inc. v. Nat'l Cable Advert., L.P., 57 F.3d 1317, 1326 (4th Cir. 1995); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 392–93 (7th Cir. 1984); *see also* Church & Dwight Co., Inc. v. Mayer Labs., Inc., 868 F. Supp. 2d 876, 903 (N.D. Cal. 2012) ("The prevailing rule in districts and circuits across the country is that where exclusive or semi-exclusive contracts are short in duration, easily terminable, incentive-based, and leave open alternative channels to competitors, they are not exclusionary."), *vacated in part*, No. 10–4429 EMC, 2012 WL 1745592 (N.D. Cal. May 16, 2012).

84 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1821d3, at 200 (3d ed. 2011) (emphasis in original). *See also id.* ("We suggest presumptively that periods of less than one year be approved[.]").

85 749 F.2d 380 (7th Cir. 1984).

86 *Id*. at 395.

87 *CDC Techs.*, 186 F.3d at 80; *Omega Envtl.*, 127 F.3d at 1163 ("[T]he short duration and easy terminability of these agreements negate substantially their potential to foreclose competition.") (internal footnote omitted); *Thompson Everett*, 57 F.3d at 1326 (holding exclusive dealing agreements that are "typically short in duration, usually terminable after a year, and contain performance criteria, which, if not met, may justify earlier termination" to be presumptively lawful); *U.S. Healthcare*, 986 F.2d at 596.

88 *U.S. Healthcare*, 986 F.2d at 596.

89 466 U.S. 2 (1984).

90 *Id.* at 32 ("There is simply no showing here of the kind of restraint on competition that is prohibited by the Sherman Act.").

91 *Id*. at 45 (O'Connor, J., concurring) (citing Standard Oil Co. v. United States, 337 U.S. 293 (1949)).

for exclusive dealing arrangements in cases where foreclosure is less than 40 percent.[92] Additionally, Professors Phillip Areeda and Herbert Hovenkamp explain "single-firm foreclosure percentages of less than 30 or 40 percent in a properly defined market would seem to be harmless to competition."[93]

In addition to establishing safe harbors for exclusive dealing arrangements, courts also began to recognize the importance of safe harbors for conduct involving innovation. In 1979, the Ninth Circuit reasoned that "[w]here the opportunity exists to increase or protect market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so."[94] Four years later, that same court held in *Foremost Pro Color, Inc. v. Eastman Kodak Co.*,[95] that any success a monopolist might achieve though innovation is "necessarily tolerated by the antitrust laws."[96] The court emphasized that in order to establish a Section 2 claim, the plaintiff must show that the monopolist "engaged in 'willful' acts directed at establishing or maintaining its monopoly, 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[97] Several courts have since cited that case as support for shielding product innovation from the reach of Section 2.[98] For example, in *United States v. Microsoft Corp.*,[99] the D.C. Circuit noted that "[a]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes."[100]

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92 S*ee* Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 124 (1st Cir. 2011) ("[F]oreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent, and while high numbers do not guarantee success for an antitrust claim, low numbers make dismissal easy.") (internal quotations omitted); B & H Med., L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008) (holding that foreclosure levels under 40 percent were unlikely to raise competitive concerns); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 68 (1st Cir. 2004) ("For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.") (citing *Jefferson Parish*, 466 U.S. at 45–46 (O'Connor, J., concurring)); *CDC Techs.*, 186 F.3d at 77; *Omega Envtl.*, 127 F.3d at 1162 (holding that an exclusive dealing arrangement which foreclosed 38 percent of the relevant market did not violate the Sherman Act); Minn. Mining & Mfg. Co. v. Appleton Papers Inc., 35 F. Supp. 2d 1138, 1143 (D. Minn. 1999) ("Generally speaking, a foreclosure rate of at least 30 percent to 40 percent must be found to support a violation of the antitrust laws."); *see also* Jacobson, *supra* note 4, at 324 n.85 (collecting cases).

93 11 AREEDA & HOVENKAMP, *supra* note 84, ¶ 1821c, at 190.

94 Cal. Comput. Prods., Inc. v. Int'l Bus. Machs. Corp., 613 F.2d 727, 742 (9th Cir. 1979).

95 703 F.2d 534 (9th Cir. 1983).

96 *Id*. at 545.

97 *Id*. at 543 (quoting Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 739–40 (9th Cir. 1981)).

98 *See, e.g.,* United States v. Microsoft Corp., 253 F.3d 34, 65 (D.C. Cir. 2001); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) ("[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors."); Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 707 F. Supp. 1170, 1180 (C.D. Cal. 1989).

99 253 F.3d 34 (D.C. Cir. 2001).

100 *Id.* at 65 (citing Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544–45 (9th Cir. 1983)).

Beyond developments set in motion by the courts, and of enormous practical significance, was agency rejection of de facto per se rules of illegality as applied to business arrangements involving intellectual property rights. Most significantly, the Department of Justice Antitrust Division ("DOJ") repudiated the "Nine No-Nos" in 1981, creating a presumption of legality for patent licensing.[101] The Nine No-Nos, established in 1970, were patent licensing practices that the DOJ considered to be "clearly unlawful" at the time.[102] Those practices are "now understood to be part of the normal competitive process and contributors to economic growth."[103]

3. Merger Enforcement

The early years of the modern antitrust era also saw significant changes in merger enforcement, though not much development of merger law. The antitrust agencies began to move away from the 1960s approach of condemning virtually all mergers toward a more effects based rule of reason approach. The adoption of this approach led to the introduction of two safe harbors for horizontal mergers. In 1982, the DOJ released revised merger guidelines for the first time since their initial issuance in 1968.[104] The 1982 Guidelines, described by Professor Carl Shapiro as a "revolution," introduced the Herfindahl-Hirschman Index ("HHI") to agency merger analysis.[105] The DOJ established enforcement thresholds upon which to analyze mergers, based on a comparison of the measures of initial HHI and post-merger HHI and the corresponding change in the HHI, including a safe harbor for mergers in generally "unconcentrated" markets.[106] For the first time, the 1982 Guidelines, based largely upon concerns about coordinated effects arising from horizontal mergers, created a presumptive safe harbor for mergers resulting in an HHI below 1000, as "implicit coordination among firms is likely to be difficult and because the prohibitions of section 1 of the Sherman Act are usually an adequate response to any explicit collusion that might occur, . . ."[107]

The DOJ and FTC released revised Merger Guidelines again in 1992.[108] The 1992 Guidelines contained what some interpreted to be a safe harbor for certain horizontal mergers involving the potential for unilateral price effects. The 1992 Guidelines explained that in both markets for differentiated and

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101 *See* Lipsky, *supra* note 9, at 517–24.

102 *Id.*

103 Joshua D. Wright & Douglas H. Ginsburg, *Patent Assertion Entities and Antitrust: A Competition Cure for a Litigation Disease?*, 79 ANTITRUST L.J. 501, 520 (2014).

104 *See* 1982 MERGER GUIDELINES, *supra* note 10, at § I n.3.

105 *Id.* at § III.A. *See also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 52 (2010).

106 1982 MERGER GUIDELINES, *supra* note 10, at § III.A.1.a.

107 *Id.*

108 *See* 1992 MERGER GUIDELINES, *supra* note 11.

markets for homogenous products, merging firms with a post-merger market share of at least 35 percent "may find it profitable to raise price and reduce joint output."[109] Whether this language was intended to or did create a safe harbor was the subject of some controversy. Some read the language as creating a safe harbor for transactions resulting in a post-merger market share of less than 35 percent.[110] Others disagreed.[111]

The following table summarizes case law and agency actions that contributed to the rise of safe harbors during the modern antitrust era.

ANTITRUST SAFE HARBORS IN THE MODERN ERA	
Horizontal and Vertical Restraints[112]	
Coordination with a wholly-owned subsidiary	*Copperweld Corp. v. Independence Tube Corp*. (1984)
Exclusionary agreements within the scope of the patent	*Schering-Plough Corp. v. FTC* (11th Cir. 2005)
Exclusionary Conduct[113]	

109 *Id.* 1992 MERGER GUIDELINES, *supra* note 11, at §§ 2.211, 2.22.

110 *See* Darren S. Tucker, *Seventeen Years Later: Thoughts on Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE, Oct. 2009, at 12, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Tucker10_23f.authcheckdam.pdf ("Practitioners have generally viewed combined market shares short of 35 percent as falling within a safe harbor. . . . Despite some concerns with the economic significance of this figure, a market-share-based safe harbor for unilateral effects—even if at a lower percentage—would be a helpful bright-line test. And as the Commentary itself notes, the 35 percent test has worked well in practice.") (footnotes omitted).

111 Shapiro, *supra* note 105, at 69–70 ("[A]s practice evolved, the 35 percent presumption was often invoked as a safe harbor, . . . In fact, the 1992 Guidelines contain no such safe harbor.").

112 Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 770 (1984) ("There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.") (footnote omitted); Shering-Plough Corp. v. FTC, 402 F.3d 1056, 1067 (11th Cir. 2005) ("[A] patent holder does not incur antitrust liability when it chooses to exclude others from producing its patented work.").

113 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful, it is an important element of the free-market system."); Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) ("[A] plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.") (footnote omitted); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 8 (1984); *Id.* at 45 (O'Connor, J., concurring); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 546 (9th Cir. 1983) ("That the dominant firm in any market may through technological innovation expand its market share, increase consumer brand identification, or create demand for new products is perfectly consistent with the competitive forces that the Sherman Act was intended to foster."); Lipsky, *supra* note 9, at 517 ("[O]ne finds that the 'Nine No Nos,' as statements of rational economic policy, contain more errors than accuracy.").

Patent Licensing	Repudiation of the “Nine No-Nos” (1981)
Product innovation	*Foremost Pro Color, Inc. v. Eastman Kodak Co.* (9th Cir. 1983)
Exclusive dealing contracts that foreclose less than 40% of market	*Jefferson Parish Hospital District No. 2 v. Hyde* (1984)

Short or terminable at will exclusive dealing contracts	*Roland Machinery Co. v. Dresser Industries, Inc.* (7th Cir. 1984)
Pricing above cost	*Brooke Group v. Brown & Williamson Tobacco Corp.* (1993)
Charging the monopoly price	*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (2004)
Merger Enforcement[114]	
Mergers in generally "unconcentrated" markets	U.S. Dep't of Justice, *Merger Guidelines* (1982)
Mergers resulting in a post-merger market share under 35%	U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (1992, rev. 1997)

II. THE RISE OF ANTITRUST SAFE HARBORS IN THE 1980S AND 1990S: CAUSES AND CONSEQUENCES

Part I documented the rise of safe harbors—defined here as rules of per se legality or rebuttable presumptions of legality—to begin the modern antitrust era. To reiterate, the term safe harbor as used within this Article encompasses conditions required in order for a plaintiff to satisfy his prima facie burden within a structured rule of reason analysis. For example, included in this Article's definition of safe harbor—consistent with the practice of most antitrust commentators—would be the requirement that a plaintiff show "substantial foreclosure" to prevail in an exclusive dealing-based Sherman Act claim,[115] or the requirement that a plaintiff establish that the defendant possesses substantial monopoly power in any claim under Section 2 of the Sherman Act.[116]

114 1982 MERGER GUIDELINES, *supra* note 10, at § I.A.1.a ; 1992 MERGER GUIDELINES, *supra* note 11, at § 2.211.

