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THE ROBERTS COURT AND THE LIMITS OF ANTITRUST

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I. INTRODUCTION

One often hears two things about the Roberts Court's antitrust jurisprudence. The first is that the Court has displayed a greater interest in antitrust than its predecessor.¹ That seems accurate. Whereas the Rehnquist Court showed little enthusiasm for antitrust cases in its later years,² the Roberts Court issued seven antitrust decisions in its first two years alone.³ Some have attributed the trend toward more antitrust cases, and more business cases generally, to Chief Justice Roberts' many years in private practice, during which he represented corporate clients and confronted a number of business and antitrust issues.⁴ Whatever its cause, there does seem to be an uptick in enthusiasm for antitrust on the current Supreme Court.

The second oft-heard observation about the Roberts Court's antitrust decisions is that they betray a significant pro-business (or, pejoratively, anti-consumer) shift on the Court. Not surprisingly, left-leaning advocacy groups have repeatedly sounded this refrain.⁵

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¹ See, e.g., Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust Analysis: The 2006 Term and Beyond*, 3 COMP. POL'Y INT'L 24, 25 (2007) ("The antitrust activity level of the Roberts Court thus far has exceeded the single case average of the Court prior to the 2003-2004 Term by a significant margin."); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 COMP. POL'Y INT'L 59, 60 (2007) ("After a long antitrust slumber, the U.S. Supreme Court has become active again in antitrust law, deciding seven cases in the last two years.")

² The Rehnquist Court decided one antitrust case from 1993 to 1995, one each year from 1996 through 1999, and none from 2000 to 2003. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 6 (2005).

³ See *Volvo Trucks, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse Securities v. Billing*, 551 U.S. 264 (2007); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁴ See, e.g., David L. Franklin, *What Kind of Business Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1055 n. 205 (2009) (noting that "Chief Justice Roberts's near-decade in private practice no doubt attuned him to the interests of the corporate bar").

⁵ See, e.g., Alliance for Justice, *Unprecedented Injustice: The Political Agenda of the Roberts Court* 4, (available at <http://www.afj.org/about-afj/press/unprecedented-injustice.html>) (under the heading "Insulating Corporate Interests from Environmental and Antitrust Regulation," construing the Court's *Leegin*

But even respected academics and leaders of the antitrust bar have construed the Roberts Court's antitrust decisions as being radically and reflexively pro-business. Noted legal scholar Erwin Chemerinsky, for example, recently dubbed the Roberts Court "the most pro-business Supreme Court there has been since the mid-1930s"⁶ and, in a *California Bar Journal* article entitled, "The Supreme Court: Sharp Turn to the Right," construed the Court's antitrust decisions as "favoring business over consumers."⁷ While Chemerinsky, by his own admission, is not an antitrust expert,⁸ the meme he recites has been embraced by others who do have substantial antitrust expertise. For example, William Kolasky, a former Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice and an associate editor of the ABA's *Antitrust Magazine*, recently (though before the Court's most recent antitrust decision) made the following observations:

Our Supreme Court, especially under the leadership of Chief Justice John Roberts, seems equally intent on cutting back on private enforcement. It has been more than fifteen years since the Supreme Court last

decision as holding "that manufacturers and retailers of consumer goods could engage in price-fixing").

⁶ Erwin Chemerinsky, *An Overview of the October 2007 Supreme Court Term*, 25 *TOURO L. REV.* 541, 545 (2009).

⁷ Chemerinsky highlighted three decisions that, he said, favored business over consumers. He wrote:

In several cases, the Court made it much more difficult to sue business for antitrust violations. In *Leegin Creative Leather Products Inc. v. PSKS Inc.*, 127 S. Ct. ____ (June 28, 2007), the Court overruled a 96-year-old decision and held that it is not a per se violation of antitrust laws for a manufacturer to set minimum resale prices. In *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007), the Court ruled that there cannot be antitrust claims for securities law violations. The court explained that securities laws were "clearly incompatible" with antitrust laws, such that securities law implicitly precluded antitrust claims. And in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Court held that stating a claim under the Sherman Act's restraint of trade provision requires that the complaint allege sufficient facts to suggest that an agreement was made. The Court rejected notice pleading for such claims, thus making it harder for plaintiff to get into court.

Erwin Chemerinsky, *The Supreme Court: Sharp Turn to the Right*, *CAL. BAR J.* (Aug. 2007). The *Leegin*, *Credit Suisse*, and *Twombly* cases are discussed later in the text.

⁸ Jonathan Adler, *AALS Mid-Year Meeting: The Changing Roberts Court*, Post to The Volokh Conspiracy weblog (2008), <http://volokh.com/posts/1212602633.shtml> (reporting that Chemerinsky "admitted he 'know[s] nothing about'" antitrust).

decided an antitrust case in favor of a plaintiff. Over this fifteen-year period, plaintiffs have gone 0-for-16, with not a single plaintiff winning an antitrust case in the Supreme Court since the first George Bush was president. This record led *Antitrust* to ask in its last issue whether the Supreme Court's recent antitrust decisions represent "The End of Antitrust as We Know It?"⁹

The central claim of this Article is that the second common assertion about the Roberts Court's antitrust jurisprudence – that it is pro-business and anti-consumer and represents a radical departure from the past – is wrong and reflects a misunderstanding of the antitrust enterprise. As a body of law regulating business conduct for the benefit of consumers, antitrust is inherently limited. Once one accounts for the limits of antitrust, the rulings of the Roberts Court, rather than "favoring business over consumers," seem calculated to maximize antitrust's effectiveness, to the ultimate *benefit* of consumers. Specifically, the Roberts Court's antitrust cases embrace a decision-theoretic approach that seeks to minimize the sum of the decision and error costs that inevitably result from antitrust adjudication.

This Article proceeds as follows: Part II sets forth the limits of antitrust and explains how a decision-theoretic approach, in light of these inherent limits, ultimately benefits consumers by maximizing the overall effectiveness of the antitrust enterprise. Part III then discusses the Roberts Court's antitrust decisions, demonstrating how each coheres with a decision-theoretic approach. Part IV looks to the future, predicting how the Roberts Court, harnessing the insights of decision theory, will resolve several antitrust issues that are likely to come before the Court in the future.

II. THE LIMITS OF ANTITRUST AND THE NEED FOR A DECISION-THEORETIC APPROACH

When it comes to ensuring that consumers have access to low prices, high quality goods, and product variety, there is no better regulator than competition. Antitrust thus aims to ensure that markets remain as competitive as possible. That does not mean, though, that antitrust should be singularly focused on ensuring that markets include large numbers of *competitors*. In many markets, output will be higher and prices lower if producers are allowed to exploit economies of scale by growing quite large – so large that

⁹ William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 ANTITRUST 85, 86 (Spring 2008).

only a handful of producers, operating at “minimum efficient scale” (the point beyond which an increase in output does not reduce per unit costs), are able to supply the entire market.¹⁰ In such markets, output would be impeded and prices would rise if the law broke large, efficient producers into smaller, less efficient ones.¹¹ It thus makes sense to adopt an *output-focused* understanding of competition, where markets are deemed more competitive when they produce more of what consumers want, and at lower prices, and less competitive when they produce less, and at higher prices.¹² The ultimate objective of antitrust is to maximize competition, so understood.

Speaking in the most general of terms, antitrust pursues this overarching goal by policing the situations in which competition breaks down, most notably monopoly (or monopsony), where there is a single seller (or buyer), and collusion, where nominal competitors agree not to compete. The two primary provisions of the Sherman Act correspond to these two paradigmatic defects in competition. Section 1 aims at collusion, boldly proclaiming that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal.”¹³ Section 2 seeks to prevent firms from attaining monopoly power, making it illegal to “monopolize,” “attempt to monopolize,” or “combine or conspire ... to monopolize” any market.¹⁴

From the very beginning, these statutory texts have created problems for judges. Read literally, Section 1 is so broad as to be nonsensical, for *every* executory contract restrains trade; when I promise to sell something to you, I “restrain” myself from “trading” that item with another.¹⁵ Accordingly, the Court early on interpreted Section 1 to forbid only unreasonable restraints of trade, requiring lower courts to grapple with the distinction between reasonable and

¹⁰ See generally HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 27-29 (2d ed. 1999).

¹¹ See RICHARD A. POSNER, ANTITRUST LAW 112 (2d ed. 2001) (“[D]econcentration might impose heavy costs on society by requiring industries to operate with higher costs than before they had been deconcentrated.”).

¹² See HOVENKAMP, *supra* note 2, at 2-5 (2005) (describing output-focused understanding of competition).

¹³ 15 U.S.C. § 1 (2010).

¹⁴ 15 U.S.C. § 2 (2010).

¹⁵ See *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (reasoning that the term “restraint of trade” in § 1 cannot possibly refer to any restraint on competition because “[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”).

unreasonable restraints.¹⁶ Section 2 poses interpretive difficulties because neither the Sherman Act nor the common law at the time of the Act's passage ever defined the term "monopolize."¹⁷ The Court eventually ruled that monopolization consists of possessing some amount of market power and engaging in exclusionary conduct,¹⁸ but many pro-consumer acts (e.g., price cuts, product improvements) win business for the actor and thus tend to exclude its rivals, and neither the Court nor antitrust commentators have been able to specify what exactly renders an act "unreasonably" exclusionary.¹⁹ Thus, every time a court confronts an antitrust challenge to a novel business practice, it must make a judgment about the overall desirability of the practice at issue (e.g., Does it constitute an "unreasonable" restraint of trade? Is it "unreasonably" exclusionary?).

The enforcement provisions of the antitrust laws ensure that courts are routinely called upon to make these sorts of judgments in lawsuits by private plaintiffs. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a lawsuit in federal court.²⁰ To account for the fact that many antitrust violations occur in secret and thus escape condemnation, the statute seeks to optimize the deterrent effect of private enforcement by permitting each successful plaintiff to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."²¹ What we end up with, then, is a body of law that is ultimately aimed at maximizing competition (understood in terms of market output), is quite general in its literal proscriptions, becomes "fleshed out" by generalist courts adjudicating private disputes, and is highly

¹⁶ *Id.* (holding that "[t]he 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").

¹⁷ See HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 53 (3d ed. 2005).

¹⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

¹⁹ See generally Thomas A. Lambert, *Weyerhaeuser and the Search for Antitrust's Holy Grail*, 2007 CATO SUP. CT. REV. 277, 300-11 (describing competing attempts to specify a unitary test for identifying instances of unreasonably exclusionary conduct).

²⁰ 15 U.S.C. § 15 (2010). Note that a number of Supreme Court decisions have foreclosed a literal reading of this right to sue by "any person who shall be injured" by an antitrust violation. The class of potential enforcers has been substantially limited by the indirect purchaser rule, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the antitrust injury requirement, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 329 U.S. 477 (1977), and the antitrust standing requirement, see *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519 (1982).

²¹ 15 U.S.C. § 15. See HOVENKAMP, *supra* note 2, at 66-67 (discussing theoretical rationale for treble damages); see also POSNER, *supra* note 11, at 272-73 (same).

attractive to private plaintiffs seeking super-compensatory recoveries.

Taken together, these aspects of American antitrust law – all of which predate the Roberts Court by decades – render antitrust adjudication an inherently limited enterprise. In most challenges to novel business practices (and the prospect of treble damages guarantees that there will be many such challenges), whether liability is appropriate will be difficult to determine. Challenges to concerted conduct are frequently perplexing because a great many, perhaps most, output-enhancing business innovations involve cooperation among independent economic actors, frequently competitors.²² Challenges to unilateral conduct that may enhance market power are often hard to resolve because all actions that help a seller win business from its rivals – even pro-consumer actions like most price cuts – technically “exclude” those rivals.²³ Distinguishing output-reducing collusion from output-enhancing coordination (in Section 1 cases) and unreasonable from reasonable exclusionary acts (in Section 2 cases) can be exceedingly difficult.²⁴ To draw the necessary distinctions, judges and juries usually must weigh conflicting testimony from economic experts and reach conclusions on a number of complex subsidiary issues, such as the contours of the relevant market, the existence and magnitude of entry barriers, and the elasticity of demand and/or supply for the product at issue.

Antitrust adjudication is thus exceedingly, and inevitably, costly. Most obviously, there are significant costs involved in simply reaching a decision. The parties themselves, with the aid of lawyers and, in most cases, economic experts, must gather, process, and present a large amount of complex data. The fact-finder must then deliberate over the information presented and reach conclusions on both subsidiary issues (e.g., the contours of the relevant market) and the outcome-determinative question (e.g., whether the challenged trade restraint is “unreasonable” because it reduces overall market

²² See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (observing that practically all output-enhancing economic activities involve extensive coordination among independent economic actors, many of whom could be competitors).

²³ See Lambert, *supra* note 19, at 278-79.

²⁴ See Easterbrook, *supra* note 22, at 26 (observing that competitive and exclusionary conduct look alike); see also Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1710 (1986) (“[I]t is almost impossible to distinguish exclusion from hard competition.”). It can also be quite difficult to distinguish concerted from unilateral conduct. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); see also *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954). And, because the Sherman Act itself draws a distinction between such types of conduct and posits different legal tests for evaluating the legality of each, the distinction matters.

output). Taken together, these costs constitute the *decision costs* of an antitrust adjudication.

But those are not the only relevant costs. Given the complexity of the issues presented in antitrust cases, mistakes are inevitable, and those mistakes will themselves impose costs. When a factfinder wrongly acquits an anticompetitive practice, market power is created or enhanced, causing loss in the form of allocative inefficiency; consumers are injured because output is lower and prices higher than they otherwise would be.²⁵ On the other hand, when a factfinder wrongly convicts a practice that is, in fact, output-enhancing, the market is denied the greater output (and lower prices) that practice would have produced, and a productive inefficiency results. Again, consumers are injured by reduced output, less product variety and innovation, and higher prices. Taken together, the productive inefficiencies spawned by false positives (or “Type I” errors) and the allocative inefficiencies resulting from false negatives (or “Type II” errors) constitute the *error costs* of antitrust adjudication. As explained below, there are good reasons to believe that the costs of false positives will exceed those of false negatives.²⁶ But, for present purposes, the important point to see is that antitrust adjudication will inevitably involve some mistakes, and those mistakes – be they false acquittals or false convictions – will impose social cost.

The decision costs and error costs associated with antitrust adjudication – costs that are simply unavoidable under our antitrust laws as drafted – constitute the limits of antitrust.²⁷ Those limits are inexorable. Courts cannot streamline the required factual inquiry, so as to lower decision costs, without raising error costs. They cannot reduce the error costs associated with false negatives (by, for example, easing a plaintiff’s prima facie proof burden or increasing the difficulty of establishing an affirmative defense) without increasing the error costs associated with false positives. They cannot reduce the error costs associated with false positives (by, for example, raising a plaintiff’s prima facie proof requirements or easing the burden of establishing an affirmative defense) without

²⁵ See generally HOVENKAMP, *supra* note 17, at 19-26 (explaining how market power generates social losses).

²⁶ This is because the result of false negatives, an increase in market power, tends to be self-correcting, whereas false positives, which wrongly condemn not only the defendant’s specific conduct but also all other instances of such conduct, can be corrected only by a subsequent court decision or a statutory override. See Easterbrook, *supra* note 22, at 2-3.

²⁷ *Id.* at 4 (“Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust.”).

increasing the error costs associated with false negatives. Legal changes to reduce one set of costs tend to enhance another.