115 11 AREEDA & HOVENKAMP, *supra* note 84, ¶ 1821c, at 190.

116 United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

Part II turns to explaining the intellectual and political forces that led to the rise of safe harbors across the antitrust landscape. This Part highlights two categories of factors, economic and political, as contributing to the rise of safe harbors.

A. *Economic Analysis and Antitrust Rules*

The Chicago School is properly characterized as a set of methodological commitments economists and legal scholars associated with the law and economics movement at the University of Chicago. Three of these methodological commitments stand out as the defining characteristics of the Chicago School: "(1) a rigorous application of price theory; (2) the centrality of empiricism; and (3) an emphasis on the social cost of legal errors in the design of antitrust rules."[117]

The Chicago School is often incorrectly described both as monolithic and as reflexively or ideologically against antitrust enforcement.[118] Each description is inaccurate. Chicago School economists and legal scholars provided the intellectual foundation for the modern theory of oligopoly,[119] have been among the most dedicated supporters of criminal enforcement for price-fixing offenses,[120] established the modern "raising rivals' costs" theories,[121] and have offered the most prominent empirical support for those raising rivals' costs theories.[122]

The rise of the intellectual influence of the Chicago School of Antitrust over the last 40 years has been well documented.[123] The Supreme Court's decision in *GTE Sylvania* was one of the first signs of what would prove to

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117 Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 245 (2012).

118 *See id.* at 243–44.

119 George J. Stigler, *A Theory of Oligopoly*, 1 J. OF REPRINTS OF ANTITRUST L. & ECON. 1465, 1467 (1969) (reprinted from 72 J. POL. ECON. 44, 44 (1964)).

120 *See, e.g.,* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 263–65 (1978).

121 *See* Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1956). The intellectual father of Post-Chicago antitrust, Steve Salop, appropriately credits the Chicago School. *See* Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 141, 144 (Robert Pitofsky ed., 2008).

122 *See* Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The* Standard Oil *Case*, 39 J.L. & ECON. 1, 3 (1996).

123 *See, e.g.,* Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 65–67 (Antonio Cucinotta et al., eds. 2002) (describing the post 1970s as the "Chicago School" era of antitrust interpretation).

be the Chicago School's significant influence upon the Supreme Court's antitrust jurisprudence.[124] But the persistent influence would become clear through a series of decisions involving vertical restraints,[125] pricing practices,[126] and horizontal restraints.[127] The Supreme Court's general reliance upon economic thinking during such time period, and upon the contributions of Chicago School economists specifically, has also been well documented.[128]

Isolating the effect of these "Chicago School" Supreme Court decisions on antitrust jurisprudence requires some understanding of the prior state of antitrust. Most commentators agree that antitrust rules during the era preceding the Chicago School's influence were very likely to chill pro-competitive behavior; thus, the Supreme Court's modifications to antitrust doctrine has been largely viewed favorably by commentators, including those that oppose the Chicago approach more generally.[129] From a consumer welfare perspective, the economic irrationality of early antitrust rules also explains the subsequent streak of defendant victories in the Supreme Court. During the decade leading up to the modern antitrust era, defendants won only 36 percent of all antitrust cases decided by the Supreme Court.[130] Then, from 1977 to 2007, defendants' win ratio increased every respective decade, from 45 percent, to 50 percent, to 100 percent.[131]

The general effect of Chicago School influence in many of the decisions during this time period was a shift from per se illegality toward rule of reason

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124 *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977) (referencing Chicago school thinkers such as Bork and Posner in relation to overturning *Schwinn's* per se rule).

125 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007); State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).

126 *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 315 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414–15 (2004); Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 212 (1993).

127 *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

128 *See generally* Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 COMPETITION POL'Y INT'L 3 (2007).

129 *See, e.g.*, LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 7 (2d ed. 2000) ("By the mid-1970s, a sense that some court decisions had suppressed conduct that was efficient and the contemporaneous growth in influence of the Chicago School of Economics began tempering enforcement policy."); Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2185 (2013) ("The old rules each likely deterred more anticompetitive conduct than the corresponding modern rules do now. But in general, the rules were modified for a good reason: they chilled cost reductions and other efficiency-enhancing conduct.") (footnote omitted); Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321, 325 (1987) ("The Supreme Court has moved cautiously and thoughtfully in the direction of more lenient antitrust policies during the last ten or fifteen years. Its decisions have become generally more solicitous toward claims of efficiency, and appear to have abandoned the occasional Warren Court preference for small business. Broad per se categories have been examined carefully and cut back in coverage. Current opinions are more likely to include economic analysis and reference to economic sources.").

130 *See* Brannon & Ginsburg, *supra* note 128, at 17.

131 *Id.*

analysis. In the aggregate, the trend of these modifications was certainly consistent with Chicagoan sentiment; however, many Chicagoans disagreed over both how much of a shift was called for and the precise contours of a rule of reason approach should the Court adopt one. For example, the shift to rule of reason analysis came despite calls from some Chicago School oriented legal scholars to declare vertical restraints per se legal.[132] Chicago School economists were more likely to favor a rule of reason analysis incorporating safe harbors for challenged conduct within the plaintiff's prima facie burden.[133]

As others have observed, the Court largely rejected calls to adopt rules of per se legality or de facto per se legality.[134] Instead, the evolution in antitrust rules has been a more modest program. It has been an incremental, yet undeniable, rise of more narrowly tailored safe harbors based upon integrating available economic theory and evidence into legal rules.

A second key intellectual force driving the creation of safe harbors in antitrust jurisprudence during the early years of the modern antitrust era was the integration of economic analysis of another sort—the economic analysis of legal rules themselves. Economic analysis influences not only the substantive legal standards that govern particular forms of business conduct, but also how courts choose which standard to apply from among the alternatives available. In other words, economic analysis also has much to say about a court's decision of whether the per se rule or the rule of reason should govern particular conduct, or how precisely to structure the plaintiff's prima facie burden within the rule of reason.

In general, the economics of legal rules focuses on comparing the social costs and benefits of alternative legal arrangements. Typically, the relevant costs associated with the analysis of legal rules fall into two categories: (1) the incidence and cost of error, including both false convictions and false acquittals; and (2) the burden of administrative costs and of processing evidence, sometimes referred to as "direct" costs. Economic analysis of legal rules seeks to identify the rule or standard that minimizes the sum of these costs.[135]

The choice between a rule and a standard itself invokes an economic tradeoff. Though a standard is presumably more costly than a bright line rule

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132 *See* Robert H. Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171, 190 (1977); Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 68 (1991); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 25 (1981).

133 A notable exception is Frank Easterbrook's work. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

134 Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 153 (2012) ("The courts have not, . . . adopted rules of per se legality or broad safe harbors, as some associated with the Chicago School have advocated.") (footnote omitted).

135 *See generally* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

in that each case requires the governing authority to more thoroughly administer and process relevant evidence and information, a standard is also presumably more accurate. It is correct that there may often be a trade-off between reduction of error and direct costs. Additional information costs more but will often reduce the error rate. However, the marginal effect on error rate reduction depends both on the quality of economic evidence produced as well as the production function, including the ability of the decision-maker—be it a generalist judge, specialist, or expert agency—to understand and process complex economic evidence. Whether additional information will improve accuracy, at what threshold it will begin to do so, and the marginal effect of the improved accuracy, are each empirical questions.

This tradeoff remains even within a set of standards that rejects bright-line rules of per se legality or per se illegality. Some standards are more costly to implement than others. For example, a safe harbor embedded within a rule of reason standard that prices above cost are lawful, or that foreclosure below a certain percentage threshold is lawful, introduces a necessary condition to truncate the analysis in favor of a finding of no liability.

The economics of the choice of legal rules as applied to antitrust is correctly, and most commonly, associated with Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, who introduced the concept to antitrust thinking in his seminal work, *The Limits of Antitrust*.[136] As applied to antitrust and invoking economic reasoning, Judge Easterbrook's error-cost framework

> [B]egins with the presumption that the costs of false convictions in the antitrust context are likely to be significantly larger than the costs of false acquittals, since judicial errors that wrongly excuse an anticompetitive practice may eventually be undone by competitive forces attracted by the presence of monopoly rents. Conversely, judicial errors that wrongly condemn a procompetitive practice are likely to have more significant social costs because such beneficial practices are abandoned by firms and not offset by equilibrating market forces tending to mitigate their impact.[137]

This framework, when combined with the insights of price theory and a commitment to empirical evidence, has proven to be a powerful tool for improving antitrust policy.[138]

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136 *See* Easterbrook, *supra* note 133, at 4.

137 Wright, *supra* note 117, at 308.

138 *See* C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 42 (1999) (describing a decision-theoretic approach to improve judicial decision making); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 641–42 (2005); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 74–75 (2005) (developing an approach based on an error-cost framework and the Chicago school); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 470 (2001) (presenting "an assessment of post-Chicago tying law and theory and [offering] a decision-theoretic framework for analyzing tying doctrine") (footnote omitted); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the*

Indeed, the primary intellectual objective of Easterbrook's seminal analysis in *The Limits of Antitrust* was to identify efficient and administrable safe harbors to be embedded within rule of reason analysis.[139] To this extent, and certainly on this issue, the Easterbookian research program for antitrust was somewhat distinct from that proposed by Bork, Ginsburg, and Posner, which focused on bright line rules of per se legality.[140] For example, Easterbrook's error-cost analysis remains the primary intellectual justification for the monopoly power safe harbor in Section 2 claims.

This is not to say that the Chicago School possesses an exclusive claim on the placing of significant weight on error and administrative costs in the design of antitrust standards. Indeed, former Federal Trade Commissioner Bill Kovacic has persuasively demonstrated that the Harvard School—and in particular, Phillip Areeda and Donald Turner—has played an integral role in promoting the administrability of antitrust rules, which is a predecessor of the error-cost framework.[141]

The rise of the error-cost framework and corresponding concern with identifying and applying administrable rules in the 1970s and 1980s, each integrated deeply into the antitrust jurisprudence of the modern era, tended toward the creation of safe harbors within structured rule of reason analyses.

B. *Political Appointments*

The shift in intellectual winds favoring modification of the structural antitrust rules from the 1940s through the 1960s was necessary but not likely sufficient to achieve it. It was very important that the economic ideas earning favor during the 1970s and 1980s created the intellectual foundation for the rise of safe harbors in the modern antitrust era. However, at least equally as important was that the owners of these ideas themselves, or others sympathetic with them, were appointed to key positions from which they could influence the development of antitrust doctrine and policy.