Given this unhappy situation, courts seeking to maximize antitrust's effectiveness, to the ultimate benefit of consumers, should pursue a simple strategy: Craft antitrust rules and standards so as to minimize the sum of decision and error costs. This is the approach prescribed by decision theory, which "sets out a process for making factual determinations and decisions when information is costly and therefore imperfect."²⁸ When it comes to antitrust adjudication, error costs consist of the allocative inefficiencies that result from wrongly permitting instances of market power-enhancing practices (the costs of false acquittals) and the productive efficiency losses that result from improperly deterring output-enhancing practices (the costs of false convictions). Error costs are therefore a function of the probability that a proffered rule will reach an incorrect judgment and the magnitude of loss that will result from that type of error.²⁹ Decision costs are a function of the liability rule's informational requirements and the ease with which it can be applied. A decision-theoretic approach to antitrust adjudication must therefore account for (1) the likelihood that the liability rule at issue will produce an incorrect judgment, (2) the magnitude of losses from the various errors the rule might generate, and (3) the difficulty of administering the rule.

As the following Part shows, all the antitrust decisions the Roberts Court has thus far rendered can be defended in light of decision theory's instruction to craft legal rules so as to minimize the sum of decision and error costs. They therefore represent an optimal – and ultimately consumer-friendly – response to the limits of antitrust.

III. DECISION THEORY AND THE ROBERTS COURT'S ANTITRUST DECISIONS

In considering how the Roberts Court's antitrust jurisprudence reflects a decision-theoretic approach to antitrust adjudication, it is helpful to divide the Court's antitrust decisions into two groups: those concerning substantive liability rules and those concerning procedures and immunities. The former category includes the Court's *Leegin*, *Weyerhaeuser*, *LinkLine*, and *Independent Ink*

²⁸ C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L. J. 41, 41 (1999) (emphasis omitted).

²⁹ If P = probability of an error and M = the expected magnitude of loss from that sort of error, then error costs = [(P_{false positive} × M_{false positive}) + (P_{false negative} × M_{false negative})].

decisions.³⁰ The latter includes the *Twombly*, *Credit Suisse*, and *American Needle* decisions.³¹ (I will not discuss the Court’s *Volvo Trucks* decision.³² While that decision technically involved a dispute under the antitrust laws, the provision at issue, the Robinson-Patman Act,³³ is expressly *not* focused on consumer welfare³⁴ and is thus not readily amenable to the decision-theoretic approach set forth above.)

a. Decisions Concerning Substantive Liability Rules

i. *Leegin*

The Roberts Court antitrust decision that has received the most criticism (at least among the popular press) for being pro-business, anti-consumer, and “radical” is *Leegin Creative Leather Products, Inc. v. PSKS Inc.*,³⁵ which held that instances of minimum resale price maintenance (“RPM”)³⁶ are not per se illegal but must be evaluated on a case-by-case basis under antitrust’s rule of reason. For example, in the wake of the *Leegin* decision, a *Baltimore Sun* columnist boldly predicted that the “[e]lectronic bargains of today will be gone by next year” and stated that “for that you can thank that radical activist Gang of Five on the U.S. Supreme Court,” which “slipped through a decision that overturned 96 years of antitrust law.”³⁷ As those remarks suggest, the perception that *Leegin* represents a radical, pro-business/anti-consumer shift stems from the facts that (1) it overruled a long-standing precedent (the 1911 *Dr.*

³⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007); *Pacific Bell Tel. Co. v. LinkLine Communications, Inc.*, 129 S. Ct. 1109 (2009); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

³¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007); *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010).

³² *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

³³ 15 U.S.C. § 13(a).

³⁴ See HOVENKAMP, *supra* note 17, at 579 (“[T]he Robinson-Patman Act cannot be understood as designed to encourage allocative efficiency or to maximize consumer welfare. It was designed to protect small businesses from larger, more efficient businesses.”).

³⁵ 551 U.S. 877 (2007).

³⁶ Minimum RPM (henceforth referred to simply as RPM) occurs when an upstream seller (e.g., a manufacturer) sets the minimum price that a downstream seller (e.g., a retailer) may charge for the upstream seller’s product.

³⁷ Mike Himowitz, *Electronic Bargains of Today Will be Gone by Next Year*, BALTIMORE SUN (June 5, 2007) (available at http://articles.baltimoresun.com/2007-07-05/business/0707050054_1_competing-on-price-price-fixing-price-agreements).

Miles decision, which had declared minimum resale price maintenance to be per se illegal³⁸); (2) it was a 5-4 decision that pitted the Court’s traditional “conservatives” (Scalia, Kennedy, Thomas, Roberts, and Alito) against its traditional “liberals” (Stevens, Souter, Ginsburg, and Breyer); and (3) it permitted the imposition of price floors, which one would expect to raise consumer prices.

In contrast to its characterization in the popular press, however, *Leegin* was not particularly controversial among mainstream antitrust scholars. For example, Harvard Law School’s Einer Elhauge – who chaired the Obama campaign’s antitrust advisory committee,³⁹ recently advocated a highly restrictive approach to regulating tying and bundled discounts,⁴⁰ and is no sense a “conservative” on antitrust issues – praised the *Leegin* holding and characterized it as reflecting a consensus view among the leading schools of antitrust analysis.⁴¹ As Elhauge observed, the first two “troubling” facts about *Leegin* – that it overturned a 96 year-old precedent and was decided on a 5-4 basis – are not really troubling at all. Deference to precedent is less important, and less expected, in antitrust cases than in other statutory cases, for courts have long viewed the Sherman Act’s broad, amorphous text as a delegation to craft a quasi-common law reflecting the ever-expanding insights of economics.⁴² Given that economic thinking on RPM has evolved dramatically since *Dr. Miles* was decided in 1911,⁴³ it is entirely appropriate that the substantive

³⁸ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

³⁹ See <http://www.law.harvard.edu/faculty/elhauge/bio.php>.

⁴⁰ Einer R. Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

⁴¹ Elhauge, *supra* note 1, at 60 (“If anything was a topic of consensus among the Harvard and Chicago schools, it was the proposition that this rule of per se illegality [for minimum resale price maintenance] was misguided.”).

⁴² *Id.* at 61-62 (“[T]he text of the U.S. Sherman Act incorporates capacious common law language that has long been thought to effectively delegate antitrust issues to the Courts for ongoing common law resolution. As a matter of practice, the Court, in fact, overrules antitrust decisions in common law fashion all the time.”). See also *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) (“As a charter of freedom, the [Sherman] [A]ct has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”).

⁴³ Most notably, economists have recognized that RPM may offer substantial procompetitive benefits. See, e.g., Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 AM. ECON. REV. 619 (1997); David A. Butz, *Vertical Price Controls with Uncertain Demand*, 40 J. L. & ECON. 433 (1997); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. L. & ECON. 265 (1988); Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J. L. & ECON.

antitrust rules evolve accordingly.⁴⁴ As for the four-justice dissent, which was authored by Justice Breyer, a sophisticated antitrust thinker (and former antitrust professor) who was certainly aware of the consensus to which Elhauge refers, a careful reading suggests that the dissenters were more concerned with cementing the notion of “super-precedent,” a key concept for defenders of the prevailing Supreme Court caselaw on abortion rights, than with contesting the actual majority holding.⁴⁵ If one focuses solely on the antitrust issues presented in the case, *Leegin* is far less controversial than the Court’s 5-4 vote would suggest.

But what about the third “troubling” fact about *Leegin* – i.e., that it sanctions manufacturer-imposed price floors that are likely to raise consumer prices? Doesn’t that render the decision pro-business and anti-consumer?⁴⁶ Not when viewed through the lens of decision theory. Recall that decision theory calls for courts to evaluate potential liability rules in light of three considerations: (1) the *likelihood* that the rule will generate an incorrect result; (2) the

363 (1985); Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346 (1984); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86 (1960); Ward S. Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955).

⁴⁴ Indeed, invoking precedent as a basis for refusing to move from per se illegality to rule of reason treatment would create an odd and indefensible asymmetry. The usual practice is to evaluate a business practice under the rule of reason unless and until courts have attained sufficient experience with the practice to know that it is always or almost always anticompetitive, in which case the law should evolve so that the practice at issue is per se illegal. Permitting the law to evolve (in response to economic learning) toward per se illegality, but refusing, on grounds of precedent, to permit a learning-inspired evolution from per se illegality to rule of reason treatment would create an unfortunate “ratchet” effect and would render antitrust a less economically defensible enterprise. HOVENKAMP, *supra* note 2, 118-19. See also Thomas A. Lambert, *Antitrust Superprecedent* (available at <http://truthonthemarket.com/2007/01/17/antitrust-superprecedent/>).

⁴⁵ See Elhauge, *supra* note 1, at 65-66:

[U]nder standard Harvard school principles, the majority was right to overrule the per se rule against vertical minimum price-fixing. The puzzle is what provoked a vigorous dissent from Justice Breyer; one of the world’s most sophisticated antitrust justices, whose opinions generally have been fully within the Harvard school. ... [T]he fact that Breyer’s dissent referred no less than six times to the stare decisis considerations that were cited in a case about restrictions on issue-advocacy ads by a right-to-life group made one wonder whether the *Leegin* case had gotten mixed up with larger political disputes about abortion and campaign finance regulation.

⁴⁶ The “pro-business” characterization is odd here, for the losing plaintiff in *Leegin* was, in fact, a business – a rogue retailer that did not wish to adhere to the pricing constraints its manufacturer imposed.

magnitude of loss that will result from the sort of errors the rule is likely to produce (collectively, these two considerations determine the rule's expected error costs); and (3) the *difficulty of administering* the rule (this determines the rule's expected decision costs). The question before the *Leegin* Court was whether, in light of these three considerations, social welfare would likely be enhanced (i.e., the sum of decision and error costs reduced) by moving from *Dr. Miles*' rule of per se illegality for RPM to a more probing, rule of reason approach. The Court decided, for good reason, that it likely would.

To see why this is so, consider how *Dr. Miles*' per se rule compares to *Leegin*'s rule of reason approach in terms of the three decision-theoretic considerations set forth above. With respect to the third, difficulty of administration, the per se rule performed pretty well – though perhaps not as well as one might initially suppose. Per se rules, which impose antitrust liability without regard to actual anticompetitive effect, are usually easy to implement; a plaintiff must show, and the factfinder must determine, nothing more than that the defendant engaged in the practice at issue.⁴⁷ While that is normally a simple matter to decide, Supreme Court precedents creating exceptions to *Dr. Miles* had rendered the inquiry somewhat complicated. For example, the plaintiff had to show that the manufacturer had not simply adopted a unilateral policy of refusing to deal with discounters (*Colgate*),⁴⁸ and in cases involving the termination of price-cutting dealers, the plaintiff had to show that the defendant manufacturer had entered an “agreement” with compliant dealers (*Monsanto*)⁴⁹ and that the agreement at issue dictated minimum prices, not simply non-price matters (*Business Electronics*).⁵⁰ The *Colgate*, *Monsanto*, and *Business Electronics* decisions, borne out of misgivings about *Dr. Miles*,⁵¹ substantially

⁴⁷ See, e.g., *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (observing that when per se rule applies, “[t]he dispositive question generally is not whether [the challenged practice] was justified, but simply whether it occurred”).

⁴⁸ *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (holding that manufacturer's unilateral, up front refusal to deal with discounters could not constitute an agreement and thus could not violate Section 1).

⁴⁹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (holding in case involving termination of price-cutting dealer that plaintiff's evidence of agreement must tend to exclude the possibility that the manufacturer merely terminated the dealer because of poor performance and must suggest that the manufacturer and the remaining dealers were committed to a common scheme involving higher prices).

⁵⁰ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (holding that evidence that a dealer was terminated for price cutting could not establish a conspiracy with the remaining dealers to maintain prices at some level absent additional evidence of an understanding that certain prices were to be charged).

⁵¹ See HOVENKAMP, *supra* note 2, at 187.

enhanced the decision costs associated with the per se rule. Nevertheless, the rule was relatively cheap to administer. *Leegin*'s rule of reason approach will likely increase the costs of administration, though the Court did take steps to constrain those costs by setting forth specific factors courts should consider in evaluating the legality of specific instances of RPM⁵² and by directing lower courts to craft a structured rule of reason (in contrast to the traditional, open-ended rule of reason inquiry).⁵³ As I and others have elsewhere explained, the rule of reason for RPM, if structured as the *Leegin* majority contemplated, may be administered fairly efficiently.⁵⁴ It likely will, though, involve higher administrative costs than the *Dr. Miles* rule.

With respect to the other two decision theory considerations, however, the *Leegin* approach represents a tremendous improvement over *Dr. Miles*. When it comes to likelihood of error, *Dr. Miles* was a disaster. As the *Leegin* majority explained, both economic theory and empirical evidence suggest that most instances of RPM are procompetitive,⁵⁵ so the per se rule, which automatically condemned all RPM, was highly likely to generate Type I errors (false convictions).

First consider theory. Manufacturers that distribute their products through retailer-dealers make their money on the sale to the dealers, not the resale to consumers. Their chief objective is to maximize purchases by dealers, whose demand will be determined by consumer demand at the retail level. If a retailer's mark-up rises but the retailer does not otherwise alter its conduct, consumers will reduce their purchases, and the manufacturer, who captures none of the retail mark-up, will lose sales and profits. All else being equal, then, manufacturers want retail mark-ups to be as small as possible.⁵⁶ Because RPM has the effect of increasing such mark-ups, manufacturers will normally avoid it *unless* the greater retailer margin it provides induces dealers to provide services that enhance demand for the manufacturer's product and thereby increase consumer sales, in which case the RPM is output-enhancing and

⁵² 551 U.S. 877, 885-86 (2007).

⁵³ *Id.* at 907.

⁵⁴ See Thomas A. Lambert, *Dr. Miles Is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937 (2009) [hereinafter Lambert, *Dr Miles Is Dead*]; Thomas A. Lambert, *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, 55 ANTITRUST BULL. 167 (2010) [hereinafter Lambert, *A Decision-Theoretic Rule*]; Christina A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, 24 ANTITRUST 22 (Fall 2009).

⁵⁵ 551 U.S. at 889.

⁵⁶ *Id.* At 896.

procompetitive. As the *Leegin* majority explained, RPM tends to promote demand-enhancing dealer services upon which other dealers may free-ride (training, product demonstration, etc.), because it prevents low-service, low-cost dealers from profiting by underselling their high-service rivals.⁵⁷ In addition, RPM may promote demand-enhancing dealer services that are not susceptible to free-riding. By coupling an RPM policy (which guarantees dealers an attractive profit margin) with a liberal right of termination (which can be exercised against dealers with poor sales records), a manufacturer encourages dealers – retailing experts – to use their own energy and innovation to promote the manufacturer’s brand so as to protect the RPM-protected profit margins. RPM thus provides an efficient mechanism for inducing output-enhancing dealer services that are difficult to secure via contract.⁵⁸ In addition, RPM may provide great assistance to a manufacturer that is a new entrant into a product market; by assuring retailers of a guaranteed margin on the manufacturer’s brand, the RPM encourages retailers to take a chance on the new brand, afford it favorable shelf space, promote it over established brands, etc.⁵⁹

But manufacturers may also demand (or at least concede to) RPM for anticompetitive reasons. Scholars have identified, and the *Leegin* majority acknowledged, four such reasons. First, a retailer cartel may demand that manufacturers impose RPM as a means of shoring up a retailer-level conspiracy.⁶⁰ Second, a dominant retailer may demand RPM in order to protect itself from more efficient retailer rivals.⁶¹ Third, colluding manufacturers may collectively impose RPM as a means of increasing price transparency (which aids in cartel enforcement) and discouraging cartel participants from cutting prices to dealers.⁶² And finally, a dominant manufacturer

⁵⁷ *Id.* at 890-92; *see also* Telser, *supra* note 43, at 89-96.

⁵⁸ *Leegin*, 551 U.S. at 891-92; *see also* Klein & Murphy, *supra* note 43.

⁵⁹ *Leegin*, 551 U.S. at 891; *see also* Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, in 3 ISSUES IN COMPETITION LAW AND POLICY 1841, 1848 (Wayne D. Collins ed., 2008) (“To secure entry, a new entrant may seek to gain retail distribution by offering independent retailers protections against discounting, in the hope that margin protection will induce retailers to market and promote the new product.”).

⁶⁰ *Leegin*, 551 U.S. at 893; *see also* Lambert, *Dr. Miles Is Dead*, *supra* note 54, at 1944-45.

⁶¹ *Leegin*, 551 U.S. at 893; *see also* Lambert, *A Decision-Theoretic Rule*, *supra* note 54, at 175-76.

⁶² *Leegin*, 551 U.S. at 892; *see also* Lambert, *Dr. Miles Is Dead*, *supra* note 54, at 1945-49.

may use RPM to “bribe” retailers to disfavor non-dominant brands (lest they lose the RPM-guaranteed profit margin).⁶³

Thus, as the *Leegin* majority acknowledged, we have two sets of theories – one procompetitive, one anticompetitive – as to why manufacturers would demand or concede to enhanced retail margins via RPM. Which set is likely to explain most instances of RPM? Probably the procompetitive theories, for the preconditions to those theories, unlike those for the anticompetitive theories, are frequently satisfied.⁶⁴

With respect to the anticompetitive explanations for RPM, the retailer cartel theory is plausible only where the retailer market is susceptible to cartelization (which is extremely uncommon, given the low barriers to entry into retail markets) and either the manufacturer’s brand is unique or RPM is also imposed on competing brands of the product (otherwise, consumers would respond to the RPM by switching to another brand).⁶⁵ RPM may operate as a device by which a dominant retailer excludes more efficient retailer rivals only where it is imposed so broadly (i.e., on so many brands) that the more efficient retailers are unable to gain a foothold.⁶⁶ The manufacturer cartel theory is plausible only where the manufacturer market is susceptible to cartelization (i.e., it is concentrated, entry barriers are high, etc.), and RPM is commonly employed throughout the market (otherwise, the RPM could not operate to police the cartel).⁶⁷ And the manufacturer exclusion theory is plausible only where the profit margin provided by RPM is significant enough to bribe retailers to drop or disfavor other brands, and the RPM scheme is implemented broadly among retail outlets (so that “foreclosed” brands cannot simply distribute through other retailers);⁶⁸ given the ubiquity of discount retailers who compete primarily on price and would be unlikely to forego carrying a lower priced product in exchange for a higher margin, this latter condition will rarely be satisfied.⁶⁹

⁶³ *Leegin*, 551 U.S. at 894; See Elzinga & Mills, *supra* note 59, at 7 (noting that RPM “might facilitate an implicit contract between the manufacturer and [its] retailers of the following nature[:]. The manufacturer assures retailers of an attractive profit margin on sales of its own brand in exchange for their refusing to take on the distribution of competing brands, including brands offered by new entrants”).

⁶⁴ Lambert, *A Decision-Theoretic Rule*, *supra* note 54, at 181-85.

⁶⁵ *Id.* at 181-82.

⁶⁶ *Id.* at 183-84.

⁶⁷ *Id.* at 183.

⁶⁸ *Id.* at 184.

⁶⁹ *Id.*

In contrast to the uncommon sets of circumstances under which RPM could cause anticompetitive harm, the preconditions for procompetitive uses of RPM are frequently satisfied.⁷⁰ RPM may be used to ensure point of sale services that might be the subject of free-riding whenever such dealer-provided services enhance demand for a manufacturer's product and are susceptible to free-riding (because, for example, dealers are in located within close proximity of each other).⁷¹ RPM may provide an optimal means of ensuring dealer performance of unspecified agreements whenever dealer activities would enhance the attractiveness of a manufacturer's offerings, and the quality-enhancing activities are difficult to delineate in advance or to monitor.⁷² RPM may facilitate entry whenever a new producer seeks to gain access to or promotion by retail outlets that already stock and provide favorable shelf space to well-established brands.⁷³ Because these various conditions quite often exist, procompetitive rationales for instances of RPM, unlike anticompetitive effects, are frequently plausible. Thus, economic theory predicts that most instances of RPM will be procompetitive, not anticompetitive, and that a rule of per se illegality will have a high error rate.

The empirical evidence on RPM's effects, while somewhat sparse, confirms this prediction. As the *Leegin* majority observed, both a detailed staff report of the FTC's Bureau of Economics⁷⁴ and an investigation of litigated RPM cases⁷⁵ suggest that most instances of RPM are pro- rather than anticompetitive.⁷⁶ While the dissent

⁷⁰ *Id.* at 184-85.

⁷¹ *Id.*

⁷² *Id.* at 185.

⁷³ *Id.*

⁷⁴ THOMAS R. OVERSTREET, JR., *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* (1983).

⁷⁵ Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J. L. & ECON. 263 (1991).

⁷⁶ Overstreet examined RPM's competitive effect by analyzing all FTC RPM cases from mid-1965 through 1982, Overstreet, *supra* note 74, at 63-82, and catalogued existing empirical studies of RPM. *Id.* at 106-63. With respect to the RPM in the FTC cases, which he took to be representative of instances of RPM generally, *id.* at 81, Overstreet concluded that most occurred in markets that could support neither manufacturer nor dealer collusion. *Id.* at 71-76 (discussing lack of manufacturer concentration in markets in which RPM was challenged); *id.* at 80 (“[O]f the 47 cases with data on the number of distributors, over 80 percent involved in excess of 200 dealers. Widespread dealer collusion involving more than 100 (or 200) decision makers seems unlikely to be effective or persistent in the absence of restrictions on entry ... or some mechanism for overt coordination”); *id.* at 81 (concluding that “[i]t is unlikely that there is effective manufacturer collusion featuring RPM in all or even most of these markets” and that “available information also suggests that the use of RPM is unrelated to widespread dealer collusion in most instances”). While he provided a more equivocal summary of his

similarly sought to invoke empirical evidence in support of retaining the rule of per se illegality,⁷⁷ the evidence it cited was inapposite. It consisted of studies purporting to show that prices were higher in “fair trade” states (which, for a period of time, were permitted to declare RPM to be per se legal) than in states that did not provide immunity for RPM. Those studies are not convincing because (1) even the procompetitive accounts of RPM involve higher consumer prices (which induce output-enhancing dealer services), so the existence of such price increases says nothing about the *competitive* effects of RPM;⁷⁸ and (2) fair trade states adopted a rule of per se *legality*, not a rule of reason, for RPM, so the results under fair trade would not necessarily follow from applying the rule of reason to RPM.⁷⁹ It seems, then, that both economic theory and empirical

findings from the survey of empirical studies, *id.* at 163 (“Theory suggests that RPM can have diverse effects, and the empirical evidence suggests that, in fact, RPM has been used in the U.S. and elsewhere in both socially desirable and undesirable ways.”), close examination of those findings suggests that they cannot support the view that RPM is, more often than not, anticompetitive. See Lambert, *Dr. Miles Is Dead*, *supra* note 54, at n. 226 (summarizing the empirical studies Overstreet examined and demonstrating that they do not support the view that anticompetitive instances of RPM dominate).

Ippolito examined the 203 reported RPM cases from 1975 through 1982 and found that allegations of collusion (which one would expect plaintiffs to assert, if there were any basis for doing so) were rare. Only 9.8 percent of the private cases and 13.1 percent of the entire sample of cases included allegations of dealer or manufacturer collusion. Ippolito, *supra* note 75, at 281. By contrast, a large percentage of the cases featured characteristics that were more consistent with procompetitive uses of RPM than with anticompetitive collusion. For example, up to 65 percent of the private cases and up to 68 percent of the government cases involved products for which consumer demand would likely be significantly affected by the provision of “special services” susceptible to free-riding. *Id.* at 282-85. Approximately 43 percent of the private cases and 28 percent of the government cases involved products for which the dealer’s role in product quality determination is important. *Id.* at 285-89. And in 24 of the 28 “simple goods” cases (in which special services are not as likely to be demand-enhancing), the facts were consistent with the use of RPM to enhance dealers’ sales efforts. *Id.* at 289-91. Based on these findings, Ippolito concluded that “service-and sales-enhancing theories, taken together, appear to have greater potential to explain the [RPM] practices” than do collusion-based explanations. *Id.* at 291-92.

⁷⁷ *Leegin*, 551 U.S. at 912 (Breyer, J., dissenting) (citing Hearings on H.R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975)).

⁷⁸ OVERSTREET, *supra* note 74, at 116-17, 160 (observing that higher prices resulting from RPM are consistent with both pro- and anticompetitive effects).

⁷⁹ See Elhauge, *supra* note 1, at 61 (“[T]his empirical evidence addressed the wrong question, because it compared prices in states with per se illegality to prices in states with a rule of per se legality. A rule of per se legality is likely to allow more anticompetitive effects than a rule of reason that remains available to redress anticompetitive forms of the conduct. Thus, the price effects of switching from per

evidence suggest that *Dr. Miles*' automatic condemnation of RPM arrangements is far more likely to generate errors than is the rule of reason approach *Leegin* embraced.

The final decision-theoretic consideration is the magnitude of loss from errors. The *Dr. Miles* rule produced more false convictions (Type I errors) than will *Leegin*'s rule of reason, which will likely tend to reduce errors overall but may raise the incidence of false acquittals (Type II errors). When it comes to antitrust, though, false convictions tend to be produce greater social loss than false acquittals.⁸⁰ When an anticompetitive instance of RPM is improperly approved, social cost (allocative inefficiency) may result from market power that is created or maintained. When a procompetitive instance of RPM is improperly condemned, by contrast, the social cost consists of the immediate benefit foregone by stopping the challenged instance plus any future benefits that are thwarted because of the precedent condemning that particular type of efficient conduct. Whereas the former harm – market power – is generally self-correcting by entry or, in the case of collusion, cheating, the latter harm – economy-wide thwarting of an output-enhancing practice – may be undone only by a court decision (or legislative or regulatory development) that corrects the bad precedent.⁸¹ False convictions are therefore more likely to cause greater and more durable harm than false acquittals and should thus be more stridently avoided by the governing liability rule.

The holding of *Leegin* is thus wholly defensible from the perspective of decision theory. Both the “likelihood of error” and “magnitude of loss from expected errors” considerations weigh heavily in favor of rule of reason adjudication. While the “difficulty of administration” consideration might support adherence to the *Dr. Miles* rule, that concern is not so compelling. As noted, the *Dr.*

se illegality to per se legality are not the same as switching from a rule of per se illegality to a rule of reason, which was the relevant issue here.”).

⁸⁰ Easterbrook, *supra* note 22, at 2-3.

⁸¹ As Judge Easterbrook explained:

If the [antitrust] court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.

Id.

Miles rule was actually fairly difficult to implement,⁸² and the *Leegin* majority helpfully constrained decision costs by noting specific factors courts should consider in evaluating instances of RPM and by directing the lower courts to craft a structured rule of reason.⁸³ Decision theory therefore supports the outcome in *Leegin*.

ii. *Weyerhaeuser*

While the *Leegin* majority implicitly adopted a decision-theoretic analysis, the Court's unanimous decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,⁸⁴ which held that predatory bidding plaintiffs must make the same two-pronged showing required of predatory pricing plaintiffs,⁸⁵ embraced decision theory explicitly.

Plaintiff Ross-Simmons and defendant Weyerhaeuser, which both operated hardwood lumber sawmills in the Pacific Northwest, regularly bid against each other in purchasing the sawlogs that they processed and sold as finished hardwood lumber. Ross-Simmons accused Weyerhaeuser, which had grown to be substantially larger than Ross-Simmons and was acquiring about 65% of the alder logs available for sale in the region, of "predatory bidding."⁸⁶ Specifically, Ross-Simmons claimed that Weyerhaeuser bought more sawlogs than it needed and bid up the price for sawlogs higher than necessary to attain the quantity it required.⁸⁷ At the same time, Weyerhaeuser did not increase the price of its output; market prices for finished hardwood lumber actually fell.⁸⁸ This created a revenue squeeze: the sawmills' revenues (reflecting market prices of finished hardwood) fell, even as the sawmills' costs (reflecting the unnecessarily high price of the most important input) were rising. After enduring this squeeze for several years, Ross-Simmons shut down its mill completely in 2001.⁸⁹ It then sued Weyerhaeuser for monopolization and attempted monopolization under Sherman Act § 2.⁹⁰

⁸² See *supra* notes 52 - 55 and accompanying text.

⁸³ *Id.*

⁸⁴ 549 U.S. 312 (2007).

⁸⁵ *Id.* at 325-26.

⁸⁶ *Id.* at 316.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 15 U.S.C. § 2. Specifically, Ross-Simmons maintained that Weyerhaeuser had used "its dominant position in the alder sawlog market to drive up the prices for

At trial, Weyerhaeuser proposed a predatory bidding jury instruction that incorporated the predatory pricing elements set forth in the Supreme Court's *Brooke Group* decision.⁹¹ That decision held that a plaintiff complaining of predatory pricing must establish that (1) "the prices complained of [were] below an appropriate measure of its rival's costs,"⁹² and (2) there was "a dangerous probability" at the time of the below-cost pricing that the rival would eventually "recoup[] its investment" in the predation by charging supracompetitive prices.⁹³ Weyerhaeuser maintained that the jury should be instructed that overbidding for sawlogs could constitute anticompetitive conduct only if it resulted in Weyerhaeuser's operating at a loss, and a dangerous probability of its recoupment of losses existed.⁹⁴ The district court rejected the proposed instruction and instead told the jury that it could find an anticompetitive act if it concluded that Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price."⁹⁵ Concluding that Ross-Simmons had proven monopolization, the jury returned a \$26 million verdict, which was trebled to approximately \$79 million.⁹⁶

On appeal, the Ninth Circuit rejected Weyerhaeuser's argument that that *Brooke Group*'s requirements for predatory pricing should similarly apply to predatory bidding claims.⁹⁷ Reasoning that predatory bidding does not necessarily produce the same consumer benefit as predatory pricing (i.e., lower prices for at least the short-term),⁹⁸ the Ninth Circuit concluded that "the concerns that led the *Brooke Group* Court to establish a high standard of liability in the

alder sawlogs to levels that severely reduced or eliminated the profit margins of Weyerhaeuser's alder sawmill competition." *Weyerhaeuser*, 549 U.S. at 316.

⁹¹ 549 U.S. at 317.

⁹² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

⁹³ *Id.* at 224.

⁹⁴ *Weyerhaeuser*, 549 U.S. at 317.

⁹⁵ *Id.* The district court instructed the jury that:

One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

Confederated Tribes of Siletz Indians of Ore. v. Weyerhaeuser Co., 411 F.3d 1030, 1039 n. 30 (9th Cir. 2005) (quoting lower court's instruction to jury).

⁹⁶ *Weyerhaeuser*, 549 U.S. at 317.

⁹⁷ *Weyerhaeuser*, 411 F.3d at 1035-36.

⁹⁸ *Id.* at 1037.

predatory pricing context do not carry over to this predatory bidding context with the same force.”⁹⁹ It held that the *Brooke Group* standards for predatory pricing liability do not apply to claims of predatory bidding.¹⁰⁰

In an 8-0 decision authored by Justice Thomas, the Supreme Court reversed the Ninth Circuit and held that *Brooke Group*’s standard of liability does apply to predatory bidding claims.¹⁰¹ The Court began its analysis by discussing the rationale for the *Brooke Group* standard. That standard is not based on a conclusion that low, but above-cost, pricing can never be anticompetitive.¹⁰² Rather, it reflects a recognition that courts cannot identify and condemn anticompetitive above-cost price cuts without chilling legitimate, procompetitive price cuts. As the Court explained:

The first prong of the [*Brooke Group*] test – requiring that prices be below cost – is necessary because “[a]s a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control.” We were particularly wary of allowing recovery for above-cost price cutting because *allowing such claims could, perversely, “chil[l] legitimate price cutting,”* which directly benefits consumers.¹⁰³

⁹⁹ *Id.* at 1038.