While *GTE Sylvania* occurred in 1977, it is generally safe to say that the shift toward safe harbors did not gain its full momentum until the early 1980s after the election of President Ronald Reagan. Reagan named William Baxter to head the DOJ's Antitrust Division and selected James C. Miller, III, as the first economist to chair the Federal Trade Commission. Reagan also appointed Chicago School oriented academics to the federal bench, including

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Limits of Antitrust, 6 J. COMPETITION L. & ECON. 153, 157 (2010) (applying the error cost framework and historical evidence to analyze how antitrust regulation should intersect with innovation).

139 Easterbrook, *supra* note 133, at 39–40.

140 *See supra* note 132 and accompanying text.

141 *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 706 (1975); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 6 (2007).

Judge Robert Bork, Judge Frank Easterbrook, Judge Douglas Ginsburg, Judge Richard Posner, Justice Antonin Scalia, and Judge Stephen Williams.[142]

The confluence of the victories Chicago School academics were accumulating in the marketplace for ideas—both in terms of the economics of antitrust and the role of economic analysis in law generally—along with Reagan's appointments to courts and agencies, created the intellectual foundation for the shift in antitrust doctrine to follow and the ability to execute it. The rise of antitrust safe harbors rather than rules of per se legality no doubt fell short of the goals of some, but not all, economists and antitrust scholars sympathetic to the Chicago view.[143] It may also be viewed as a political compromise with forces that strongly preferred a more interventionist and progressive role for antitrust.[144] Regardless, it was certainly a remarkable shift in the law widely understood to have improved the state of antitrust law as an instrument to improve consumer welfare and economic growth.

Importantly, the simultaneous economic and political movements described above were both necessary to begin the development and integration of safe harbors within the modern rule of reason. Part III turns to the recent and ongoing deterioration and elimination of these safe harbors, documenting the shift over the past two decades before explaining what changes have rendered the intellectual and political equilibrium described above unstable.

III. THE DEATH OF ANTITRUST SAFE HARBORS

Turning to the past two decades of the modern antitrust era, there has been a significant decline in the application of safe harbors and in some areas, an elimination of safe harbors altogether. Notwithstanding the few safe harbors established during the late 1990s and early 2000s, antitrust has increasingly rejected previously established safe harbors over the last 20 years. Courts and agencies have rejected safe harbors for horizontal and vertical restraints,[145] exclusionary conduct,[146] and mergers,[147] and have found creative ways to evade others. In each case, the shift away from antitrust safe harbors is an important development in the evolution of antitrust doctrine, with significant implications. This Part begins by documenting the death of antitrust safe harbors in recent years.

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142 *See* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 49–50 (1991).

143 *See* Kobayashi & Muris, *supra* note 134, at 154.

144 *See* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 483 (2006).

145 *See infra* Part III.A.

146 *See infra* Part III.B.

147 *See infra* Part III.C.

A. *Horizontal and Vertical Restraints*

The Supreme Court has played an important role in the effective elimination of two key safe harbors covering horizontal restraints.

First, in 2010, the Court carved out an exception to the rule of per se legality set forth in *Copperweld*, which created a safe harbor for coordination between a firm and its wholly-owned subsidiary, when it decided *American Needle, Inc. v. NFL*.[148] In *American Needle*, the Court held that the *Copperweld* safe harbor was not applicable to an agreement between a professional sports league and its member teams to license the teams' intellectual property collectively through a single entity.[149] The Court emphasized, "concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities," but rather on a "functional consideration of how the parties involved . . . actually operate."[150] After *American Needle*, courts must now analyze whether the alleged concerted action "joins together separate decisionmakers" that would otherwise pursue separate economic interests but for the agreement.[151] Though there is disagreement among commentators over *American Needle*'s value and ultimate impact, many have asserted that the Court's decision dismantled the safe harbor *Copperweld* established for coordination among single entities.[152] Some support exists for this stance, as defendants have had less success in invoking the safe harbor since *American Needle*.[153]

Second, the Supreme Court eliminated the "scope of the patent" test, which as discussed in Part I.B.1, provided a de facto rule of per se legality

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148 560 U.S. 183, 200–01 (2010).

149 *Id.*

150 *Id.* at 191.

151 *Id.* at 195, 197 (explaining that an agreement among "'separate economic actors pursuing separate economic interests' . . . 'depriv[es] the marketplace of independent centers of decisionmaking' and therefore of actual or potential competition.") (citations omitted) (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984)).

152 *See* Judd Stone & Joshua D. Wright, *Antitrust Formalism is Dead! Long Live Antitrust Formalism!: Some Implications of* American Needle v. NFL, 2010 CATO SUP. CT. REV. 369, 371 (2010) ("*American Needle* represents the Supreme Court's understandable decision to abandon an antitrust 'filter' that proved perennially problematic in its practical application."); Gabriel A. Feldman, *The Supreme Court Puts to Rest the NFL's Single Entity Defense in* American Needle, HUFFINGTON POST (May 24, 2010), www.huffingtonpost.com/gabriel-a-feldman/the-supreme-court-puts-to-b_588086.html ("[F]or all conceivable purposes, and after decades of litigating the issue, the single-entity argument for professional sports leagues is dead."); Press Release, American Antitrust Institute, American Antitrust Institute Applauds Supreme Court's Decision in *American Needle* (May 24, 2010), http://www.antitrustinstitute.org/Archives/Needle_Decision.ashx ("'This decision shows that the Supreme Court is still capable of rejecting extreme pro-defendant positions, and should be a cautionary tale for defendants that seek to short-cut sound antitrust analysis . . . .'").

153 *See* Marc Edelman, *NFL Lawyers Lose Again in* American Needle*; Case Likely Headed for Trial*, FORBES (Apr. 16, 2014), http://www.forbes.com/sites/marcedelman/2014/04/16/nfl-lawyers-lose-again-in-american-needle-case-likely-headed-for-trial/-ccd6c8f26eef.

for reverse payment settlement agreements resulting in exclusion within the scope of the patent. In *FTC v. Actavis*,[154] the Court rejected the argument that anticompetitive effects falling within the scope of the patent are immune from antitrust attack, explaining that "patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by a patent."[155] In rejecting a form of truncated analysis, the Court held that the traditional rule of reason framework applies when analyzing reverse payment settlements.[156] Though the Court delegated to the lower courts the task of structuring the rule of reason, it did provide guidance:

> As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.[157]

Regarding reverse payment settlements specifically, the Court explained that a prima facie demonstration of an agreement's anticompetitive effects depend on "its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification."[158] The Court emphasized the existence of a potential analytical link between the size of the reverse payment, the strength of the patent, and anticompetitive effects.[159] Consequently, lower courts have used the size of the payment as a proxy for patent strength, inferring anticompetitive effects when reverse payments are "large and unjustified."[160] Within a decade, the scope of the patent

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154 133 S. Ct. 2223 (2013).

155 *Id.* at 2231.

156 *Id.* at 2237.

157 *Id.* at 2238.

158 *Id.* at 2237. For a critique of size of settlement payment as a proxy for anticompetitive effects within the rule of reason, see Bruce H. Kobayashi et al., Actavis *and Multiple ANDA Entrants: Beyond the Temporary Duopoly*, ANTITRUST, Spring 2015, at 89, http://www.crai.com/sites/default/files/publications/Actavis-and-Multiple-ANDA-Entrants-Beyond-the-Temporary-Duoply-Antitrust-Spring-2015.pdf.

159 *Actavis*, 133 S. Ct. at 2235–37.

160 *In re* Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 241 (D. Conn. 2015) ("The salient question is . . . whether the settlement included a large and unjustified reverse payment leading to the inference of profit-sharing to avoid the risk of competition."). *See also* King Drug Co. of Florence, Inc. v. Cephalon, Inc., 88 F. Supp. 3d 402, 415 (E.D. Pa. 2015) (rejecting, on a motion for summary judgment, the assertion that a demonstration of actual anticompetitive effects is necessary and instead finding that only "evidence of a large payment is required for a plaintiff to satisfy its initial burden of demonstrating anticompetitive effects under the *Actavis* rule of reason analysis."); United Food & Commercial Workers Local 1776 & Participating Emp'rs. Health & Welfare Fund v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1075

safe harbor as originally adopted by various lower courts has essentially been reversed and replaced by a truncated rule of reason analysis that relies upon the existence of a large payment to trigger a presumption of liability in condemning reverse patent settlements.[161]

B. *Exclusionary Conduct*

Several safe harbors for exclusionary conduct have also withered away over the last 20 years. Perhaps most significantly, the well-established presumption of legality for a monopolist merely charging the monopoly price set forth in *Trinko* is under attack. Recent agency enforcement activity surrounding standard essential patents ("SEPs") suggests that the FTC has narrowed the breadth of *Trinko*'s safe harbor.[162]

The FTC has asserted that a SEP holder that has lawfully obtained monopoly power—that is, the SEP holder did not obtain any monopoly power by deceiving a standard setting organization ("SSO") into including its technology in the standard—violates Section 5 of the FTC Act when it charges a price inconsistent with its contractual commitment to license its technology to the SSO on fair, reasonable, and non-discriminatory ("FRAND") terms.[163] The FTC has alleged in a number of complaints, ultimately resulting in settlements with SEP holders, that the mere act of seeking an injunction against willing licensees of a SEP violates Section 5 of the FTC Act.[164]

It is important to recognize that these cases are analytically identical to allegations that a firm with lawfully acquired monopoly power has violated

(N.D. Cal. 2014) ("[P]laintiffs have plausibly alleged that the terms were large and unjustified reverse payments, which is sufficient to support plaintiffs' theories of injury at this juncture.").

161 *King Drug Co.*, 88 F. Supp. 3d at 405.

162 *See* Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 COMPETITION POL'Y INT'L 41, 44–45 (2013), http://www.masonlec.org/site/rte_uploads/files/GAI/Readings/Economics%20Institute/Wright%20and%20Ginsburg_Whither%20Symmetry%20%20CPI%20Reprint.pdf.

163 Fed. Trade Comm'n, Statement Concerning Google Inc., FTC File No. 121-0120 at 1, (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolastmtofcomm.pdf [hereinafter FTC Google/MMI Statement]. *See also* Fed. Trade Comm'n, Statement Concerning Robert Bosch GmbH, FTC File No. 121-0081 at 1, (Apr. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcommissionstatement.pdf [hereinafter FTC Bosch Statement]; *In re* Negotiated Data Solutions LLC, FTC File No. 051-0094, 2008 WL 258308 at ¶ 1 (F.T.C., Jan. 22, 2008), https://www.ftc.gov/enforcement/cases-proceedings/051-0094/negotiated-data-solutions-llc-matter.

164 *See, e.g.*, FTC Bosch Statement, *supra* note 163 at 1. For a contrary view on antitrust liability for seeking an injunction on a FRAND-encumbered SEP, see Douglas H. Ginsburg et al., *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, ANTITRUST SOURCE, Oct. 2014, at 1, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf.

the antitrust laws by charging the monopoly price and thus undermine *Trinko*'s safe harbor. Complaints that the SEP holder achieved monopoly power through deception allege the acquisition of market power through exclusionary conduct and thus clearly fall outside the safe harbor created by *Trinko* and *Nynex v. Discon*.[165] By way of contrast, complaints that mere breach of a FRAND commitment alone—without deception—violates the antitrust laws are better characterized as attempting to use the antitrust laws to attack the exercise of lawfully acquired monopoly power. These complaints fall within the realm of the safe harbor established by *Trinko* and *Nynex* and thus, some have argued, would be better served by contract law and remedies than antitrust.[166]

Deception-less patent holdup allegations based upon breach of a FRAND commitment have thus far given rise only to complaints under Section 5 of the FTC Act. They have not been successful under the traditional antitrust laws. After the FTC Section 5 Policy Statement on Unfair Methods of Competition ("Section 5 Statement"), however, it is doubtful that merely breaching a FRAND commitment or seeking an injunction could violate Section 5. The Section 5 Statement interprets the competitive harm relevant to a Section 5 violation as identical to harm under the traditional antitrust laws, including the Sherman Act.[167] Given that the Sherman Act deems any static economic welfare losses associated with the exercise of lawfully acquired monopoly power to be outside its scope, it seems unlikely that the SEP cases preceding the Policy Statement would reach the same result today.[168] While the DOJ Antitrust Division has occasionally used policy speeches to breathe life to the idea that breach of a SSO contract might violate Section 2 of the Sherman Act, neither it nor a single private plaintiff has prevailed on this theory.[169] The FTC SEP cases represent a clear erosion of the price-setting safe harbor reaffirmed by *Trinko* and long at the core of Section 2 intellectual foundation.

Yet another pricing-related safe harbor under attack is the rule of de facto per se legality for above-cost pricing established by *Brooke Group*.[170]

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165 525 U.S. 128 (1998).

166 *See* Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L.J. 505, 516, 519 (2012); Wright & Ginsburg, *supra* note 162, at 44–45.

167 Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf; Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, ANTITRUST SOURCE, Oct. 2015, at 4, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf.

168 For a related argument, see Wright & Diveley, *supra* note 167, at 11.

169 U.S. Dep't of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf.

170 *See* Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1705 (2005).

In the context of multi-product discounts, plaintiffs have had increasing success in avoiding this safe harbor. For example, in 2008 the Ninth Circuit endorsed the discount-attribution test as the appropriate measure of cost for analyzing bundled discounts.[171] The discount-attribution test, which was first introduced in a report by the U.S. Antitrust Modernization Commission in 2007, requires courts to "allocate all discounts and rebates attributable to the entire bundle of products to the competitive product," and then determine whether "the defendant sold the competitive product below its incremental cost for the competitive product[.]"[172] Because this test allows courts to compare price to the cost of individual products rather than the cost of the entire bundle, it is far more likely that a discount on bundled products will be deemed unlawful.[173]

Exclusive dealing safe harbors, if not entirely eliminated, have been substantially weakened. Consider, for example, that several courts in recent years have challenged the view that exclusive dealing contracts that are short in duration or terminable at will are presumptively lawful.[174] To the contrary of that safe harbor, in *United States v. Dentsply, Int'l, Inc.*,[175] the Third Circuit held that exclusive supply contracts between a dominant manufacturer and its dealers violated Section 2 despite the fact that the contracts were "essentially terminable at will."[176] Other courts have also concluded that contracts that are facially terminable on short notice may be unlawful when termination is difficult or infeasible as a matter of practical economics.[177]

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171 Cascade Health Sols., Inc. v. PeaceHealth, 515 F.3d 883, 906 (9th Cir. 2008) ("[A]s our cost-based rule, we adopt what amici refer to as a 'discount attribution' standard. Under this standard, the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2.") (footnote omitted).

172 ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 99 (2007).

173 *See* Moore & Wright, *supra* note 12, at 1210 ("[E]mbracing a discount-attribution test for challenges to conditional discounting would allow for a greater number of successful claims and would be more difficult to administer than the traditional *Brooke Group* test.").

174 *See, e.g.,* McWane, Inc. v. FTC, 783 F.3d 814, 833–35 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 193–94 (3d Cir. 2005); Minn. Mining & Mfg. Co. v. Appleton Papers, Inc., 35 F. Supp, 2d 1138, 1143–44 (D. Minn. 1999).

175 399 F.3d 181 (3d Cir. 2005).

176 *Id.* at 185.

177 *See McWane*, 783 F.3d at 834; Masimo Corp. v. Tyco Health Care Grp., L.P., 2006 WL 123666, at *6 (C.D. Cal. March 22, 2006) (upholding a jury conclusion that discount agreements, which appeared to be terminable on short notice, could not actually be economically terminated by customers on short notice); Am. Express Travel Related Servs. Co. v. Visa U.S.A., 2005 WL 1515399, at *6–7 (S.D.N.Y. June 23, 2005) (finding dismissal of plaintiff's claims inappropriate because plaintiff alleged that although the contracts were facially terminable at will, they were not easily terminable in practice); *Minn. Mining & Mfg.*, 35 F. Supp. 2d at 1144 (finding that the terminable at will agreements at issue have the "practical effect of tying up the paper sheet inventory of a merchant over a period of several years" due to high switching costs and deep customer loyalty).

The safe harbor for exclusionary conduct involving foreclosure rates below 40 percent still exists in theory, but plaintiffs are increasingly able to avoid it by recasting exclusive dealing or loyalty discount claims as predatory pricing claims. There is an ongoing debate about whether exclusionary conduct cases involving a raising rivals' costs theory should be analyzed under an exclusion theory or a predation theory.[178] When a court analyzes a case under an exclusion theory, it is tasked with determining whether the defendant has raised its rivals' costs by entering into contracts that foreclose its competitors from key channels of distribution. On the other hand, under a predation theory, courts must simply determine whether the defendant priced its goods below cost in an attempt to force competitors out of the market with the expectation of recouping forgone profits in the future. Courts that choose to analyze exclusionary conduct cases under a predation theory are sometimes able to escape the foreclosure safe harbor altogether. The Third Circuit, for example, has asserted that the price-cost test is the relevant method of analysis when price is the "predominant mechanism of exclusion."[179] The court listed single-product loyalty discounts as an example of conduct that should be analyzed under a predation theory.[180]

Courts that choose to apply an exclusion theory may also evade the foreclosure safe harbor by tinkering with methods of measuring foreclosure. In *Microsoft*, the D.C. Circuit held that Microsoft had foreclosed a substantial share of the market by entering into exclusive dealing contracts with various Internet service providers, fourteen of the fifteen largest Internet access providers ("IAPs"), and several computer manufacturers, even though Microsoft had not barred its rivals from all means of distribution.[181] The court explained that because IAPs and computer manufacturers were the two most cost-effective channels for browser distribution, Microsoft's exclusivity agreements had "largely foreclosed the two primary channels to its rivals."[182] This method of measuring foreclosure, often referred to as naïve foreclosure, illustrates the amount of distribution that the agreement forecloses without considering the amount of distribution that would nonetheless be excluded without the agreement.

Additionally, at least one court has determined that adherence to the foreclosure safe harbor may not be required if the defendant is a monopolist.[183] In *Microsoft*, the D.C. Circuit noted that "a monopolist's use of exclusive contracts . . . may give rise to a [Section] 2 violation even though the

178 *See* Moore & Wright, *supra* note 12, at 1205–06.

179 Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 409 (3d Cir. 2016) (quoting ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 269 (3d Cir. 2012)).

180 *Id.* ("Under *ZF Meritor*, when pricing predominates over other means of exclusivity, the price-cost test applies. This is usually the case when a firm uses a single-product loyalty discount or rebate to compete with similar products.") (footnote omitted).

181 United States v. Microsoft Corp., 253 F.3d 34, 70–71 (D.C. Cir. 2001).

182 *Id.* at 72.

183 *Id*. at 70.

contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a [Section] 1 violation."[184] Other courts, most recently the Eleventh Circuit in *McWane, Inc. v. FTC*,[185] have avoided the foreclosure safe harbor by condemning exclusive dealing contracts without requiring the plaintiff to demonstrate a foreclosure percentage at all.[186]

Plaintiffs alleging that product innovation constitutes an exclusionary act under Section 2 have also been able to evade pre-existing safe harbors more frequently. So-called "product hopping" cases provide an example of the recent attenuation of safe harbors involving innovation in the intellectual property setting.[187] One court has effectively concluded that product hopping is per se lawful, consistent with *Berkey Photo, Inc. v. Eastman Kodak*,[188] which established a safe harbor for product innovation.[189] However, the trend appears to be to apply greater scrutiny to conduct involving the introduction of new products alleged to constitute exclusionary conduct, greater skepticism to the benefits of incremental product innovations, and greater willingness to weigh the benefits to consumers from such innovation against any costs imposed on consumers.

For example, the Second Circuit recently explained in *New York v. Actavis*[190] that because "competition through state drug substitution laws is the only cost-efficient means of competing available to generic manufacturers," Section 2 imposes a duty to assist rivals because it "requires [brand manufacturers] to allow generic competitors a fair opportunity to compete using state substitution laws."[191] Accordingly, the Second Circuit held that when a branded company engages in product hopping and removes the original drug from the market and the formulary list (a so-called "hard" switch), it may violate the Sherman Act.[192] On the other hand, the court indicated that a branded company engaging in product hopping through a "soft" switch (i.e., the company aggressively attempts to persuade patients and doctors to switch to the new formulation while allowing the original formulation to remain on

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184 *Id.*

185 783 F.3d 814 (11th Cir. 2015).

186 *See id.* at 835; Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 793 (6th Cir. 2002).

187 Product hopping refers to the practice by which a branded drug manufacturer modifies a drug with expiring patent protection and seeks to switch consumer demand to the newer version of the drug, which enjoys a longer term of patent protection. *See* Douglas H. Ginsburg et al., *Product Hopping and the Limits of Antitrust: The Danger of Micromanaging Innovation*, CPI ANTITRUST CHRON. 2 (Dec. 2015).

188 603 F.2d 263 (2d Cir. 1979).

189 Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd., 2015 WL 1736957, at *12, *14 (E.D. Pa. 2015) (explaining that product hopping does not constitute exclusionary conduct under the antitrust laws because the generic company is still able to compete and can "reach consumers through, *inter alia*, advertising, promotion, cost competition, or superior product development.").

190 787 F.3d 638 (2d Cir. 2015).

191 *Id.* at 656, 658.