¹⁰⁰ *Id.*

¹⁰¹ *Weyerhaeuser*, 549 U.S. at 317-18.

¹⁰² It is well understood that so-called “limit” pricing, which occurs when a firm with market power sets its prices above its costs but below the profit-maximizing level so as to deter entry, can be anticompetitive. When the dominant firm has lower costs than potential rivals, which will frequently occur because of economies of scale, it can set its prices at a level above its costs—and therefore above predatory levels—but low enough to deter new entrants, perhaps indefinitely. While such pricing may impose competitive harm and injure consumers in the long run, it is simply too difficult for antitrust tribunals to police. As Herbert Hovenkamp has observed, “[n]o court has ever developed a workable test for determining when an above-cost price is anticompetitive.” Hovenkamp, *supra* note 2, at 162. In addition, there is the problem of fashioning a remedy. *Id.* Forcing the defendant to raise its price to the monopoly level to invite new entry poses serious risks to consumers (what if entry never occurs or takes a long time?). *Id.* Alternatively, forcing the defendant to lower its price to competitive levels (i.e., to cost) would make eventual entry even less likely and would “put the court in the position of a regulatory agency, constantly monitoring the dominant firm’s prices to ensure that they stayed near the competitive level.” *Id.*

¹⁰³ *Weyerhaeuser*, 549 U.S. at 319 (emphasis added, citations omitted) (quoting *Brooke Group*, 509 U.S. at 223-24).

The Court thus acknowledged that the *Brooke Group* standard is ultimately concerned with minimizing error costs.

The Court then reasoned that the regulation of predatory bidding, which it took to be “analytically similar” to predatory pricing,¹⁰⁴ raises similar error cost concerns.¹⁰⁵ It noted that because predatory bidding, like predatory pricing, involves a certain, up-front loss and only a speculative, future gain, it will rarely be attempted.¹⁰⁶ A liability rule that made it easy to establish predatory bidding would thus entail a high likelihood of error (i.e., false convictions). Moreover, as in the predatory pricing context, the magnitude of loss from false convictions would be great. As with price-cutting, “[t]here are myriad legitimate reasons – ranging from benign to affirmatively procompetitive – why a buyer might bid up input prices.”¹⁰⁷ For example, the firm might (1) simply miscalculate its input needs; (2) anticipate increased consumer demand for its output; (3) face different efficiencies than its input market rivals (e.g., it may

¹⁰⁴ *Weyerhaeuser*, 549 U.S. at 321. The Court observed that both practices involve an attempt to attain market power – i.e., the power to enhance one’s profits by affecting prices. *Id.* at 319-20. Whereas predatory pricing may permit a firm to attain monopoly power (the power to drive output prices upward by withholding one’s production), predatory bidding may enable a firm to attain monopsony power – the power to drive input prices (and thus the firm’s costs) downward by cutting back on one’s purchases. *Id.* Exercises of both types of market power result in allocative inefficiency – the wealth loss that occurs when resources, because of price distortions, are not directed toward their highest and best uses. *Id.* Moreover, the Court observed, claims of predatory-pricing and predatory-bidding involve “strikingly similar allegations.” *Id.* at 322. A predatory-pricing plaintiff alleges that the defendant reduced the price of its product in order to drive the plaintiff out of business so that the defendant, insulated from selling competition, could then raise its prices above competitive levels. A predatory-bidding plaintiff alleges that the defendant deliberately bid up the price of a key input in order to drive the plaintiff out of business so that the defendant, insulated from buying competition, could then cut back on its input purchases and thereby drive down the price of inputs. Both strategies “logically require firms to incur short-term losses on the chance that they might reap supracompetitive profits in the future.” *Id.*

Despite the similarity of predatory pricing and predatory bidding, Keith Hylton has argued persuasively that predatory bidding poses greater potential for anticompetitive harm. See Keith N. Hylton, *Weyerhaeuser, Predatory Bidding, and Error Costs*, 53 ANTITRUST BULL. 51, 52 (2008). Nonetheless, decision-theoretic considerations (in particular, concerns about error costs) lead Hylton to approve of *Weyerhaeuser*’s holding. *Id.* at 52-53.

¹⁰⁵ *Weyerhaeuser*, 549 U.S. at 323 (“More importantly, predatory bidding mirrors predatory pricing in respects that we deemed significant to our analysis in *Brooke Group*.”).

¹⁰⁶ *Id.* at 323 (“Predatory pricing requires a firm to suffer certain losses in the short term on the chance of reaping supracompetitive profits in the future. A rational business will rarely make this sacrifice. The same reasoning applies to predatory bidding.”).

¹⁰⁷ *Id.*

be able to extract greater value from the input, which would cause it to have a higher reservation price, or it may use a particularly input-intensive production process, which would cause it to demand more inputs); or (4) seek to acquire excess inputs as a hedge against future price increases.¹⁰⁸ A rule that made it easy to punish high bid prices or large purchases of inputs could chill all sorts of procompetitive (or at least benign) conduct, causing significant social loss. This is particularly the case because, as Keith Hylton has observed, the prices generated by firms' unfettered input-bidding produce a tremendous amount of socially valuable information (e.g., predictions about future output demand, expectations concerning future input supply, etc.).¹⁰⁹ Thus, consideration of error costs – a function of a legal rule's likelihood of error and the magnitude of loss from expected errors – supports application in the predatory bidding context of the admittedly stringent *Brooke Group* liability test.

While the *Weyerhaeuser* Court focused solely on error costs and did not explicitly address decision costs, consideration of such costs would only have bolstered its holding. In the context of predatory bidding, the alternative to the *Brooke Group* standard would be something like the jury instruction given by the district court: The defendant is liable if it “purchased more [inputs] than it needed, or paid a higher price for [inputs] than necessary, in order to prevent [its input market rivals] from obtaining the [inputs] they needed at a fair price.”¹¹⁰ This sort of squishy liability rule would open the door to long and costly expeditions to establish the number of inputs “needed,” the price “necessary” to obtain such a quantity, the motives of the defendant in making its bids, and the “fair” price that should have been guaranteed to the defendant's rivals. Thus, *Weyerhaeuser*'s holding effectively minimized the sum of decision and error costs, as decision theory prescribes.

iii. *LinkLine*

Decision theory also played a central role in *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*,¹¹¹ in which the Court held that a monopolization claim cannot arise from a mere “price squeeze” by a vertically integrated firm that possesses monopoly power in the upstream (input) market but is not subject to an antitrust duty to deal with its rivals in the downstream (output)

¹⁰⁸ *Id.*

¹⁰⁹ Hylton, *supra* note 104, at 66-68

¹¹⁰ *Weyerhaeuser* at 317.

¹¹¹ 129 S. Ct. 1109 (2009).

market.¹¹² As Chief Justice Roberts explained in the majority opinion,¹¹³ the holding in *LinkLine* was ultimately dictated by two Supreme Court precedents that themselves incorporated the insights of decision theory. Moreover, independent decision-theoretic concerns bolster the Court's holding.

Plaintiff LinkLine sold DSL Internet service to retail consumers.¹¹⁴ So did defendant AT&T.¹¹⁵ LinkLine, however, did not actually own all the facilities needed to provide DSL service; it leased such facilities from AT&T, its rival in the retail DSL market.¹¹⁶ Antitrust law did not impose a duty on AT&T to lease DSL facilities to its retail rivals, but a federal communications law did: As a condition for a recent merger, the Federal Communications Commission required AT&T to provide access to the leased facilities at a price no greater than the retail price of its DSL service.¹¹⁷ LinkLine was thus AT&T's customer in the upstream wholesale market (leasing an input – access to DSL infrastructure) and its competitor in the downstream retail market (selling the same output, DSL service, to consumers).

LinkLine claimed that AT&T had violated Section 2 of the Sherman Act by engaging in a price squeeze.¹¹⁸ The squeeze occurred because AT&T charged such a high wholesale price for access to its DSL infrastructure, and such a low retail price for the DSL service it sold to customers, that LinkLine found itself excluded from the retail market.¹¹⁹ Observing that price squeeze claims had been recognized by several Circuit Courts of Appeal, the district court denied AT&T's motion for judgment on the pleadings on the price squeeze claim.¹²⁰ It then certified its order for interlocutory appeal on the question of whether the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*,

¹¹² *Id.* at 1120.

¹¹³ Justice Breyer, joined by Justices Steven, Souter, and Ginsburg, filed a concurring opinion that did not dispute the central holding or reasoning of the majority opinion but would have prescribed a different procedural outcome. Specifically, the concurring justices would have allowed the district court, on remand, to consider predatory pricing allegations the plaintiff had asserted in an amended complaint that was never ruled on by the Ninth Circuit (and thus, in the majority's view, was not properly before the Supreme Court). *Id.* at 1124-25 (Breyer, J., concurring).

¹¹⁴ *Id.* at 1115.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.* at 1116 (discussing proceedings in district court).

LLP (“*Trinko*”)¹²¹ bars price squeeze claims where the parties are compelled to deal under the federal communications laws.¹²² The Ninth Circuit affirmed the district court’s denial of AT&T’s motion for judgment on the pleadings, reasoning that price squeeze claims, which were recognized prior to *Trinko* and were not present in that case, remain viable post-*Trinko*.¹²³

In reversing the Ninth Circuit, the Supreme Court reasoned that LinkLine’s price squeeze theory consisted of two components – a high wholesale price and a low retail price – neither of which could constitute an antitrust violation under existing precedents.¹²⁴ A claim based on AT&T’s charging a high wholesale price for access to DSL facilities would be barred by *Trinko*.¹²⁵ That case held that a vertically integrated monopolist has no general duty to deal in the upstream market with its downstream rivals¹²⁶ and that, absent some specific antitrust duty to deal, there can be no antitrust liability for dealing in a shoddy fashion.¹²⁷ The *LinkLine* Court reasoned that if, as *Trinko* held, a firm lacking an antitrust duty to deal faces no antitrust liability for dealing but providing poor service, then such a firm would also not be liable for dealing but charging high prices.¹²⁸ Thus, LinkLine could not succeed against AT&T on the theory that it had charged too high a price for access to DSL facilities that it had no antitrust duty to provide. As for the other component of the alleged price squeeze, any claim based on AT&T’s charging a low retail price for DSL service would be barred by *Brooke Group*,¹²⁹ unless LinkLine established the pre-requisites to predatory pricing liability (i.e., below-cost pricing and a likelihood of recoupment).¹³⁰ Because the complaint before the Supreme Court had not included allegations of predatory pricing at the retail level, AT&T could face no liability on the basis of its low retail prices.¹³¹ The Court therefore concluded that

¹²¹ 540 U.S. 398 (2004).

¹²² *LinkLine*, 129 S. Ct. at 1116.

¹²³ *LinkLine Communications, Inc. v. SBC California, Inc.*, 503 F.3d 876 (9th Cir. 2007).

¹²⁴ *See LinkLine*, 129 S. Ct. at 1120.

¹²⁵ *Id.* at 1119 (“A straightforward application of our recent decision in *Trinko* forecloses any challenge to AT&T’s *wholesale* prices.”) (emphasis in original).

¹²⁶ *Trinko*, 540 U.S. at 408-09.

¹²⁷ *Id.* at 410-11.

¹²⁸ *LinkLine*, 129 S. Ct. at 1120.

¹²⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

¹³⁰ *Id.* at 222-24 (positing requirements for predatory pricing claims).

¹³¹ *LinkLine*, 129 S. Ct. at 1120.

[p]laintiffs’ price-squeeze claim ... is ... nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals’ profit margins.¹³²

Because decision theory concerns largely motivated the holdings in *Brooke Group* and *Trinko*, they were central to the Court’s conclusion in *LinkLine*. As explained above, *Brooke Group*’s holding that there can be no predatory pricing liability absent below-cost pricing and a likelihood of recoupment was based not on a belief that above-cost prices can never be anticompetitive but instead on skepticism about the judiciary’s ability to regulate prices that are above-cost, but anticompetitively low, without chilling proconsumer price competition.¹³³ In other words, it arose from a desire to limit error costs. The *Brooke Group* test also constrains decision costs, for inquiries into whether the defendant’s prices are below its costs and whether the market is susceptible to a recoupment period, while complicated, are far less costly for the parties and the court than an inquiry into whether the defendant has attempted to preclude entry by pricing below its profit-maximizing level, which is extremely difficult to ascertain.¹³⁴

Trinko’s holding similarly reflected decision-theoretic considerations. With respect to error costs, the *Trinko* Court observed that a broad rule requiring monopolists to deal with their rivals could impose numerous and costly errors by reducing firms’ incentives to innovate¹³⁵ and encouraging collusion.¹³⁶ A broad forced-dealing rule would also entail high decision costs, for “[e]nforced sharing ... requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited.”¹³⁷ When there is a non-antitrust duty to deal with one’s rivals, imposition of antitrust liability for deficient dealing (unresponsiveness, shoddy service, etc.)

¹³² *Id.*

¹³³ See *supra* notes 102 - 103 and accompanying text.

¹³⁴ Cf. Hovenkamp, *supra* note 2, at 162-64 (discussing difficulty of policing “limit pricing”).

¹³⁵ *Trinko*, 540 U.S. at 407-08 (“Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”).

¹³⁶ *Id.* at 408 (“Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.”).

¹³⁷ *Id.*

would entail both high error costs¹³⁸ and high decision costs.¹³⁹ Thus, both of *Trinko*'s primary holdings – that there is no general antitrust duty to deal with one's rivals and that, when another body of law imposes such duty, there can be no antitrust liability for discharging that duty deficiently – rested upon decision-theoretic concerns. *LinkLine*'s holding, the logical implication of *Brooke Group* and *Trinko*, should therefore be viewed as a product of decision theory.

Dennis Carlton has further explained how the *LinkLine* holding comports with a decision-theoretic approach.¹⁴⁰ He first observes that any procompetitive benefits that would result from recognizing the price squeeze as a form of anticompetitive conduct would be small.¹⁴¹ Most of the time, a vertically integrated monopolist whose upstream product is used in fixed proportions in producing the downstream product will have no incentive to engage in a price squeeze in order to eliminate its rivals in the downstream market. If there are economic (i.e., supracompetitive) profits to be had in the downstream market, the monopolist can capture those profits by simply setting its input price at a level that permits its downstream rivals to stay in business earning a normal (competitive) rate of return but prevents them from earning supracompetitive profits.¹⁴²

¹³⁸ *Id.* at 408 (“The cost of false positives counsels against an undue expansion of §2 liability. One false-positive risk is that [a monopolist’s] failure to provide a service with sufficient alacrity might have nothing to do with exclusion.”).

¹³⁹ *Id.* at 414-15 (“Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. ... An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.”).

¹⁴⁰ See Dennis W. Carlton, *Should “Price Squeeze” Be a Recognized Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271 (2009).

¹⁴¹ *Id.* at 274-76.

¹⁴² Carlton explains:

Firm 1 [the vertically integrated monopolist] cannot gain by driving Firm 2 [its downstream rival] out of the market for *B* [the downstream product]. The reason is that Firm 1 already has all the power it needs, by assumption, to extract the profit from Firm 2 by raising P_A [the price of the input] to just enable Firm 2 to earn a normal rate of return without driving Firm 2 out of business. Firm 1 gains nothing further by destroying Firm 2, even though any sales that Firm 2 would have made would instead be made by Firm 1. Because the increased profits that Firm 1 would earn by so doing would be the same as Firm 2 (assuming that both firms are efficient), and because that profit on Product *B* is “normal,” there is no extra (above normal) profit to be earned. This example is just an illustration of the “one monopoly profit theory” associated with the Chicago School.