192 *Id.* at 653–54. *See also* Ginsburg et al., *supra* note 187, at 3.

the market and the formulary list) is immune from antitrust liability.[193] Under the Second Circuit's holding, a brand name drug manufacturer that introduces a modified version of a drug to the market coupled with a hard switch—that is, removal of the old formulation from the market—will find itself not only outside of the safe harbor protections applied to soft switches, but subject to presumptive liability.[194]

C. *Merger Enforcement*

Finally, there has also been a decline in the application of safe harbors in merger enforcement. The 2010 Horizontal Merger Guidelines marked a shift in agency merger enforcement away from reliance upon market definition and inferring competitive effects from market shares toward competitive effects.[195] The 2010 Guidelines reject the step-by-step approach to merger analysis of the 1992 Guidelines in favor of a "more integrated and less mechanistic approach."[196] For example, Section 4 of the 2010 Guidelines recognizes that the potential benefit of market definition is no longer in calculating shares, but rather in helping guide the effects analysis, stating, "Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects."[197] The agencies are thus left with much greater discretion when determining whether and how much weight to give to market concentration and market shares in their analysis. In terms of the impact of merger concentration-based safe harbors, it follows from the 2010 Guidelines' approach that merging firms with low HHIs may no longer be safe from scrutiny. This is especially the case should the agencies believe that the merger is between particularly close substitutes and is likely to give rise to unilateral price effects or involves a maverick—a firm that disrupts a concentrated market in a way that benefits consumers—and is thus likely to significantly increase the likelihood of coordinated effects.

In merger reviews primarily focused upon the possibility of unilateral price effects, the FTC also recently, and controversially, rejected a previously adopted safe harbor based upon measuring the value of diverted sales using the gross upward pricing pressure index ("GUPPI").[198] Carl Shapiro, Deputy

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193 *Actavis*, 787 F.3d at 654 ("As long as [the manufacturers] sought to persuade patients and their doctors to switch from [Product A to Product B] while both were on the market (the soft switch) and with generic [] drugs on the horizon, patients and doctors could evaluate the products and their generics on the merits in furtherance of competitive objectives.").

194 *See id.*

195 *See* 2010 MERGER GUIDELINES, *supra* note 15, at § 1.

196 *See* Shapiro, *supra* note 105, at 707–08.

197 2010 MERGER GUIDELINES, *supra* note 15, at § 4.

198 The GUPPI is a tool used by the agencies to measure the merging parties' incentive to unilaterally raise price post-merger. The 2010 Guidelines explain that unilateral price effects arise when the merger "gives the merged entity an incentive to raise the price of [Product 1] previously sold by one merging firm

Assistant Attorney General for Economics in the Antitrust Division when the 2010 Guidelines were issued, announced that the Division would treat 5 percent as a GUPPI threshold below which proposed mergers were unlikely to generate unilateral price increases.[199]

The FTC recently rejected this GUPPI safe harbor its investigation of Dollar Tree, Inc.'s proposed acquisition of Family Dollar Stores, Inc. The FTC entered into a consent order with the parties settling its allegations that the transaction would violate Section 7 of the Clayton Act while ordering them to divest 330 stores.[200] The Commission voted 4-1 to accept the Complaint and Consent Order.[201] Commissioner Joshua Wright dissented with respect to the Commission's decision to require divestiture in 27 markets where the GUPPI was below 5 percent.[202]

In its investigation, the FTC relied upon diversion analysis and the calculation of GUPPIs to identify relevant markets in which competitive concerns existed, and thus potential areas proper for divestiture.[203] Commissioner Wright argued in his dissent that a GUPPI-based safe harbor in unilateral effects merger investigations was appropriate.[204] He also argued that, in addition to the DOJ's official adoption of the safe harbor in the form of Shapiro's speech, the 2010 Guidelines themselves appear to contemplate "precisely such a safe harbor."[205] The Majority, however, rejected adoption of a safe harbor, emphasizing that merger analysis is "inherently fact-specific[,]" and that the application of a GUPPI safe harbor could produce false

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and thereby divert sales to [Product 2] previously sold by the merging firm, boosting the profits on the latter products[,]" adverse unilateral price effects can arise. The agencies are sometimes able to measure the diversion ratio between the merging parties, which is the percentage of unit sales lost by raising the price of Product 1 that are then captured by Product 2. The value of diverted sales is the product of the diversion ration between the merging parties' products and the profit margin of Product 2." 2010 MERGER GUIDELINES, *supra* note 15, at § 6.1. The GUPPI is calculated by measuring the value of diverted sales in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase.

199 Carl Shapiro, Deputy Ass't Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Update from the Antitrust Division, Remarks as Prepared for the ABA Antitrust Law Fall Forum 24–25 (Nov. 18, 2010) (transcript available at https://www.justice.gov/atr/file/518246/download). *See also* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Statement Dissenting in Part and Concurring in Part, *In re* Dollar Tree, Inc. and Family Dollar Stores, Inc., FTC File No. 141-0207 (July 13, 2015), at 2, https://www.ftc.gov/system/files/documents/public_statements/681781/150713dollartree-jdwstmt.pdf, [hereinafter Wright Dollar Tree Dissent].

200 *See* Statement of the Fed. Trade Comm'n, *In re* Dollar Tree, Inc. and Family Dollar Stores, Inc., FTC File No. 141-0207 (July 13, 2015), at 1, https://www.ftc.gov/system/files/documents/public_statements/681901/150714dollarstoresstatement.pdf, [hereinafter FTC Dollar Tree Statement].

201 Press Release, Fed. Trade Comm'n, FTC Requires Dollar Tree and Family Dollar to Divest 330 Stores as Condition of Merger (July 2, 2015), https://www.ftc.gov/news-events/press-releases/2015/07/ftc-requires-dollar-tree-family-dollar-divest-330-stores.

202 Wright Dollar Tree Dissent, *supra* note 199, at 1.

203 FTC Dollar Tree Statement, *supra* note 200, at 2–3.

204 Wright Dollar Tree Dissent, *supra* note 199, at 3–4.

205 *Id.* at 2. *See also* 2010 MERGER GUIDELINES, *supra* note 15, at § 6.1 ("If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.") (footnote omitted).

negatives.[206] The DOJ has not subsequently clarified whether it currently applies a 5 percent GUPPI threshold as a safe harbor or whether it now rejects the policy Shapiro announced on behalf of the Antitrust Division. Nonetheless, the trend in merger enforcement appears to be away from the establishment of safe harbors and toward fact-intensive, case-by-case analysis.

Given the phenomenon of deteriorating and disappearing safe harbors described thus far, this Article now seeks to explore potential explanations.

IV. WHITHER SAFE HARBORS?

Part II explained the causes stimulating the rise of safe harbors to begin the modern era of antitrust enforcement, followed by Part III's explanation of the gradual but steady shift from more structured, bright-line rules toward less structured standards. This shift has largely taken the form of the elimination of safe harbors, resulting in fewer clear "off ramps" on the road to antitrust liability for defendants than there were 20, or even 10, years ago. This Part explores possible explanations for the new and ongoing deviation from the equilibrium that emerged over the two decades following the Supreme Court's *GTE Sylvania* decision in 1977.[207] In particular, it examines a number of hypotheses for the increasingly common rejection of safe harbors embedded within substantive rule of reason antitrust standards.

Recall the argument presented in Part II, that intellectual trends in antitrust economics and political changes, jointly together, were the likely causes for the rise of safe harbors in the roughly quarter century following *Sylvania*.[208] Three contributing factors were identified to explain the initial shift toward antitrust safe harbors in the modern era: (1) the introduction and integration of the economic analysis of legal rules and decision theory into antitrust; (2) the rise of the Chicago School of antitrust economics, particularly pro-competitive explanations of various vertical restraints and pricing practices, as well as the disintegration of the empirical foundation of the market structure-conduct-performance paradigm; and (3) several key agency and judicial appointments during the Reagan administration that helped facilitate the intellectual movement away from per se rules of illegality and toward a structured rule of reason.[209]

This section begins by exploring, and ultimately rejecting, the view that reversals in these same factors explain the disintegration of antitrust safe harbors in recent years, and then turns to offer some alternative hypotheses.

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206 FTC Dollar Tree Statement, *supra* note 200, at 3.

207 For a useful political economy explanation of the post-*Sylvania* equilibrium, see Baker, *supra* note 144.

208 *See supra* Part II.

209 *Id.*

A. *Economic Analysis and Antitrust Rules*

While it is undeniable that continuous advances in intellectual understanding by and through technological progression, coupled with an understanding of analytical tools available, have drastically expanded the potential and accuracy of economic analysis in legal decision making, empirical evidence does not indicate the postulation that these advances would in any way support or explain a reduction in the use of safe harbors.

1. Economic Analysis of Legal Rules, Decision Theory, and the Error Cost Framework

An important change in the intellectual landscape of antitrust law and policy in the modern antitrust era was the integration of economic analysis of legal rules. Since the publication of Easterbrook's *Limits of Antitrust* in 1984, the application of decision theoretic analysis, or error cost analysis, has been an important force in the evolution of antitrust doctrine.[210]

The error cost framework, at its core, is a decision theoretic approach to analyzing antitrust rules and enforcement decisions that seeks to minimize the social costs associated with false acquittals, false convictions, and administrative costs. As discussed in Part II.A.1, the framework begins with the presumption that the costs of false convictions in the antitrust context are likely to be significantly larger than the costs of false acquittals.[211] Economists and legal scholars have applied the error cost framework to explain a variety of antitrust rules and to argue for modifications to existing rules.[212]

The error cost framework has also had considerable influence on antitrust doctrine, particularly as articulated by the Supreme Court.[213] In the context of horizontal and vertical restraints, the error cost framework is present in the Supreme Court's analysis of resale price maintenance in *Leegin*,[214]

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210 *See supra* notes 136–141 and accompanying text.

211 *See* Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMPETITION L. & ECON. 11, 16 (2010).

212 *See, e.g.,* LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING 232 (2013) (using the error cost framework to explain coordinated oligopoly pricing); Beckner & Salop, *supra* note 138, at 42–43; Cooper, *supra* note 138, at 658–61 (comparing established vertical restraint principles to a Bayesian decision framework); Evans & Padilla, *supra* note 138, at 98; Hylton & Salinger, *supra* note 138, at 470–72 (presenting a decision theory framework to analyze the tying doctrine); Manne & Wright, *supra* note 138, at 156–57 (arguing that the error cost framework along with hindsight and historical evidence are often underutilized antitrust tools).

213 *See* Kobayashi & Muris, *supra* note 134, at 152–53; Wright, *supra* note 117, at 246; Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 25, 26 (2007).

214 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–92 (2007).

predatory pricing in *Brooke Group*[215] and *Matsushita*,[216] refusals to deal in *Trinko*[217] and *linkLine*,[218] and predatory overbidding in *Weyerhauser*.[219] Beyond application to specific forms of business conduct, error cost concerns significantly influenced the Supreme Court's decisions concerning the optimal scope of monopolization law in *Credit Suisse*[220] and pleading standards in *Twombly*.[221] Of course, as Professor Kovacic has emphasized, the Harvard School's concerns with administrability complement the error cost framework and were also an important intellectual influence on antitrust doctrine in the modern era.[222]

The error cost framework, at least as applied by antitrust scholars and the Supreme Court over the past 40 years, is not without its critics.[223] However, there is no questioning its influence. The relevant inquiry here is whether there is any reason to believe the error cost framework has been less influential over the past 10 years than it was during the beginning of the modern era, and thus provides a reasonable explanation for the recent retreat from antitrust safe harbors.