Id. at 275.

The monopolist would gain nothing extra by destroying its downstream rivals via a price squeeze; its incremental profit gain in the downstream market would be perfectly offset by its loss of profits in the upstream market. Admittedly, this analysis may not apply in more complex situations, such as when the downstream firm sells a differentiated substitute that constrains the monopolist's pricing and permits the downstream rival to earn some supracompetitive profit.¹⁴³ But in that situation, consumers may or may not be better off with a rule forbidding the monopolist to utilize a price squeeze to eliminate the downstream rival.¹⁴⁴ Consumers could be unharmed, or even benefited, if the monopolist began producing the differentiated substitute (so as to capture its former rival's supracompetitive profits) without having to pay a supracompetitive price for the input.¹⁴⁵ The elimination of double marginalization (the monopolist's charging of a supracompetitive price for the input and the rival's charging of a supracompetitive price for the end product) could end up lowering prices for consumers.¹⁴⁶ Thus, a rule prohibiting price squeezes to preserve a vertically integrated monopolist's downstream rivals promises only speculative, and probably small, procompetitive benefits.

On the other hand, the costs of such a rule would be significant. If, as in *LinkLine*, the vertically integrated monopolist has no antitrust duty to deal with its downstream rival, recognition of a price squeeze theory could create substantial consumer harm.¹⁴⁷ The monopolist could avoid antitrust liability altogether if it simply refused to sell inputs to its downstream rivals, but it would risk antitrust liability if it made such sales at prices that were deemed

¹⁴³ *Id.* at 275-76.

¹⁴⁴ *Id.*

¹⁴⁵ Carlton explains:

If Firm 1 [the vertically integrated monopolist] drives out Firm 2 [the downstream rival that produces a differentiated substitute (Product *B'*) to Firm 1's downstream product (Product *B*)], then even though it may be less efficient than Firm 2 (which will tend to cause price to rise), it may actually lower the price of Product *B'*. The reason has to do with the elimination of double marginalization.

Id. at 276.

¹⁴⁶ *Id.* at 276 (“When Firm 2 [the downstream rival] buys Product *A* [the input] at P_A [the monopoly price], it faces a price that is above the marginal cost of Product *A*, yet P_A is the marginal cost to Firm 2 of an additional unit of Product *A*. In contrast, when Firm 1 [the vertically integrated monopolist] produces an additional unit of Product *B'*, it recognizes that, because it produces Product *A*, the additional cost of Product *A* is not P_A , but the lower marginal cost of *A*.”)

¹⁴⁷ *Id.* at 276-78.

(after the fact) to create an exclusionary price squeeze.¹⁴⁸ Thus, recognition of a price squeeze theory in the absence of an antitrust duty to deal would encourage vertically integrated firms with upstream monopolies to refuse to make any input sales to downstream rivals. Such refusals would create greater consumer harm than would continued input sales at high wholesale prices that created a price squeeze, because an outright refusal to sell the input, unlike sales at “squeezing” wholesale price levels, would deprive consumers of *other products* that incorporate the input and are sold by downstream rivals but not the monopolist.¹⁴⁹

Decision theory therefore counsels rejecting the price squeeze theory of liability in the absence of an antitrust duty to deal. In simple cases, price squeezes create no competitive harm.¹⁵⁰ In more complicated cases, price squeezes may or may not harm consumers, and determining whether there has been consumer harm would require complicated inquiries into the relative efficiencies of the monopolist versus its purportedly excluded rival, the magnitude of double marginalization, etc.¹⁵¹ Moreover, creating price squeeze liability absent a duty to deal would simply encourage the vertically integrated monopolist to raise the price of its downstream product (so as to ensure a sufficient margin for its rivals) or to stop selling its

¹⁴⁸ *Id.* at 276 (“In the absence of a duty to deal, Firm 1 would have no duty to provide Product A as an input to Firm 2, but if it did so, it would be subject to potential liability if the prices that it charged for Product A and Product B excluded Firm 2 from the market for Product B.”).

¹⁴⁹ Carlton offers the following example:

Suppose that Firm 2 [the downstream firm] uses Product A [the monopoly input] to produce, in addition to Product B [the downstream product the monopolist also produces], some Product C that Firm 1 [the monopolist] cannot produce. Firm 2 buys Product A, uses it to produce Product C as well as Product B and this benefits consumers who otherwise would be forced to do without Product C. Suppose now that Firm 2 can profitably produce Product C but not Product B at the current price for Product A. A price squeeze doctrine would permit Firm 2 to complain that it is subject to a price squeeze on Product B. Firm 1 could respond to this liability threat by increasing the price of Product B. This would be bad for consumers, at least in the short run Firm 1 could also avoid liability simply by refusing to deal with Firm 2. If it did so, it would deprive consumers of Product C, creating consumer harm at the same time that it avoids antitrust liability. Thus, there is the increased risk of significant harm created by the incentive to avoid antitrust liability if there is a price squeeze doctrine.

Id. at 277.

¹⁵⁰ See *supra* notes 141 - 142 and accompanying text.

¹⁵¹ See *supra* notes 143 - 146 and accompanying text.

input to downstream rivals.¹⁵² Both outcomes threaten substantial consumer harm. Accordingly, it is simply not “worth it” to recognize a price squeeze theory of liability in the absence of an antitrust duty to deal, even if price squeezes may, on occasion, cause anticompetitive harm.¹⁵³

iv. *Independent Ink*

The Court’s unanimous decision in *Illinois Tool Works Inc. v. Independent Ink, Inc.*,¹⁵⁴ which rejected the view that a tying defendant’s possession of a patent on its tying product gives rise to a presumption that the defendant has market power in the tying product market,¹⁵⁵ greatly reduced error costs in tying cases involving patented tying products and is thus consistent with a decision-theoretic approach. Moreover, in expressly rejecting a

¹⁵² See *supra* notes 147 - 149 and accompanying text.

¹⁵³ Erik and Herbert Hovenkamp have argued for recognition of a limited price squeeze theory when facts suggest that the monopolist utilized the price squeeze “to prevent the smaller [downstream] rival from integrating upstream into the defendant’s monopolized primary market.” Erik N. Hovenkamp & Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 ARIZ. L. REV. 273, 299 (2009). They explain their recommended rule as follows:

Defendants should enjoy a safe harbor, or per se legality, when the margin between the wholesale price to the rival and the output price of the finished product is greater than the total (fixed + variable) processing costs that the defendant incurs for production between the two stages. ... If the margin between the defendant’s price for the upstream input to the rival and the defendant’s own second-stage output price is below either the defendant’s average total or the average variable cost of intervening production, then some further inquiry may be necessary. The most likely explanations are joint costs (economies of scope) or price discrimination, in which cases we would not find liability, and we would not force an antitrust tribunal to assume the regulator’s role of allocating fixed costs among multiple products. Liability is appropriate in the relatively uncommon situation when a margin squeeze has clearly been created by the dominant firm in order to prevent the smaller rival from integrating into the defendant’s monopolized primary market.

Id. at 298-99. While evaluation of the Hovenkamps’ proposed liability rule would require empirical data on the incidence, success rate, and cost of price squeezes aimed at preventing upstream integration, it would be surprising if the complicated liability rule they propose, which would impose high decision costs to police a situation that they concede is “relatively uncommon,” proved to be justified on decision-theoretic grounds.

¹⁵⁴ 547 U.S. 28 (2006). Justice Alito, who was sworn in after the oral argument in *Independent Ink*, did not participate in the decision.

¹⁵⁵ *Id.* at 31.

compromise position advocated by a group of “post-Chicago” antitrust commentators,¹⁵⁶ the *Independent Ink* Court further recognized the limits of antitrust.

Tying – selling one’s monopoly product (the “tying” product) on the condition that the buyer also purchase a separate “tied” product – is currently governed by a quasi-per se rule. Under that rule, a tie-in arrangement is per se illegal as long as (1) the tie-in involves multiple products (as opposed to a single product consisting of multiple parts), (2) the seller has market power over the tying product, and (3) the tie-in affects a “not insubstantial” amount of commerce in the tied product market.¹⁵⁷ Relying on a Supreme Court dictum that “if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power,”¹⁵⁸ the plaintiff in *Independent Ink* had simply assumed that the defendant, whose tying product consisted of patented printer technology,¹⁵⁹ possessed tying market power, so that the second element was satisfied.¹⁶⁰ The district court granted summary judgment in favor of the defendant on the ground that the plaintiff, which had presented no evidence defining the tying product market or establishing the defendant’s power within it, had failed to establish tying market power.¹⁶¹ Citing the aforementioned Supreme Court dictum, the Federal Circuit reversed on the ground that tying market power should be presumed in light of the defendant’s possession of patents on the tying product.¹⁶² The narrow issue before the Supreme Court was thus whether a presumption of tying market power will arise when the defendant holds a patent on the tying product. Consistent with view of antitrust scholars,¹⁶³

¹⁵⁶ *Id.* at 43-45.

¹⁵⁷ See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-17 (1984). Importantly, this last element does not require that the tie-in cause substantial foreclosure of marketing opportunities in the tied product market; rather, it must simply affect more than a *de minimis* dollar volume of commerce in the tied market. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501 (1969).

¹⁵⁸ *Jefferson Parish*, 466 U.S. at 16.

¹⁵⁹ The tied product was defendant’s unpatented ink. The ink market was competitive. *Independent Ink*, 547 U.S. at 31-32.

¹⁶⁰ *Id.* at 32, 46.

¹⁶¹ *Independent Ink, Inc. v. Trident, Inc.*, 210 F. Supp.2d 1155, 1167, 1173, 1177 (C.D. Cal. 2002).

¹⁶² *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 393 F.3d 1342, 1351 (Fed. Cir. 2005).

¹⁶³ See 10 P. AREEDA, H. HOVENKAMP, & E. ELHAUGE, *ANTITRUST LAW* ¶ 1737a (“[T]here is no economic basis for inferring any amount of market power from the

Congress,¹⁶⁴ and the federal antitrust regulators,¹⁶⁵ the Court held that the mere possession of a patent on a tying product does not confer market power over the tying product market.¹⁶⁶

From the standpoint of decision theory, the merits of *Independent Ink*'s holding are obvious. The market power presumption the Court rejected was, put bluntly, an error cost machine. Patents are ubiquitous; market power is not. A great many – perhaps most – products incorporating some patented technology are sold in competitive markets.¹⁶⁷ Accordingly, the market power presumption regularly deemed the “tying market power” element of a tying claim to be satisfied when, in fact, it was not. To the extent the element was designed to screen out non-meritorious tying claims (and why impose it otherwise?), the market power presumption rendered the element largely ineffective. In jettisoning the presumption, the Supreme Court thus substantially reduced the number of false positives its tying doctrine generates and the social losses associated with those mistakes. While elimination of the market power

mere fact that the defendant holds a valid patent.”); Burchfiel, *Patent Misuse and Antitrust Reform: “Blessed be the Tie?”*, 4 HARV. J. L. & TECH. 1, 57, and n. 340 (1991) (noting that the market power presumption has been extensively criticized and citing sources); 1 H. HOVENKAMP, M. JANIS, & M. LEMLEY, IP AND ANTITRUST § 4.2a (2005 Supp.) (“[C]overage of one’s product with an intellectual property right does not confer a monopoly”); W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 374 (2003).

¹⁶⁴ See 35 U.S.C. § 271(d)(4), (5) (amending patenting laws to mandate proof of market power in the tying product in the patent misuse context).

¹⁶⁵ See U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (Apr. 6, 1995) (enforcement agencies will “not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner”).

¹⁶⁶ The Court observed that the presumption of market power over a patented product first arose in a patent misuse case, *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917), “migrated” from patent law to antitrust law (at the Government’s urging) in *International Salt Co. v. United States*, 332 U.S. 392 (1947), and was eliminated in the patent context by a 1988 statute, 102 Stat. 4676 (codified at 35 U.S.C. § 271(d)(5)). *Independent Ink*, 547 U.S. at 38-42. The Court reasoned that because “the patent misuse doctrine provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation.” *Id.* at 42. The Court also observed that its conclusion that a tying defendant’s tying market power must be proven, not presumed, even when the defendant possesses a patent on the tying product “accords with the vast majority of academic literature on the subject.” *Id.* at 43, n. 4 (citing authorities cited in note 163, *supra*).

¹⁶⁷ See, e.g., F.M. Scherer, *The Value of Patents and Other Legally Protected Commercial Rights Panel Discussion* (1984), in 53 ANTITRUST L. J. 535, 547 (1985) (“studies suggest that the vast majority of all patents confer very little monopoly power”); John R. Allison et al., *Valuable Patents*, 92 GEO. L. J. 435, 437 (2004).

presumption did raise decision costs (by requiring that plaintiffs actually prove, and courts actually evaluate, claims of tying market power), the increase in decision costs is likely dwarfed by the error cost reduction the Court's holding achieves. Accordingly, *Independent Ink*'s holding makes perfect sense from a decision-theoretic perspective.

The *Independent Ink* Court further displayed a sensitivity to decision theory concerns – and to the limits of antitrust, from which such concerns arise – in rejecting a compromise position on the market power presumption. In seeking to sustain the judgment in its favor, plaintiff Independent Ink presented the Court with a narrower alternative to its requested holding that possession of a patent creates a presumption of market power.¹⁶⁸ That narrower alternative would have created a presumption of tying market power when a defendant with a patent on its tying product imposes a “requirements tie,” mandating that tying product purchasers also purchase their requirements of unpatented complements (e.g., unpatented ink for a patented printer) from the defendant.¹⁶⁹ As Post-Chicago scholars Barry Nalebuff, Ian Ayres, and Lawrence Sullivan explained in an amicus brief advocating this narrower holding, the presumption of tying market power in cases involving patented tying products and requirements ties would enable antitrust to police the use of tie-ins to price discriminate and extract additional consumer surplus by metering consumer demand for the tying product.¹⁷⁰ Nalebuff, Ayres, and Sullivan argued that such price discrimination and surplus extraction are anticompetitive effects that are properly addressed by antitrust. The Supreme Court, while acknowledging that metering tie-ins may result in price discrimination and surplus extraction,¹⁷¹ disagreed. Concluding that price discrimination “occurs in fully competitive markets”¹⁷² and that “[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent

¹⁶⁸ *Independent Ink*, 547 U.S. at 43-44.

¹⁶⁹ *Id.* at 44.

¹⁷⁰ See Brief of Professors Barry Nalebuff, Ian Ayres, and Lawrence Sullivan as Amici Curiae in Support of Respondent, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, No. 04-1329, 2005 WL 2427646 (Sept. 28, 2005).

¹⁷¹ The Court cited its own discussion of this matter in *Jefferson Parish*, where it had “discuss[ed] price discrimination of this sort and cit[ed] sources.” *Independent Ink*, 547 U.S. at 44 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984)).

¹⁷² *Id.* at 45 (citing Baumol & Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 ANTITRUST L. J. 661, 666 (2003); 9 PHILLIP AREEDA & HERBERT HOVENKAMP [check], ANTITRUST LAW ¶ 1711 (___ ed.); W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 374-75 (2003)).

with a free, competitive market,”¹⁷³ the Court rejected the narrower holding advocated by Nalebuff, et al.¹⁷⁴ The Court thus made clear that, while it recognizes that price discrimination and additional surplus extraction are possible effects of tying, they are not appropriately deemed *anticompetitive* effects subject to condemnation under the antitrust laws.