The clear answer seems to be no. Within the Supreme Court, the error cost framework appears to be alive and well.[224] That said, it is worth noting some trends that might implicate decision theoretic thinking about antitrust rules and enforcement decisions. For example, the combination of an increase in availability of data, along with the rise of more sophisticated econometric techniques to analyze such data, and the continuing development of economic theory has expanded significantly the tool kit available to agencies and courts to analyze the competitive effects of business practices.

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215 *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220–27 (1993).

216 *See* Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 590–91 (1986).

217 *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409–11 (2004).

218 *See* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 448–49 (2009).

219 *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 319–20 (2007).

220 *See* Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 282–83 (2007); *see also* Kobayashi & Wright, *supra* note 166, at 712–13.

221 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007); *see also* Kobayashi & Muris, *supra* note 134, at 155–57 (discussing error cost framework and *Twombly*).

222 *See* Kovacic, *supra* note 141, at 13–15.

223 *See, e.g.,* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015). Baker collects and explains his disagreements with a variety of arguments made by what he describes as so-called "conservative" antitrust commentators, including Professor Joshua Wright. *See id.*, at 2. Baker correctly anticipates the objection that some of his targets, Professor Wright included, view his "claimed mistakes as caricatures of their views." *Id.* at 7–8. But his analysis is largely unrelated to ours. Baker addresses arguments antitrust scholars have made to narrow antitrust doctrine or to increase the size of the plaintiff's prima facie burden when alleging antitrust violations. Our unit of analysis is not antitrust scholars or positions they have taken, but rather to explain changes in law and agency practice that have eliminated safe harbors.

224 *See supra* notes 214-219 and accompanying text.

One might hypothesize that the technocratic turn in antitrust, led by these intellectual and technological improvements, could lead to a lower perceived error rate—particularly a lower false positive rate—and alter the modern equilibrium. While it is acknowledged that the evolution of economic tools and techniques for evaluating the competitive effects of antitrust-relevant conduct has improved the antitrust enterprise as a whole, it is unclear that these changes have altered the error cost tradeoffs as perceived by the antitrust enforcement agencies and courts. Though these changes have made enforcement agencies more interventionist in nature on the margin, there is no evidence in recent decisions that the Supreme Court is more confident that it can accurately identify competitive harm as a result of those advancements.[225]

It is also true that antitrust enforcement agencies and courts are better positioned to employ these tools to make more accurate assessments than they could have in the 1960s. The tradeoff between analytical sophistication and complexity in the name of greater accuracy on the one hand, and ease of administration on the other, is a more important aspect of the modern antitrust enterprise than it was at the beginning of the modern era.[226] The resolution of the tension between economists' desire for sophisticated analyses and the law's desire for administrable standards will remain a critical aspect of the evolution of antitrust rules as these tools continue to develop. Nonetheless, there has been no evidence that a perceived reduction in the error rate, and thus a reduction in the social costs associated with false positives, has motivated the elimination of safe harbors in recent years.

2. 21st Century Changes in Economic Theory & Empirical Knowledge

A second possible explanation for the decline in safe harbors is changes in the body of economic knowledge. Given the role of the increase in eco-

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225 Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 453 (2009) ("It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level."); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Under the best of circumstances, applying the requirements of § 2 'can be difficult[.]'") (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001)).

226 *See* Michael R. Baye & Joshua D. Wright*, Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 4 (2011) (demonstrating that basic economic training improves the performance of federal judges in antitrust cases by reducing appeal and reversal rates in relatively unsophisticated cases, but has little effect in more complex cases); Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENF'T 1, 15–16 (2012) (finding the Federal Trade Commission's appeal and reversal rates are significantly higher than those rates for generalist federal judges controlling for observable differences between cases).

nomic knowledge and empirical evidence in providing the intellectual foundation for the creation of antitrust safe harbors in the modern era, one reasonable hypothesis is that more recent developments in economic thinking have undermined the rationale for those safe harbors. While there have been substantial developments in the economic literature over the past 16 years, those advances have largely involved empirical techniques and methods, not an integration of new economic theory into antitrust rules. Again, this Article ultimately rejects the hypothesis that changes in economic knowledge have pushed the retreat from safe harbors. If anything, the claim is that recent changes in economic theory and empirical evidence support a call for an increased use of safe harbors.

Recent developments in economic theory with the potential to influence antitrust preferences for safe harbors serves as a starting point. One general observation is that the past two decades have not seen a tremendous change in the development of economic theory relevant to antitrust policy. There have no doubt been important developments in economic theory over the past 16 years. The antitrust chapter of the most recent Handbook of Law and Economics, published in 2007, cites 124 articles.[227] However, only about 30 of these articles involve contributions to economic theory after the turn of the century.[228] Indeed, this casual empiricism suggests, perhaps unsurprisingly, that the most influential contributions from economic theory to antitrust law and policy took place in the 1980s and 1990s. Figure 1 below summarizes the distribution of cited articles over time.

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227 *See* Louis Kaplow & Carl Shapiro, *Antitrust*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1214–24 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

228 *See id.* The majority of the cited "theory" articles focus on collusion and analyzing unilateral effects in mergers with differentiated products or related issues. *See, e.g.*, Susan Athey & Kyle Bagwell, *Optimal Collusion with Private Information*, 32 RAND J. ECON. 428, 429 (2001); Patrick Bajari & Garrett Summers, *Detecting Collusion in Procurement Auctions*, 70 ANTITRUST L.J. 143, 143–44 (2002); Joseph Farrell, *Renegotiation in Repeated Oligopoly Interaction*, *in* FETSCHRIFT (G. Myles & P. Hammond eds., 2000); Joseph E. Harrington, Jr., *Detecting Cartels*, *in* HANDBOOK OF ANTITRUST ECONOMICS 213, 214 (Paolo Buccirossi ed., 2008); Joseph E. Harrington, Jr. & Andrzej Skrzypacz, *Collusion Under Monitoring of Sales*, 38 RAND J. ECON. 314, 315 (2007); Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 564 (2000); Daniel O'Brien & Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 ANTITRUST L.J. 161, 163 (2003); Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, *in* HANDBOOK OF ANTITRUST ECONOMICS 43, 44 (Paolo Buccirossi ed., 2008); Michael L. Katz & Carl Shapiro, *Critical Loss: Let's Tell the Whole Story*, ANTITRUST MAG., Spring 2003, at 51.

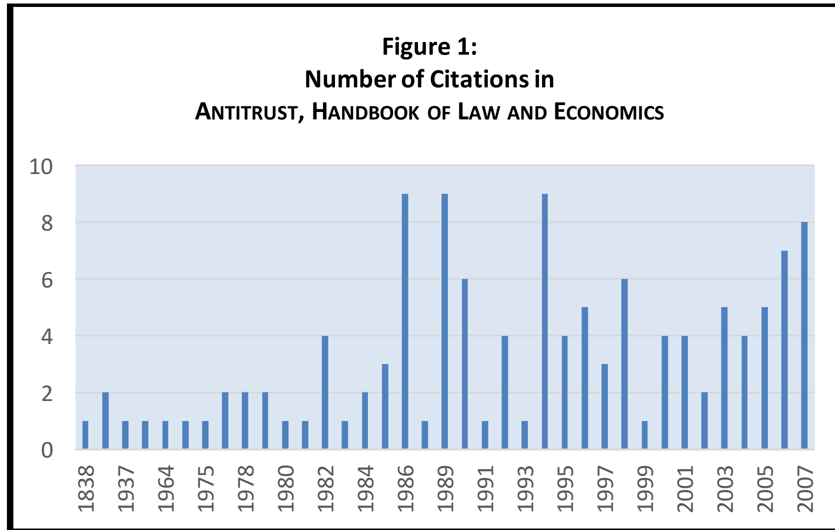

Figure 1:
Number of Citations in
ANTITRUST, HANDBOOK OF LAW AND ECONOMICS

Our claim is merely that these recent developments in economic theory do not favor a retreat from safe harbors. What changes in economic theory would provide intellectual support a retreat in safe harbors in favor of more frequent application of fact-intensive standards? Two categories of changes in economic theory seem especially relevant to the elimination of safe harbors: (1) economic analysis that uncovers *new* necessary (or sufficient) conditions for anticompetitive effects to arise from business conduct subject to the antitrust laws; or (2) economic analysis that provides convincing theoretical reason to reject conditions previously accepted as sufficient to justify a safe harbor for business conduct subject to the antitrust laws.

By way of illustration, some have argued that loyalty discounts might exclude rivals and harm competition without substantial foreclosure.[229] If this theoretical account of loyalty discounts persuaded the economic profession that the raising rivals' costs paradigm applied to that conduct was inappropriate—to be clear, it has not—one might conclude that the foreclosure safe harbor should be rejected. Where this would be the correct result in such scenario, rejection of the argument would support the continued application of the foreclosure safe harbor to loyalty discounts or exclusive dealing antitrust claims based upon competitive concerns with exclusion rather than predation.[230]

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229 *See, e.g.,* Einer Elhauge, *How Loyalty Discounts Can Perversely Discourage Discounting*, 5 J. COMPETITION L. & ECON. 189, 192–94 (2009).

230 *See* Moore & Wright, *supra* note 12, at 1216; Wright, *supra* note 4, at 1178–79 (discussing foreclosure analysis in loyalty discount and exclusive dealing cases); *see also* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test*, GEO. UNIV. L. CTR. 1, 4 (2016), http://ssrn.com/abstract=2734240 (distinguishing the economic framework underlying raising rival's cost exclusion claims from price predation and rejecting the incremental price-cost test as appropriate to analyze conditional pricing practices in most cases).

An assessment of the major developments in economic theory relevant to antitrust over the past 16 years further shows that, while many are significant—especially in increasing the understanding of collusion,[231] unilateral effects in mergers involving differentiated products,[232] and auctions[233]—such developments do not explain the shift away from safe harbors. In some cases, the underlying economic developments plainly do not map onto the shift away from safe harbors. In other cases, the developments in theory simply have not yet been integrated into the law by courts or agencies.

Perhaps the most important example of the assimilation of economic theory into antitrust rules in the past 16 years has been the further integration of the economic analysis of unilateral price effects in differentiated product markets into the 2010 Merger Guidelines.[234] The agencies have employed the economics of unilateral effects into merger analysis since at least the early 1990s.[235] In fact, the 2010 Guidelines retain, and indeed essentially replicate verbatim, the passage on diversion ratios from the 1992 Guidelines.[236] The major contribution of the 2010 Guidelines in terms of the economics of unilateral effects was the formal introduction of the "value of diverted sales" and the GUPPI as methods of diagnosing the likelihood of unilateral price effects.[237]

This development does not favor nor explain a movement away from safe harbors or presumptions. Indeed, to the contrary, leading antitrust economists have suggested that the underlying economic theory of the GUPPI *supports* a safe harbor.[238] Regardless of whether that suggestion is correct—

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231 *See* Athey & Bagwell, *supra* note 228, at 429; Harrington & Skrzypacz, *supra* note 228, at 314–15; David Gilo, et al., *Partial Cross Ownership and Tacit Collusion*, 37 RAND J. ECON. 81, 82 (2006); Helder Vasconcelos, *Tacit Collusion, Cost Asymmetries, and Mergers*, 36 RAND J. ECON. 39, 40–41 (2005).