This is a salutary acknowledgement of antitrust’s limits. In recent years, Post-Chicago theorists have urged that antitrust pursue not simply the extension of market power but also acts that involve the extraction of additional consumer surplus, even if the acts do not threaten to enhance market power.¹⁷⁵ Price discrimination is one of the surplus-extractive, but not market power-expanding, practices that these scholars would like to police under the antitrust laws.¹⁷⁶ But price discrimination, particularly of the metering variety, frequently enhances overall social welfare by expanding market output,¹⁷⁷ so efforts to constrain it may involve high error costs. Moreover, many of the liability rules the Post-Chicago scholars have proposed for policing price discrimination and surplus extraction are exceedingly difficult to implement, provide little guidance to business planners, and thus raise decision costs while chilling business practices that are procompetitive but may be avoided because of the lack of legal clarity.¹⁷⁸ In acknowledging that requirements tie-ins may result in price discrimination and surplus extraction but are nonetheless “fully consistent with a free, competitive market,”¹⁷⁹ the Supreme Court implied that an extractive effect is not enough to render a practice anticompetitive and seemingly limited antitrust’s domain to acts that could enhance market power. It thereby moved antitrust in a direction decision theory would counsel, a direction that recognizes antitrust’s inherent

¹⁷³ *Independent Ink*, 547 U.S. at 45.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Elhauge, *supra* note 40, at 426-42. Compare Carlton & Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* (cite).

¹⁷⁶ See *id.* at 404-13.

¹⁷⁷ See Benjamin Klein & John Shepard Wiley, Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L. J. 599, 612-13 (2003).

¹⁷⁸ For example, Einer Elhauge’s recently proposed rule for evaluating bundled discounts (so as to police discounts that cause price discrimination and surplus extraction) calls for courts to determine whether the unbundled price exceeds the “but for” single-product price that the defendant would offer absent the discounting scheme. See Elhauge, *supra* note 40, at 468-77. As a practical matter, how is a court to determine but for prices? And how can a bundled discounter be assured that a judge or jury will not deem its unbundled price to exceed the but for level? This complicated, vague rule could not help but chill bundled discounting.

¹⁷⁹ *Independent Ink*, 547 U.S. at 45.

limits.

v. *Dagher*

The Court's unanimous decision in *Texaco Inc. v. Dagher*,¹⁸⁰ which held that it is not per se illegal for a lawfully constituted joint venture to set the price of its products¹⁸¹ and clarified that the "ancillary restraints" doctrine applies only to restraints on non-venture activities,¹⁸² coheres with decision theory in that it promises to reduce the error and decision costs associated with challenges to the business practices of competitor joint ventures.

In 1998, gasoline companies Texaco and Shell formed a joint venture, Equilon Enterprises, that combined the companies' downstream operations in the refining and marketing of gasoline in the western United States.¹⁸³ The formation of Equilon, which was approved by the Federal Trade Commission (subject to certain divestments and other modifications) and the attorneys general of California, Hawaii, Oregon, and Washington,¹⁸⁴ allowed Texaco and Shell to take advantage of numerous synergies and productive efficiencies.¹⁸⁵ The gasoline Equilon developed was sold to downstream purchasers under the original Texaco and Shell brand names, but Equilon charged a uniform price for its gasoline (whether branded Texaco or Shell) within each geographic market.¹⁸⁶ After Equilon had commenced operation, a class of Texaco and Shell service station owners sued Texaco and Shell, alleging that they had engaged in per se illegal horizontal price-fixing by charging a single price for Equilon's Texaco and Shell branded gasoline.¹⁸⁷ Notably, the plaintiffs chose not to pursue a rule of reason claim against the gasoline companies.¹⁸⁸

¹⁸⁰ 547 U.S. 1 (2006).

¹⁸¹ *Id.* at 8 (holding that "the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the Sherman Act").

¹⁸² *Id.* at 7 ("Th[e] [ancillary restraints] doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities.").

¹⁸³ *Id.* at 3-4.

¹⁸⁴ *Id.* at 4.

¹⁸⁵ *Id.* at 6, n.1.

¹⁸⁶ *Id.* at 3-4.

¹⁸⁷ *Id.* at 4.

¹⁸⁸ *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108, 1113 (9th Cir. 2004) (hereinafter "*Saudi Refining*") ("The plaintiffs disclaimed any reliance on the traditional 'rule of reason' test, instead resting their entire claim on either the per se rule or a 'quick look' theory of liability."), rev'd in part, *Dagher*, 547 U.S. 1 (2006).

The district court granted summary judgment in favor of Texaco and Shell.¹⁸⁹ It concluded that the rule of reason must govern the claim asserted and that plaintiffs, by eschewing a rule of reason analysis, had failed to raise an issue for trial.¹⁹⁰ The Ninth Circuit reversed.¹⁹¹ It contended that the defendants had not proven that Equilon’s uniform pricing of Shell and Texaco branded gasoline was an ancillary trade restraint, because they had failed to show that such unified pricing was reasonably necessary to permit Equilon to achieve its legitimate ends.¹⁹² Absent such proof, the Ninth Circuit reasoned, there should be no “exception” to the generally applicable per se rule against horizontal price-fixing.¹⁹³

Reversing the Ninth Circuit, the Supreme Court ruled that a lawfully constituted joint venture’s pricing of its own products is not per se illegal.¹⁹⁴ As long as the joint venture is not a mere sham, the venture’s pricing decision cannot constitute horizontal price-fixing (i.e., price-fixing among competitors) for the simple reason that the co-venturers are not *competitors* when it comes to the activity of their joint venture.¹⁹⁵ Accordingly, the venture’s pricing must be challenged under the rule of reason, not under the per se rule applicable to horizontal price-fixing.¹⁹⁶ With respect to the Ninth Circuit’s analysis under the ancillary restraints doctrine, the Court clarified that the doctrine (which holds that competitor trade restraints that might otherwise be illegal may escape liability if they are reasonably necessary to achieve procompetitive integration),¹⁹⁷ governs only “the validity of restrictions imposed ... on *nonventure* activities”;¹⁹⁸ the doctrine has no applicability “where the business practice being challenged involves the core activity of the joint venture itself – namely, the pricing of the very goods produced and sold by [the joint venture].”¹⁹⁹

Had it been allowed to stand, the Ninth Circuit’s analysis would have generated tremendous error costs. If a lawfully constituted joint venture’s pricing of its products – as “core” an activity of a business

¹⁸⁹ See *Dagher*, 547 U.S. at 4.

¹⁹⁰ *Id.*

¹⁹¹ *Saudi Refining*, 369 F.3d at 1122-25.

¹⁹² *Id.* at 1121-22.

¹⁹³ *Id.* at 1116 (“We think the exception the defendants seek is inconsistent with the Sherman Act as it has been understood to date.”).

¹⁹⁴ *Dagher*, 547 U.S. at 8.

¹⁹⁵ *Id.* at 6.

¹⁹⁶ *Id.* at 7.

¹⁹⁷ See generally Hovenkamp, *supra* note 17, at 194-96.

¹⁹⁸ *Dagher*, 547 U.S. at 8 (emphasis added).

¹⁹⁹ *Id.* at 7-8.

venture as one can conceive – were subject to the per se rule, then virtually every post-formation decision of the venture would be subject to attack. Whenever the venture made a decision that could be construed as involving a reduction of some output, a setting of price, a judgment about where to market (or not market) the venture’s products, or a judgment about which features to include in (or exclude from) the venture’s product or service offerings, the venture participants would risk automatic antitrust liability. To avoid application of the per se rule – which applies to horizontal agreements to reduce output, to fix price, to divide markets, and to refuse to compete on product features²⁰⁰ – the venturers would have to show that the decision at issue was necessary for the venture to accomplish its objective. If they failed to do so, they would face immediate liability and be subject to treble damages. Such an approach could not help but chill joint venture activity. And, because competitor joint ventures frequently benefit consumers by enabling participants to (among other things) create new products, enhance productive efficiency by exploiting economies of scope and scale, achieve synergies through the pooling of complementary assets or skills, and lower transaction costs,²⁰¹ such a chilling effect would be costly indeed. The *Dagher* Court’s holding and its clarification of the ancillary restraints doctrine therefore rein in a particularly costly species of Type I error.

In addition, *Dagher* is likely to reduce the decision costs associated with challenges to the conduct of competitor joint ventures. By insulating the core business decisions of a lawfully constituted joint venture, the decision forces consolidation of concerns about joint activity into the earlier proceeding on the joint venture’s legality. It avoids multiple proceedings every time the joint venture engages in some core activity that could be construed as unnecessary to the venture’s ultimate objective (and thus, under the Ninth Circuit’s view, non-ancillary).

b. Decisions Concerning Procedures and Immunities

Like its decisions on substantive antitrust liability rules, the Roberts Court’s three decisions on antitrust procedures and immunities have reflected decision theory concerns.

i. Credit Suisse

²⁰⁰ See generally WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 143, 235 (2009-2010 ed.) (cataloguing horizontal restraints deemed to be per se illegal).

²⁰¹ See generally Hovenkamp, *supra* note 17, at 194, 201-03, 205, 211-14 (describing various benefits of competitor joint ventures).

Justice Breyer, who has long advocated crafting antitrust rules in light of the limits of antitrust,²⁰² authored the majority opinion in *Credit Suisse Securities (USA) LLC v. Billing*.²⁰³ It should come as no surprise, then, that the Court explicitly embraced decision-theoretic reasoning in holding that antitrust challenges to certain securities marketing practices were implicitly precluded by the federal securities laws.²⁰⁴

The plaintiffs in *Credit Suisse* were investors who had purchased newly issued securities in initial public offerings (“IPOs”).²⁰⁵ They claimed that the defendants, various investment banks that had formed underwriting syndicates to help issuing companies sell their newly issued securities, had unlawfully agreed with one another not to sell shares of a popular new issue to any buyer who would not commit to (1) buy additional shares of the security in the future at escalating prices; (2) buy less desirable securities, in addition to the popular issue; or (3) pay the underwriter an unusually high commission on subsequent security purchases.²⁰⁶ The defendant banks moved to dismiss the complaint on the ground that the federal securities laws impliedly preclude application of the antitrust laws to the conduct in question.²⁰⁷ The district court agreed and dismissed the claim,²⁰⁸ but the Second Circuit reversed.²⁰⁹

In reversing the Second Circuit, the Supreme Court began by reviewing its precedents addressing the relation of the securities laws to the antitrust laws.²¹⁰ Those precedents, the Court observed,

²⁰² See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 284 (1st Cir. 1983) (Breyer, J.) (“Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, under-cutting the very economic ends they seek to serve. . . . [W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up discouraging legitimate price competition.”); *Town of Concord, Massachusetts v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) (“[A]ntitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot take account of every complex economic circumstance or qualification.”).

²⁰³ 551 U.S. 264 (2007).

²⁰⁴ *Id.* at 285.

²⁰⁵ *Id.* at 267.

²⁰⁶ *Id.*

²⁰⁷ See *id.* at 270.

²⁰⁸ *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp.2d 497, 524-25 (S.D.N.Y. 2003).

²⁰⁹ *In re Initial Public Offering Antitrust Litigation*, 426 F.3d 130, 170, 172 (2d Cir. 2005).

²¹⁰ *Credit Suisse*, 551 U.S. at 271-75 (discussing *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Gordon v. New York Stock Exchange, Inc.*, 422

establish that the securities laws implicitly preclude an antitrust complaint when there is a “clear repugnancy” between the complaint and the securities laws or, put differently, when the two are “clearly incompatible.”²¹¹ The precedents also prescribe four factors that are critical in determining whether such incompatibility exists: (1) whether the challenged practice lies squarely within an area of financial market activity that the securities laws seek to regulate; (2) whether an administrative body has legal authority to supervise the practice; (3) whether the regulator has, in fact, exercised its regulatory authority; and (4) whether permitting the antitrust action would risk conflicting guidance, requirements, or standards.²¹² With respect to the complaint before it, the Court concluded that no one could “reasonably dispute” that the first three factors favored implicit preclusion:²¹³ the activities in question lay squarely within the sphere the securities laws regulate;²¹⁴ the Securities and Exchange Commission (“SEC”) had statutory authority to supervise the challenged activities;²¹⁵ and the SEC had, in fact, exercised its authority to regulate the type of conduct at issue.²¹⁶ The only question before the Court, then, was whether the plaintiff’s complaint threatened to create a conflict between antitrust and securities law, or, in the Court’s words, “Is an antitrust suit such as this likely to prove practically incompatible with the SEC’s administration of the Nation’s securities laws?”²¹⁷

The plaintiffs maintained that their lawsuit (and others like it) could not be incompatible with securities law concerns because the SEC had already disapproved of the complained of activities and would likely continue to do so into the foreseeable future.²¹⁸ Thus, they contended, there could be no significant downside to allowing them to pursue their antitrust claims. In rejecting that view and concluding that maintenance of the antitrust action at issue would be incompatible with the securities laws, the Court made little effort to

U.S. 659 (1975); and *United States v. National Ass’n of Securities Dealers, Inc.*, 422 U.S. 694 (1975)).

²¹¹ *Credit Suisse*, 551 U.S. at 275.

²¹² *Id.* at 275-76.

²¹³ *Id.* at 276.

²¹⁴ *Id.* (“[T]he activities in question here – the underwriters’ efforts jointly to promote and to sell newly issued securities – is central to the proper functioning of well-regulated capital markets.”).

²¹⁵ *Id.* (“[T]he law grants the SEC authority to supervise all of the activities here in question.”).

²¹⁶ *Id.* at 277 (“[T]he SEC has continuously exercised its legal authority to regulate conduct of the general kind now at issue.”).

²¹⁷ *Id.*

²¹⁸ *Id.* at 278.

identify specific points of conflict between the securities and antitrust laws. Instead, it invoked decision theory concerns, comparing the expected error costs of permitting the action at issue (and others like it) to the expected error costs of deeming such actions to be implicitly precluded.²¹⁹

Contrary to the plaintiffs' claim that there could be no downside to antitrust lawsuits attacking anticompetitive conduct of which the SEC had already disapproved, the Supreme Court saw a cause for concern: potential antitrust condemnation of socially beneficial securities marketing practices (or, in decision theory lingo, Type I errors).²²⁰ Even if one assumes that the SEC has disapproved of the complained of conduct and will likely continue to do so in the future, as the Court did, antitrust actions based on securities marketing practices are prone to generate false convictions.²²¹ The Court pointed to four factors that create potential for such errors: (1) the fine distinctions between permissible and impermissible conduct in the securities marketing context;²²² (2) the need for securities-related expertise, which generalist courts lack, to draw these distinctions and to determine whether, in fact, the SEC's disapproval of a complained of practice is likely to remain permanent;²²³ (3) the fact that the evidence presented in antitrust lawsuits arising from securities marketing practices would likely permit contradictory, but mutually reasonable, inferences;²²⁴ and (4) the high risk of inconsistent court results as antitrust plaintiffs "bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries."²²⁵ It asserted that those factors, taken together, "make mistakes unusually likely" in this context.²²⁶

²¹⁹ *Id.* at 279-84.

²²⁰ *Id.* at 279-82.

²²¹ *See id.*

²²² *Id.* at 279 ("[O]nly a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on respondents' theory, should be open to antitrust attack).").

²²³ *Id.* at 280-81 ("[T]o distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to services provided, a commission is 'excessive,' indeed, so 'excessive' that it will remain *permanently* forbidden. And who but the SEC itself could do so with confidence?") (internal citation omitted).

²²⁴ *Id.* at 281 ("[E]vidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical.").

²²⁵ *Id.*

²²⁶ *Id.* at 282 ("This kind of problem exists to some degree in respect to other antitrust lawsuits. But here the factors we have mentioned make mistakes unusually likely (a matter relevant to Congress' determination of which institution should regulate a particular set of market activities).").