232 *See* Werden & Froeb, *supra* note 228, at 2.

233 *See generally* PAUL KLEMPERER, AUCTIONS: THEORY AND PRACTICE (2004); Bajari & Summers, *supra* note 228, at 143–44; Robert C. Marshall & Michael J. Meurer, *Bidder Collusion and Antitrust Law: Refining the Analysis of Price Fixing to Account for the Special Features of Auction Markets*, 72 ANTITRUST L.J. 83, 83–88 (2004); Keith Waehrer & Martin K. Perry, *The Effects of Mergers in Open-Auction Markets*, 34 RAND J. ECON. 287, 288 (2003).

234 *See* 2010 MERGER GUIDELINES, *supra* note 15, at § 6.1.

235 *See* 1992 MERGER GUIDELINES, *supra* note 11 at § 2.21 ("A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales loss due to the price rise merely will be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable premerger."); *see also* Robert D. Willig, *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, 1991 BROOKINGS PAPERS ON ECON. ACTIVITY 281, 299 (1991).

236 2010 MERGER GUIDELINES, *supra* note 15, at § 6.1.

237 Shapiro, *supra* note 105, at 65.

238 Shapiro, *supra* note 199, at 24 ("[U]nilateral effects for a given product are unlikely if the gross upward pricing pressure index for that product is less than 5%.").

this Article assumes that it is—recent developments and integration of economic theory into antitrust rules certainly do not require, or even favor, a retreat from safe harbors.

Turning to recent developments in empirical evidence, it is equally difficult to attribute the significant change in the use of antitrust safe harbors to any change in accumulated knowledge about the effects of horizontal and vertical restraints, mergers, or exclusion.

Over the past 16 years, there has not been any significant shift in the weight given to empirical evidence regarding vertical restraints and contracts. The economic theory literature establishes that vertical restraints may be anticompetitive, but the empirical literature clearly demonstrates that they most often are not, and are instead generally procompetitive.[239] Because "virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition[,]" the economic literature provides ample support for safe harbors applied to vertical restraints.[240]

Furthermore, empirical evidence regarding vertical mergers has remained largely unchanged over the past 16 years. The general weight of the evidence used to examine vertical integration reveals a consensus that vertical mergers can, but rarely do, result in anticompetitive effects.[241] In fact, empirical studies of vertical mergers generally favor safe harbors because the data shows that "efficiency considerations overwhelm anticompetitive motives in most contexts."[242] While vertical mergers can certainly raise competitive concerns, and are properly the subject of antitrust law, there has been no change in the evidence regarding vertical integration that favors a retreat from safe harbors, much less explains the more general phenomenon described.

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239 *See* Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 392–400 (Paolo Buccirossi, ed., 2008); Cooper, *supra* note 138, at 648–49; Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40 (2008); Wright, *supra* note 60; *see also* Christopher T. Conlon & Julie Holland Mortimer, *Efficiency and Foreclosure Effects of All-Units Discounts: Empirical Evidence* at 9–10 (NBER Working Paper No. 19709, Jan. 13, 2015); Bogdan Genchev & Julie Holland Mortimer, *Empirical Evidence on Conditional Pricing Practices* at 3–8 (NBER Working Paper No. 22313, May 28, 2016).

240 Cooper, *supra* note 138, at 658. *See also* Lafontaine & Slade, *supra* note 239, at 409 ("[T]he present empirical evidence suggests that a fairly relaxed antitrust attitude toward [vertical] restraints is warranted."); O'Brien, *supra* note 239, at 76 (noting three additions to the literature and concluding that "[w]ith few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons").

241 *See* Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 677 (2007).

242 *Id.*

Horizontal merger policy and the empirical evidence concerning horizontal merger policy in particular, however, have received significant attention as of late.[243] The recent debate largely turns upon the question of whether FTC and DOJ merger enforcement policy accurately targets anticompetitive mergers. For example, John Kwoka's recent meta-analysis of retrospective analyses of horizontal mergers concludes that current FTC and DOJ merger policy successfully targets anticompetitive mergers, and in fact, more aggressive merger policy would improve consumer outcomes.[244]

Holding aside this Article's evaluation of the empirical evidence on horizontal mergers, and further accepting Kwoka's interpretation of the existing evidence for the moment, still would not support a *retreat* from safe harbors. Current merger law embraces a structural presumption of liability for plaintiffs when post-merger market shares are greater than 35 percent under *Philadelphia National Bank*.[245] While one might argue that the overall body of evidence supports a tightening of merger policy—a position many disagree with—the argument would at best support maintaining the *PNB* presumption.

There simply have not been any changes in the body of empirical knowledge concerning horizontal mergers that would warrant a retreat from existing safe harbors. The most significant retreat from a safe harbor in the merger context has been the FTC's rejection of the GUPPI-based safe harbor previously endorsed by the DOJ and Carl Shapiro. The FTC certainly did not justify its rejection of that safe harbor based upon changes in empirical evidence, nor would have such an argument been appropriate.[246]

In sum, neither development in economic theory nor in the body of empirical evidence during the 21st century explains the retreat from safe harbors. Because changes in substantive economic knowledge do not explain the departure from safe harbors in the law and agency practice in recent years, other potential explanations for the shift must be explored.

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243 *See* Sen. Elizabeth Warren, Keynote Remarks at New America's Open Markets Program Event: Reigniting Competition in the American Economy 6 (June 29, 2016), http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf; Hillary Clinton, *Being Pro-Business Doesn't Mean Hanging Consumers Out to Dry*, QUARTZ, (Oct. 20, 2015), http://qz.com/529303/hillary-clinton-being-pro-business-doesnt-mean-hanging-consumers-out-to-dry/.

244 *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 18–22 (2015); John E. Kwoka, Jr., *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?* 38–39 (Ne. Univ. Dep't of Econs., Working Paper, May 19, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782152 (explaining that the HHI structural presumption in the 2010 Guidelines "correctly identifies a group of mergers with a very high likelihood of resulting in price increases[,]" and "is, if anything, excessively high for an equally high degree of successful identification of problematic mergers.").

245 *Id.* ("The problem for today's courts in applying this semicentenary standard is that the field of industrial organization has long since moved beyond the structural presumption upon which the standard is based. The point is not that 30 percent is an outdated threshold above which to presume adverse effects upon competition; rather, it is that market structure is an inappropriate starting point for the analysis of likely competitive effects. Market structure and competitive effects are not systematically correlated.").

246 *See* FTC Dollar Tree Statement, *supra* note 200, at 2.

B. *Political Appointments*

Another potential explanation for the retreat of antitrust safe harbors worth further examination is a change in the composition of judicial or agency appointments. As discussed, changes in both agency personnel and the composition of the federal bench, particularly the appointment of law and economics oriented thinkers to the appellate bench in the 1980s, had a significant impact on the evolution of antitrust law and the rise of antitrust safe harbors.[247] This begs the question of whether similar changes gave rise to the reversal of course observed in recent years.

A preliminary assessment of this hypothesis suggests the answer is no. There is little reason to believe that judicial appointments have influenced significantly the changes in antitrust doctrine leading to the observed reduction in safe harbors. To begin with, most of the influential judges cited above remain on the appellate courts, e.g., Posner, Easterbrook, Ginsburg, and Williams. Justice Antonin Scalia also remained on the Supreme Court throughout the documented decline in safe harbors until he passed away in 2016. The change in composition of the Supreme Court has certainly not resulted in the observed shift away from safe harbors. As discussed, the Supreme Court has been responsible for a number of recent decisions creating or reaffirming safe harbors.[248] While a complete analysis would require a more detailed assessment of whether changes in judicial composition have led to subtle shifts in antitrust rules in the lower courts, for example, the preliminary conclusion that changes in judicial composition cannot explain the shift is likely correct.

C. *Other Potential Explanations*

Having rejected substantive changes in economic theory, empirical evidence, or judicial or agency appointments as plausible explanations of the death of antitrust safe harbors, we turn to other potential causes. One candidate explanation is change in antitrust enforcement agency preferences over time. On the one hand, this change can only serve as a partial explanation. Indeed, the elimination and weakening of most of the safe harbors discussed in Part III occurred in the courts without much help from the antitrust agencies. Nonetheless, the FTC and DOJ have considerable opportunity to influence law and direct competition policy and there is ample evidence they have used that influence to encourage the decline of antitrust safe harbors.

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247 *See supra* Part II.B.

248 *See generally* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264 (2007); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). *But see* FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

Consider the FTC's influence in its policy decision to reject the GUPPI-based safe harbor. The FTC also played a significant role in *FTC v. Actavis*, where it urged the Supreme Court to classify reverse payments as per se unlawful and to reject the scope of the patent safe harbor.[249] This influential role of the agencies raises the question of whether a change in agency preferences for antitrust standards rather than rules has contributed to the reduction of safe harbors?

There is certainly a plausible argument that the answer is yes. The FTC rejects safe harbors applied to product hopping and allegations of anticompetitive product design in its amicus brief for *Mylan Pharmaceuticals, Inc. v. Warner-Chilcott PLC*.[250] The FTC appears to base its approach upon the questionable assumption that health care markets are necessarily unique, and that competition in those markets does not work.[251] However, while that reasoning suggests that the FTC's advocacy against innovation-based safe harbors is attributable to its idiosyncratic views of health care markets and is thus limited in scope, a deeper examination of other recent policy decisions suggest otherwise.

The FTC's recent decision to abandon the GUPPI-based safe harbor for horizontal mergers is one such example. The FTC acknowledged that bright line rules and presumptions are appropriate when they rest on "accumulated experience and economic learning that the conduct in question is likely or unlikely to harm competition."[252] However, the FTC emphasized the "inherently fact-specific" nature of merger analysis and noted that how GUPPI analysis is used "will vary depending on the factual circumstances, the available data, and the other evidence gathered during an investigation."[253]

One might attribute these changes to a general preference for fact-intensive standards rather than rules—not necessarily a specific rejection of safe harbors or rules of presumptive legality. But that appears not to be the case. For example, the FTC and DOJ continue to proudly favor the application of bright line presumptions of liability, such as the *PNB* presumption, which

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249 *Actavis*, 133 S. Ct. at 2237 ("The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a 'quick look' approach rather than applying a 'rule of reason.'").

250 Civ. No. 12-3824, 2015 WL 1736957 (E.D. Penn. Apr. 16, 2015), *appeal filed*, No. 15-2236 (3d Cir. May 20, 2015).

251 Brief for Amicus Curiae Federal Trade Commission Supporting Plaintiff-Appellant at 15–21, Mylan Pharm., Inc. v. Warner-Chilcott PLC, (3d Cir. 2016) (No. 2:12-cv-03824-PD).

252 FTC Dollar Tree Statement, *supra* note 200, at 3–4 (footnote omitted).

253 *Id.* at 3.

reject a "fact-intensive" approach.[254] Furthermore, the FTC strongly advocated for adoption of a per se rule of illegality for reverse payment settlements in *Actavis*.[255]

It is certainly no surprise that an antitrust enforcement agency, or any law enforcement agency, might favor rules that increase their expected win rate. But the FTC and DOJ have a remarkable history of promoting sound antitrust analysis and rules even when that approach makes enforcement more difficult. For example, the FTC and DOJ embraced the merger efficiencies defense in their own guidelines,[256] repudiated the Nine No-Nos,[257] rejected the view that patents confer market power well before the courts,[258] and supported reversal of the per se rule against minimum resale price maintenance.[259] In the context of that history, the modern trend toward rejecting safe harbors across all facets of antitrust doctrine and enforcement activity begs the question of whether antitrust agencies' preferences for discretion have intensified over time.

Another possible, and potentially related, explanation for the recent death of antitrust safe harbors worth fuller examination is a shift in *political* or *ideological* decision-making at the antitrust enforcement agencies. Greater ideological influence over agency decision-making is one possible source of the shift in agency preferences toward greater discretion and fewer safe harbors.

A simple theory of why a more ideologically-driven antitrust enforcement agency might lead to greater investment in nudging toward antitrust standards and greater discretion is that discretion gives the agency greater leverage and influence which can be converted to more significant political

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254 *See* Bill Baer, Assoc. Att'y Gen., Dep't of Justice, Remarks at American Antitrust Institute's 17th Annual Conference (June 16, 2016), https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute (describing the *PNB* presumption as "a sensible way of implementing Section 7's ban on mergers that may tend to substantially lessen competition."); Terrell McSweeny, Comm'r, Fed. Trade Comm'n, Keynote Remarks at Global Antitrust Enforcement Symposium: A Carpenter Is Only as Good as Her Tools: The Importance of Using Our Full Toolbox as Antitrust Enforcers, (Sep. 28, 2015), https://www.ftc.gov/system/files/documents/public_statements/804901/mcsweeny_-_georgetown_antitrust_enforcement_symposium_9-28-15.pdf ("[T]he recommendation to eliminate the presumption is thus very much a solution in search of a problem.").

255 FTC v. Actavis, 133 S. Ct. 2223, 2237 (2013) ("The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a 'quick look' approach, rather than applying a 'rule of reason.'").

256 *See* 1992 MERGER GUIDELINES, *supra* note 11, at § 4.

257 *See* Lipsky, *supra* note 9, at 517–524.

258 *Compare* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (1995), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf *with* Ill. Tools Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2006).

259 Brief for the United States as Amicus Curiae Supporting Petitioner at 27, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06-480).

payoffs. As discussed, FTC and DOJ history is replete with examples of decisions that might be construed as against their own narrow interest, at least as measured by the anticipated impact on win-rates.

Even a modest shift toward a more politically oriented decision-making process can have significant effects on agency case selection and outcomes. Indeed, one might expect such a shift to be reflected immediately in the agency voting record in the form of split or non-unanimous votes. Figure 2 illustrates the percentage of non-unanimous votes at the FTC since 1989 and through August 2015, under each Chairman.[260] The data in Figure 2 below suggest the hypothesis that the FTC has become more political over time.[261]

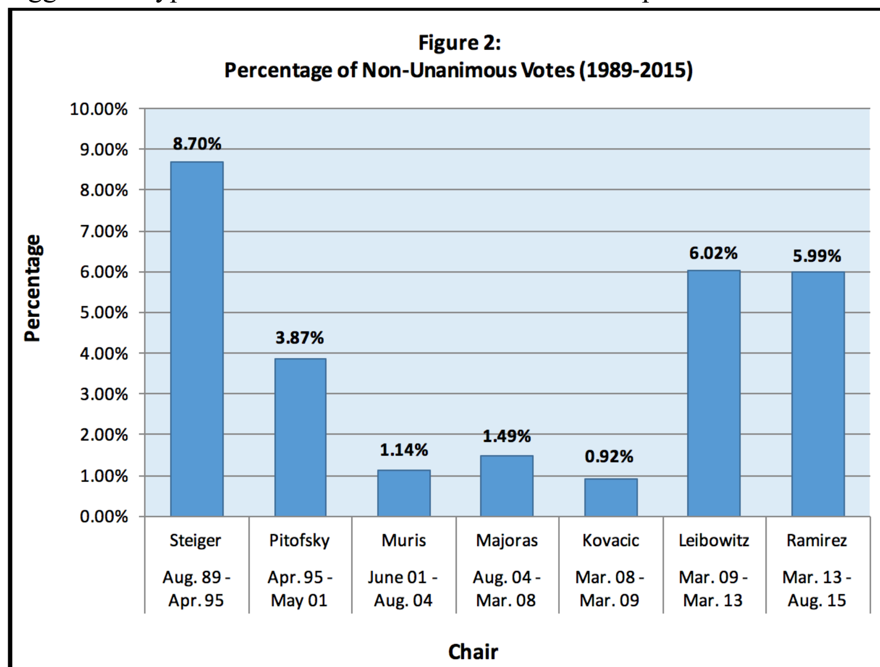


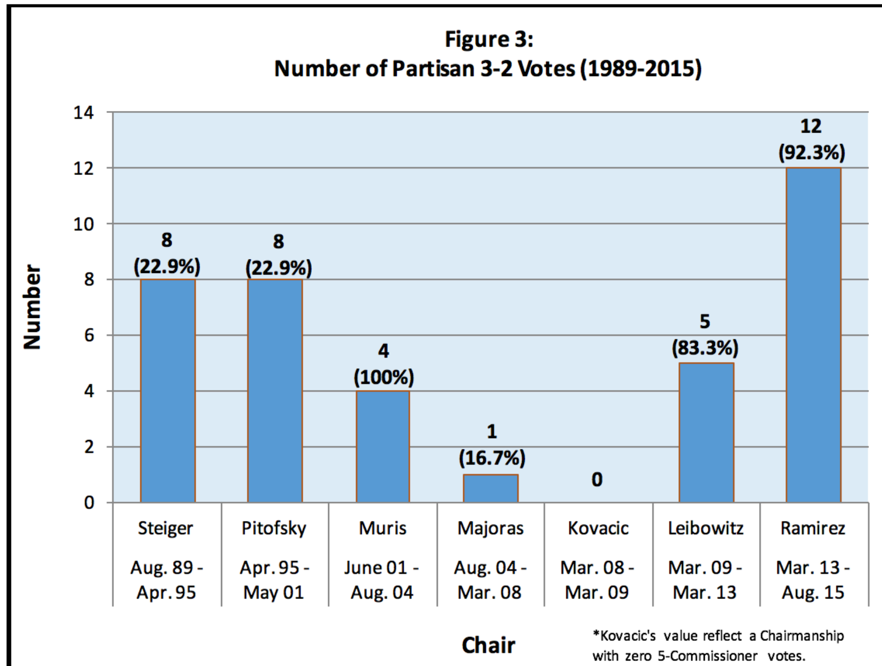
Figure 3 below demonstrates that Figure 2's U-shaped pattern in non-unanimous votes is not explained by changes in the likelihood that any one Commissioner is more likely to dissent.[262] If that were the case, one would not expect disagreements to follow party lines. Furthermore, one would expect the pattern to disappear if attention were restricted to 3-2 votes. It does not. Indeed, an overwhelming majority of 3-2 votes during the last 9 years

260 Voting data was collected by the authors from FTC records. *See, e.g.*, Federal Trade Comm'n, Cases and Proceedings, https://www.ftc.gov/enforcement/cases-proceedings (data on file with authors).

261 One alternative hypothesis is that an underlying shift in the mix of cases at the FTC led to a greater number of non-unanimous votes for reasons unrelated to ideology. For example, a significant increase in the number of complex or "close" cases over time could lead to this result.

262 Voting data collected by the authors. *See supra* note 260 and accompanying text.

were split along party lines.[263] Given the important role that the FTC played in eliminating safe harbors over the past decade in particular, the possibility that an increase in ideological decision-making at the FTC in recent years contributed to this shift cannot be ruled out.



Finally, another possible explanation for the documented decline in safe harbors is the rise of *Twombly* as a filter for antitrust claims that lack merit. *Twombly* provides an all-purpose "safe harbor" for antitrust defendants in that it can be applied to all forms of antitrust-relevant conduct. Some antitrust scholars have pointed to *Twombly* as providing a rationale for courts to push against other safe harbors deemed less administrable to apply in practice.[264] For example, the equilibrating force created by *Twombly* may provide a plausible explanation of the Supreme Court's *American Needle* opinion essentially eliminating the single entity defense.[265] Unfortunately, attempts to test empirically the hypothesis that *Twombly* serves as a general purpose safe

263 There were 17 partisan 3-2 votes under Chairman Leibowitz and Chairwoman Ramirez during the six years and five months between March 2009 and August 2015. By way of comparison, there were only 21 partisan 3-2 votes during the 18 years and seven months between August 1989 and March 2008. By both absolute number and percentage, partisan 3-2 FTC votes have become significantly more common during the Obama administration.

264 *See, e.g.*, Stone & Wright, *supra* note 152, at 403–06.

265 *See id.*, at 405–06.

harbor in place of the disappearing conduct-specific safe harbors are unlikely to prove fruitful.[266]

CONCLUSION

The rise of antitrust safe harbors in the modern antitrust era, which occurred quickly and involved interrelated actions by the Supreme Court, lower courts, and antitrust agencies, significantly contributed to the evolution of antitrust law toward a more economically coherent enterprise. Importantly, the rise of antitrust safe harbors was a function not only of a better economic understanding of business conduct, but also a result of the role economic analysis of legal rules played in shifting antitrust jurisprudence.

But just as quickly as safe harbors proliferated throughout antitrust doctrine in the early years of the modern antitrust era, they are disappearing. Since the turn of the century, the number and practical significance of antitrust safe harbors has declined. The primary goal of this Article is to document and seek to explain this systematic retreat from bright line rules and presumptions across the antitrust landscape. This documented retreat from safe harbors provides an interesting puzzle, to say the least. The disappearance of safe harbors is not explained by any of the factors—a shift in economic analysis of legal rules, economic theory, empirical evidence, or the influence of particular judicial appointments—that led to the original rise in safe harbors. Preliminary evidence suggests that other forces are at work, including but not limited to, changes in partisanship at the FTC over time.

This general shift in the antitrust landscape away from safe harbors may represent the beginning of a systematic change in doctrine. If this Article is correct in postulating that it is indeed a systematic change, understanding its causes will be critical to identifying its implications for agencies, courts, and practitioners moving forward.

266 *See* Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STANFORD L. REV. 369, 424 (2016) ("[E]ven with the relatively strong assumption related to selection into summary judgment, and even with usable data on nearly 2000 cases, it is not possible to clearly determine the quality-filtering effects of Twiqbal.").