Together these factors mean there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, *i.e.*, results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).²²⁷

Having thus disposed of the first part of the formula for estimating the cost of Type I errors – the likelihood of false convictions that would chill conduct that should be legal – the Court turned to the second component: the magnitude of losses from such mistakes. It observed that false positives would create significant social costs in the context at hand, for “the role that joint conduct plays in respect to the marketing of IPOs, along with the important role IPOs themselves play in relation to the effective functioning of capital markets, means that the securities-related costs of mistakes is unusually high.”²²⁸ The Court thus concluded that the error costs of permitting the antitrust action at issue (and others like it) would likely be high.

The Court then compared those expected costs to the expected error costs of deeming the action to be implicitly precluded.²²⁹ Any errors resulting from such a decision would, of course, consist of Type II errors – false acquittals of practices that would have been condemned had antitrust actions been permitted. The Court concluded that the costs associated with such errors would likely be relatively small. First, if the conduct is already forbidden by the SEC, as the plaintiffs assumed,²³⁰ either it or private investors could bring securities lawsuits to stop the offensive practices.²³¹ Moreover,

²²⁷ *Id.*

²²⁸ *Id.* at 282.

²²⁹ *Id.* at 283-84.

²³⁰ *See supra* note 218 and accompanying text.

²³¹ *Credit Suisse*, 551 U.S. at 283 (“For one thing, the SEC actively enforces the rules and regulations that prohibit the conduct in question. For another, ... investors harmed by underwriters’ unlawful practices may bring lawsuits and obtain damages under the securities law.”).

there is less need for antitrust to intervene to thwart anticompetitive practices because the securities laws already require the SEC “to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations.”²³² Accordingly, antitrust liability in this context adds little social value, and the costs of reining in its reach so that it fails to capture some anticompetitive conduct would be relatively low.²³³

It was thus an analysis of error costs – a comparison of the costs of too much antitrust intervention versus too little – that led the Court to conclude that there was an inevitable conflict between the sort of antitrust action at issue and the effective implementation of the securities laws.²³⁴ While the Court did not expressly analyze likely decision costs, consideration of such costs would only have bolstered its conclusion, for a legal regime permitting plaintiffs to choose between two types of lawsuits (involving very different substantive doctrine, procedural rules, and damages formulae) in challenging a single set of business practices would almost certainly involve higher decision costs than a regime that dealt with such practices under a single body of law. Thus, the reasoning of *Credit Suisse* explicitly embraces decision theory’s error cost analysis, and the holding of the case comports with decision theory as a whole.

ii. *Twombly*

Rivaling *Leegin* as the Roberts Court antitrust decision most perceived to be pro-business, anti-consumer, and radical is *Bell Atlantic Corp. v. Twombly*.²³⁵ *Twombly*’s infamy likely stems from the fact that it dealt with pleading standards, an issue in every lawsuit. And the Supreme Court later upped the ante by expressly extending *Twombly*’s plausibility requirement beyond the antitrust

²³² *Id.*

²³³ *Id.* (observing that “any enforcement-related need for an antitrust lawsuit is unusually small” in this context because SEC involvement “makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior”).

²³⁴ The Court summarized its reasoning as follows:

In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets [high Type I error costs] and by a diminished need for antitrust enforcement to address anticompetitive conduct [low Type II error costs]. Together these considerations indicate a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law.

Id. at 284.

²³⁵ 550 U.S. 544 (2007).

conspiracy context.²³⁶ Putting aside *Twombly*'s effect on pleading standards generally and focusing solely on the decision's implications for antitrust lawsuits, the decision appears to have been largely motivated by, and is wholly consistent with, principles of decision theory.

The narrow issue in *Twombly* was whether a plaintiff adequately pleads the agreement element of a Sherman Act Section 1 claim merely by alleging parallel conduct and asserting that a conspiracy existed.²³⁷ The plaintiffs in the case, consumers of local telecommunications services, sued the defendants, regional telephone companies known as Incumbent Local Exchange Carriers or "ILECs," for allegedly entering two competition-limiting agreements: (1) to impede efforts by Competitive Local Exchange Carriers ("CLECs") to enter the ILECs' markets, and (2) to refrain from entering each others' markets.²³⁸ In attempting to allege these two agreements, the plaintiffs averred that the defendants had uniformly followed the same patterns of opposing CLECs²³⁹ and failing to enter other ILECs' markets.²⁴⁰ The plaintiffs then baldly stated that defendants, having engaged in such parallel conduct, had entered into a contract, combination, or conspiracy.²⁴¹ The problem was that the parallel conduct alleged was as consistent with unilateral conduct as with an agreement: Each ILEC had an independent incentive to oppose CLECs' entrance into its market,²⁴² and each also had an incentive not to disrupt the traditional (pre-1996 Telecommunications Act) market divisions by entering others' markets.²⁴³

Plaintiffs understood that mere parallel conduct and an assertion of conspiracy would not enable them to survive a motion for summary judgment.²⁴⁴ At a minimum, they would have to produce

²³⁶ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²³⁷ *Twombly*, 550 U.S. at 548-49.

²³⁸ *Id.* at 549-51.

²³⁹ *Id.* at 550 (noting that plaintiffs had alleged "that the ILECs 'engaged in parallel conduct' I their respective service areas to inhibit the growth of upstart CLECs").

²⁴⁰ *Id.* at 551 (observing that the ILECs' purported agreements to avoid competing against each other were "to be inferred from the ILECs' common failure" to enter each others' markets).

²⁴¹ *Id.* at 551 (quoting complaint ¶¶ 51, 64); *id.* at 564 ("Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations").

²⁴² *Id.* at 566.

²⁴³ *Id.* at 567-68.

²⁴⁴ *Id.* at 560 ("Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior" to survive a defendant's motion for summary judgment).

evidence tending to exclude unilateral, self-interested conduct as a basis for the ILECs parallel conduct.²⁴⁵ They maintained, though, that they need not set forth facts tending to exclude non-collusive explanations for parallel conduct at the *pleading* stage. In support of that position, they cited the Supreme Court’s statement in *Conley v. Gibson*²⁴⁶ that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”²⁴⁷ Conceding that a literal reading of this statement from *Conley* would prevent dismissal of plaintiffs’ complaint (since they could later prove some set of undisclosed facts that would tend to exclude unilateral action as the explanation for the defendants’ parallel conduct), the Court abrogated *Conley*’s “no set of facts” standard²⁴⁸ and held that a Sherman Act Section 1 complaint should be dismissed if all it alleges is parallel conduct coupled with a bald assertion of conspiracy.²⁴⁹

Twombly’s holding on Section 1 pleading standards comports with decision theory’s overarching prescription to minimize the sum of error and decision costs. In terms of error costs, permitting plaintiffs’ complaint (and others like it) to proceed to discovery would have been disastrous. Both the likelihood and magnitude of errors would have been high because the precedent would have encouraged plaintiffs’ lawyers – who are well aware that antitrust discovery can impose huge costs and that defendants frequently settle antitrust actions to avoid such costs (along with the risk of treble damages) – simply to search out parallel business conduct involving a failure to pursue some business opportunity (such parallel behavior is ubiquitous), baldly assert that there was an “agreement” to engage in such conduct, prepare onerous discovery requests, and hope to extract a settlement. Decision costs also would have been high because unfounded antitrust conspiracy claims would have to be dealt with in costly summary judgment proceedings rather than via relatively cheap motions to dismiss.

Compared to the error and decision costs that would have resulted had the *Twombly* plaintiffs been allowed to proceed with their claim, the error and decision costs created by the Court’s

²⁴⁵ See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

²⁴⁶ 355 U.S. 41 (1957).

²⁴⁷ *Id.* at 45-46.

²⁴⁸ *Twombly*, 550 U.S. at 563 (“[A]fter puzzling the profession for 50 years, [*Conley*’s] famous [‘no set of facts’] observation has earned its retirement.”).

²⁴⁹ *Id.* at 564-70.

holding are likely to be lower. Any errors resulting from the Court's holding will consist of false negatives – i.e., improper dismissals of meritorious conspiracy claims. Because plaintiffs can avoid dismissal under *Twombly* if they allege either an actual agreement or consciously parallel business behavior coupled with facts suggesting that the parallel conduct is more likely a product of agreement than unilateral action,²⁵⁰ the only antitrust conspiracy claims likely to be significantly impeded by *Twombly*'s pleading requirements are those that involve no known agreement and no known “plus factors” suggesting a collusive explanation for parallel conduct. While this is not necessarily an insignificant set of potential collusion claims, it seems likely that pre-complaint investigation of legitimate claims would usually reveal either sufficient facts to allege an actual agreement or economic factors tending to exclude the possibility that the parallel conduct resulted from independent, unilateral action. Moreover, any judgment that a complaint was inadequate under *Twombly* would likely be entered without prejudice, so plaintiffs (and others similarly situated) could continue to monitor the situation and file suit if and when they uncovered facts suggesting an actual agreement or establishing plus factors. Given that cartels are fragile and generally require some policing efforts,²⁵¹ it is likely that plaintiffs monitoring genuine collusion would eventually discover facts that, when pled, would allow meritorious claims to proceed. Thus, the error costs resulting from *Twombly*'s holding, while perhaps not insignificant, are likely less than those that would have resulted had the Supreme Court held as plaintiffs desired. Moreover, the decision costs associated with the *Twombly* rule are likely less than those that would have been imposed under the alternative holding: While *Twombly* may have the effect of forcing multiple complaints and motions to dismiss, it avoids the far greater costs associated with protracted discovery and expensive summary judgment proceedings to dispose of meritless collusion claims based solely on consciously parallel conduct and conclusory conspiracy allegations.

In addition to *Twombly*'s holding on the pleading standards governing antitrust conspiracy claims, another aspect of the decision

²⁵⁰ For example, a plaintiff could avoid dismissal by making an economically plausible assertion that the conduct at issue would not make economic sense for the defendant unless it had reached an understanding with the other firms that they would all follow the same course of conduct. See Elhauge, *supra* note 1, at 10 (“[T]he requisite additional evidence could be provided not only by direct evidence of a conspiracy, but also by evidence that indicates the parallel conduct either was implausible without an explicit agreement or followed common invitations or secret meetings.”).

²⁵¹ See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 (1988) (“Cartels are neither easy to form nor easy to maintain.”).

– one concerning substantive liability standards under Sherman Act Section 1 – similarly comports with decision theory. As Einer Elhauge has observed, *Twombly* clarified a point that “was widely understood before, but surprisingly never quite explicitly stated by prior Supreme Court cases,” namely, “that mere interdependent parallel conduct, or oligopolistic coordination, does not suffice to show an antitrust conspiracy under U.S. law.”²⁵² The Court clarified that point in concluding that no actionable agreement would arise from the ILECs’ uniform decision not to enter each others’ markets but instead to “sit[] tight, expecting their neighbors to do the same thing.”²⁵³

Over the years, prominent antitrust scholars, including Judge Posner and leading treatise co-author Herbert Hovenkamp, have asserted that courts should construe Section 1’s agreement requirement in a more “economic,” less “lawyerly” fashion, so as to capture instances of oligopolistic coordination.²⁵⁴ The key difficulties with such an approach lie in giving guidance to oligopolists about what is allowed and forbidden, and in articulating administrable means by which courts may identify tacit collusion. The first matter is difficult because firms in oligopolistic markets inevitably know, at the time they set their prices, that those prices are interdependent, and it is thus difficult to define a prohibition in a way notifies them of how they must behave.²⁵⁵ The second matter is difficult because (legal) parallel conduct resulting from competition and (illegal) tacit collusion frequently look alike.

Judge Posner proposed that courts determine the existence of actionable tacit collusion by: (1) analyzing the structure of the market at issue to see if it is “propitious for the emergence of collusion”; (2) examining various pieces of economic evidence that indicate whether tacit collusion is in fact occurring; and (3) making, on the basis of these two examinations, a gestalt-like determination as to whether collusion is occurring.²⁵⁶ While it sounds simple enough, implementation of the suggested approach would actually be quite complicated. For example, Posner suggests that courts consider *seventeen* factors in their examination of market structure

²⁵² *Id.* at 9.

²⁵³ *Twombly*, 550 U.S. at 568.

²⁵⁴ See Hovenkamp, *supra* note 2, at 126-36; Posner, *supra* note 11, at 69-93; Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

²⁵⁵ Elhauge, *supra* note 1, at 10; Donald Turner, *The Definition of Agreement Under the Sherman Act*, 75 HARV. L. REV. 655 (1962).

²⁵⁶ Posner, *supra* note 11, at 69.

(step one),²⁵⁷ and he lists *fourteen* factors that would suggest the existence of actual collusion (step two).²⁵⁸ In light of this complexity, Hovenkamp has sought to distance himself from the details of Posner's proposal.²⁵⁹ Yet, he has not offered a workable alternative.²⁶⁰ This is not surprising, for it is well nigh impossible to craft a legal rule that will accurately characterize highly subtle business behavior (i.e., is it tacit collusion, or parallel behavior resulting from common competitive considerations?) while remaining easy to implement.²⁶¹

The upshot is that attempts to police tacit collusion under Section 1 are likely to involve high error costs (as competitive acts that lead to similar business practices are deemed collusive, and firms respond

²⁵⁷ The seventeen factors are: (1) whether the “[m]arket [is] concentrated on the selling side”; (2) whether there is a “fringe of small sellers”; (3) whether there is “[i]nelastic demand at [the] competitive price”; (4) whether “[e]ntry takes a long time”; (5) whether the “[b]uying side of [the] market [is] unconcentrated”; (6) whether the product is standardized; (7) whether the product is durable; (8) whether “[t]he principal firms sell at the same level in the chain of distribution”; (9) whether “[p]rice competition [is] more important [in the relevant market] than other forms of competition”; (10) whether there is a “[h]igh ratio of fixed to variable costs”; (11) whether the firms face “[s]imilar cost structures and production processes”; (12) whether “[d]emand [is] static or declining over time”; (13) whether “[p]rices can be changed quickly”; (14) whether “[s]ealed bidding” is used; (15) whether the “[m]arket is local”; (16) whether the firms in the market employ “[c]ooperative practices”; and (17) “[t]he industry’s antitrust ‘record.’” *Id.* at 69–79 (typeface altered).

²⁵⁸ The fourteen factors are: (1) whether the firms in the market have “[f]ixed relative market shares”; (2) whether there is “[m]arketwide price discrimination”; (3) whether the firms exchange price information; (4) whether there are “[r]egional price variations”; (5) whether the firms have submitted “identical sealed bids”; (6) whether there has been an abrupt change of price, output, or capacity in the market; (7) whether there is “[i]ndustrywide resale price maintenance”; (8) whether the market shares of industry leaders are declining; (9) the “[a]mplitude and fluctuation of price changes”; (10) the elasticity of demand at the market price; (11) the “[l]evel and pattern of profits” among market participants; (12) whether “[m]arket price [is] inversely correlated with [the] number of firms or elasticity of demand”; (13) the use of “basing-point pricing”; and (14) the existence of “exclusionary practices.” *Id.* at 79–93 (typeface altered).

²⁵⁹ See Hovenkamp, *supra* note 2, at 133 (observing that Posner’s approach toward identifying markets conducive to collusion is “more difficult for courts to manage”); *id.* at 134 (arguing that Posner’s approach to identifying the existence of tacit collusion would “pose formidable administrative difficulties”).

²⁶⁰ See Thomas A. Lambert, *Tweaking Antitrust’s Business Model*, 85 TEX. L. REV. 153, 171 (2006) (discussing Hovenkamp’s discussion of the limitations of the Posner proposal and his failure to provide an alternative means of identifying facilitating devices that are imposed unilaterally).

²⁶¹ See *id.* (“When it comes to tacit collusion, [Hovenkamp] cannot have his cake and eat it too: he must either approve the sort of complicated inquiry Posner proposes or fall back on the ‘lawyerly’ understanding of agreement, which is admittedly inaccurate but easy to work with.”)

by altering their behavior from the competitive norm) and high decision costs (as generalist courts are forced to grapple with highly subtle, economically complex, multi-faceted tests such as those proffered by Judge Posner). Sticking to the traditional, “lawyerly” understanding of agreement may well allow some collusion to go unpunished. But collusion is always difficult to sustain,²⁶² and many facilitating practices – any that are adopted via agreement – are already regulated under the lawyerly understanding of agreement,²⁶³ so the costs of false negatives are not likely to be that great. Thus, the Court’s now-explicit rejection of oligopolistic coordination as an “agreement” for purposes of Sherman Act Section 1 likely reduces the sum of decision and error costs. It seems, then, that both the express holding of *Twombly* and its implicit clarification of what constitutes a horizontal agreement are consistent with decision theory.

iii. *American Needle*

The Roberts Court’s most recent antitrust decision, *American Needle, Inc. v. National Football League*,²⁶⁴ resulted in the first Supreme Court judgment in favor of an antitrust plaintiff since 1992.²⁶⁵ Given that the Court cut back on the scope of an antitrust immunity, thereby permitting more antitrust actions to proceed to discovery, the decision might at first seem inconsistent with decision theory’s focus on the limits of antitrust. But, as Judd Stone and Joshua Wright have recently explained, *American Needle* actually moves antitrust in a direction consistent with decision theory’s instruction to minimize the sum of decision and error costs.²⁶⁶

At issue in *American Needle* was whether a vote by the members of the National Football League (“NFL”) to authorize an action by a corporate entity they created and controlled, the National Football League Properties (“NFLP”), could constitute a contract, combination, or conspiracy for purposes of Sherman Act Section

²⁶² See *supra* note 251 and accompanying text.

²⁶³ See Lambert, *supra* note 260, at 171 (observing that courts routinely condemn cartel facilitators adopted by agreement, “reasoning that the agreement element is satisfied by the agreement to employ the facilitator”).

²⁶⁴ 130 S. Ct. 2201 (2010).

²⁶⁵ Prior to *American Needle*, the last Supreme Court decision in favor of an antitrust plaintiff was *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 45 (1992).

²⁶⁶ See Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! – Some Implications of American Needle v. NFL*, 2009-2010 CATO SUPREME CT. REV. 369.

1.²⁶⁷ In 1963, the members of the NFL established NFLP to develop, license, and market their intellectual property.²⁶⁸ For almost four decades, NFLP granted non-exclusive licenses, permitting multiple manufacturers and vendors to produce and sell team-branded apparel.²⁶⁹ Plaintiff American Needle received such a non-exclusive license.²⁷⁰ In 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. a 10-year exclusive license to produce and sell trademarked headwear for the NFL teams.²⁷¹ NFLP then declined to renew American Needle's nonexclusive license. American Needle sued, claiming that the agreements between the NFL, its teams, NFLP, and Reebok violated Sections 1 and 2 of the Sherman Act.²⁷²

In defending against American Needle's Section 1 claim, the defendants asserted that they were incapable of conspiring "because they are a single economic enterprise, at least with respect to the conduct challenged."²⁷³ The district court agreed, holding that the NFL, NFLP, and respective NFL teams qualified as a "single entity" and therefore could not conspire in violation of Section 1.²⁷⁴ On appeal, the Seventh Circuit affirmed, carefully limiting its holding to whether the defendants were acting as a single entity with respect to the particular conduct at issue, the licensing of teams' intellectual property.²⁷⁵ Both American Needle and, somewhat surprisingly, the defendants then petitioned the Supreme Court for writ of certiorari, the former on grounds that the defendants were capable of conspiring with respect to the challenged conduct²⁷⁶ and the latter on grounds that the Seventh Circuit should have held more broadly that the NFL (and other sports leagues) act as a single entity generally, not just

²⁶⁷ *American Needle*, 130 S. Ct. at 2208.

²⁶⁸ *Id.* at 2207.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *American Needle, Inc. v. New Orleans La. Saints*, 469 F. Supp.2d 941, 943 (Ct? 2007).

²⁷⁵ *American Needle, Inc. v. National Football League*, 538 F.3d 736, 743-44 (7th Cir. 2008). The Seventh Circuit reasoned that NFL football itself must be produced collectively, that promotion of such jointly produced football involves a shared economic interest (not independent interests), that promotion includes the licensing of intellectual property, and that the teams' joint licensing through NFLP therefore failed to deprive the market of independent centers of decisionmaking. *Id.*

²⁷⁶ See *Petition for Writ of Certiorari, American Needle, Inc. v. National Football League*, No. 08-661, 2008 WL 4948434 (Nov. 17, 2008).

with respect to some of their conduct.²⁷⁷ Disregarding the Solicitor General’s advice to deny certiorari,²⁷⁸ the Supreme Court accepted the appeal, characterizing the issue before it as “whether the NFL respondents are capable of engaging in a ‘contract, combination . . . , or conspiracy’ as defined by § 1 of the Sherman Act, 15 U.S.C. § 1, or . . . whether the alleged activity by the NFL respondents ‘must be viewed as that of a single enterprise for purpose of § 1.’”²⁷⁹

American Needle therefore afforded the Court an opportunity to reconsider the contours of the “intra-enterprise immunity” doctrine. That doctrine recognizes that even the obviously unilateral conduct of individual business firms often involves some literal agreements (e.g., between agents of the firm) but generally should not be considered concerted conduct for purposes of Sherman Act Section 1.²⁸⁰ The point of the intra-enterprise immunity doctrine is to insulate from liability those literal agreements (such as understandings between a parent corporation and its wholly-owned subsidiary) that cannot really reduce competition by removing independent centers of decisionmaking from the economy and thereby potentially consolidating market power.²⁸¹

The Supreme Court most fully articulated the intra-enterprise immunity doctrine in *Copperweld Corp. v. Independence Tube Corp.*,²⁸² in which the Court had to decide whether a parent corporation and its wholly owned subsidiary were capable of “conspiring” for purposes of Section 1.²⁸³ In answering that question in the negative, the Court began by noting two fundamental and distinct screens inherent within the Sherman Act’s structure: Section 1 prohibits only “concerted” conduct but does not require that the defendant(s) possess market power; Section 2 reaches “unilateral” conduct but generally requires actual market power or a dangerous probability of attaining it.²⁸⁴ Because Section 1 lacks Section 2’s

²⁷⁷ See *Brief for the NFL Respondents*, *American Needle, Inc. v. National Football League*, No. 08-661, 2009 WL 164245 (Jan. 21, 2009).

²⁷⁸ See *Brief for the United States as Amicus Curiae*, *American Needle, Inc. v. National Football League*, No. 08-661, 2009 WL 1497823 (May 28, 2009).

²⁷⁹ *American Needle*, 130 S. Ct. at 2208.

²⁸⁰ See *id.* at 2209-11.

²⁸¹ *Id.* at 2211.

²⁸² 467 U.S. 752 (1984).

²⁸³ The defendants, Copperweld and its wholly owned subsidiary, collectively contacted customers and suppliers to discourage them from doing business with the plaintiff, Independence Tube. Based on that conduct, Independence Tube sued Copperweld and its subsidiary, alleging that they had engaged in a conspiracy in restraint of trade in violation of Sherman Act § 1. The defendants maintained that they were incapable of conspiring. See *id.* at 755-57.

²⁸⁴ *Id.* at 767-68 (distinguishing between §§ 1 and 2 of Sherman Act).

market power screen, the Court reasoned, it is important to honor its concerted conduct screen by finding a Section 1 violation only when a literal combination has “deprive[d] the marketplace of independent centers of decisionmaking” by joining two entities that would otherwise be expected to pursue their own, perhaps divergent, interests.²⁸⁵ When it comes to a parent corporation and the wholly-owned subsidiary that it fully controls and whose gain and loss it captures in full, the Court reasoned, divergent interests are impossible.²⁸⁶ Thus, the Court concluded, a literal combination between a parent corporation and its wholly owned subsidiary does not deprive the market of independent centers of decisionmaking and thus cannot constitute a contract, combination, or conspiracy for purposes of Sherman Act Section 1.²⁸⁷

Copperweld was a bit of a mixed bag. As Stone and Wright have explained, the Court’s desire to eliminate liability under Sherman Act § 1 for literal combinations such as the one at issue in the case was laudable.²⁸⁸ When a literal combination involves no actual or threatened market power (so Section 2 is inapplicable) and does not deprive the market of any independent center of economic decisionmaking, it is highly unlikely to harm consumers; instead, the literal combination has probably been effected because it is efficient. Assigning liability for such combinations would thwart efficient relationships without providing any benefit for consumers.²⁸⁹ A *Copperweld* doctrine that allows early termination of conspiracy claims premised on harmless intraenterprise combinations thus seems desirable from a decision-theoretic perspective.

In terms of its direction on how to identify literal combinations that should be immune from Section 1 scrutiny, though, *Copperweld* was a mess.²⁹⁰ In concluding that *Copperweld* and its wholly-owned subsidiary were incapable of conspiring, the Court reasoned that

a parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions

²⁸⁵ *Id.* at 769.

²⁸⁶ *Id.* at 771-72.

²⁸⁷ *Id.*

²⁸⁸ See Stone & Wright, *supra* note 266, at 375.

²⁸⁹ See *id.* (“*Copperweld* immunity provided an easily articulated rationale that mapped onto straightforward economic intuition: a parent and a wholly owned subsidiary neither could nor should be expected to behave as potential competitors might. Rival firms predicating Section 1 claims on wholly internal behavior are therefore unlikely to increase net consumer welfare by doing so, and courts should be unwilling to entertain these claims.”).

²⁹⁰ See *id.* at 375-81 (discussing difficulties resulting from *Copperweld*’s imprecise formulation of a test for identifying entities incapable of conspiring).

are guided or determined not by two separate corporate consciousnesses, but one.²⁹¹

While this is all true, the Court created some confusion by simultaneously emphasizing the “unity of interest” of a parent and its wholly owned subsidiary and the fact that the two entities are subject to common control.²⁹² Implementation difficulties were bound to arise because unity of interest and common control need not follow each other. Firms with unified interests may lack common control, and commonly controlled business divisions may diverge in their interests.²⁹³

In applying *Copperweld*, lower courts generally latched onto the “unity of interests” language, looking to see if the parties to the purported agreement face any divergence in their incentives.²⁹⁴ This proved problematic. For one thing, focusing on whether the combining units share a unity of interests led to significant divergence in outcomes.²⁹⁵ Some courts construed unity of interests broadly, holding, for example, that pure sister corporations (wholly owned subsidiaries of a common parent) merit *Copperweld* immunity,²⁹⁶ that a franchisor and its franchisees could be a single entity,²⁹⁷ that separately owned franchisees may constitute a single entity,²⁹⁸ and that one firm’s ownership of a bare majority of the other’s stock creates a single entity.²⁹⁹ Other courts were disinclined

²⁹¹ *Copperweld*, 467 U.S. at 771.

²⁹² See Stone & Wright, *supra* note 266, at 375-76.

²⁹³ As Stone and Wright observe,

Members of an oligopolistic cartel certainly enjoy a ‘unity of interests’ at least in the short-run; various directors of a division within a single corporation hold at least partially divergent interests with regards to future business strategies for their divisions and the company as a whole.

Id. at 375.

²⁹⁴ *Id.* at 376-78.

²⁹⁵ *Id.* at 377-78.

²⁹⁶ See Davidson Schaaf, Inc. v. Liberty Nat. Fire Ins., 69 F.3d 868, 871 (8th Cir. 1995) (two wholly-owned subsidiaries of the same parent cannot conspire under Section 1); Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1993) (a group of individuals with joint ownership over a parent company and its two subsidiaries have Section 1 immunity).

²⁹⁷ See Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026 (D. Nev. 1992), *aff’d*, 999 F.2d 445 (9th Cir. 1993).

²⁹⁸ See Orson, Inc. v. Miramax Film Corp., 862 F. Supp. 1378, 1386 (E.D. Pa. 1994).

²⁹⁹ See Novatel Communications, Inc. v. Cellular Telephone Supply, Inc., 1986 WL 798475, *9 (N.D. Ga. Dec. 23, 1986) (“The 51% ownership retained by Novatel-Canada assured it of full control over Carcom and assured it could intervene at any time that Carcom ceased to act in its best interests. Thus, Carcom

to find a unity of interests, ruling, for example, that sibling corporations sharing a common parent are not a single entity³⁰⁰ and that a parent and subsidiary corporation are not a single entity if more than a *de minimis* percentage of the subsidiary's stock (i.e., less than 10% or so) is owned by someone other than the parent.³⁰¹

In addition to creating implementation difficulties, the focus on whether business units share a unity of interests ultimately seems inapposite to whether they are, in reality, a single economic entity.³⁰² As Judge Easterbrook has noted, there are often incentive conflicts among agents within what is obviously a single firm,³⁰³ and within obvious cartels there is frequently no divergence in interests.³⁰⁴ As Stone and Wright explain, a more economically sensible approach would endeavor to immunize from antitrust liability those literal combinations involving parties who are subject to common control.³⁰⁵ Such an approach would correspond to the economic understanding of the firm, which consists of a body in which resources are allocated according to managerial fiat in order to reduce transaction costs, avoid hold-up problems resulting from asset-specific investments, and create incentives for performance.³⁰⁶

That, however, is not the tack the Court took in *American Needle*. Instead, it disregarded control questions and focused exclusively on whether the defendants possessed a *complete* unity of interests.³⁰⁷ In holding that the NFL members could conspire in jointly authorizing NFLP to grant exclusive licenses, the Court emphasized that “[a]lthough [they] have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not *necessarily* aligned.”³⁰⁸ The Court then observed that while “[c]ommon interests in the NFL *partially* unite the economic interests of the parent firms,

and Novatel-Canada are incapable of conspiring for purposes of § 1 of the Sherman Act.”).

³⁰⁰ See *Aspen Title & Escrow, Inc. v. Jeld Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987).

³⁰¹ See *Leaco Enterprises, Inc. v. General Elec. Co.*, 737 F. Supp. 605, 608-09 (D. Or. 1990).

³⁰² See Stone & Wright, *supra* note 266, at 379-80.

³⁰³ See *Chicago Prof'l Sports, Ltd. v. National Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1996) (“Even a single firm contains many competing interests. ... Conflicts are endemic in any multi-stage firm...”).

³⁰⁴ See *supra* note 293 and accompanying text.

³⁰⁵ See Stone & Wright, *supra* note 266, at 379-80.

³⁰⁶ See *id.*

³⁰⁷ See *id.* at 393-95.

³⁰⁸ *American Needle*, 130 S. Ct. at 2213 (emphasis added).

... the teams still have distinct, potentially competing interests.”³⁰⁹ With respect to the Seventh Circuit’s reasoning that because a joint venture is necessary to produce NFL football, promotion of the jointly produced product (including the licensing of intellectual property) should be deemed unilateral conduct of the single joint venture,³¹⁰ the Court was not persuaded. It stated that “[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action,”³¹¹ and it emphasized that “necessity of cooperation” does not necessarily “transform[] concerted action into independent action.”³¹² Rather, the need for cooperation is relevant to (1) whether concerted conduct is evaluated under the rule of reason and (2) how that conduct fares under the rule.³¹³ Indeed, the Court emphasized that although the NFL members’ joint conduct would not be exempt from liability under the intra-enterprise immunity doctrine, it might still pass muster under a rule of reason analysis.³¹⁴ In sum, the Court seemed to reason that only a *complete* unity of interests will invoke the intra-enterprise immunity doctrine, that the need for joint conduct to produce a product is not enough to render that conduct unilateral, but that the rule of reason may acquit joint actions that appear to be output-enhancing.

So how could this analysis, which weakens the degree to which the intra-enterprise immunity screen may weed out meritless antitrust actions and permits more claims to proceed to costly discovery, comport with decision theory and a sensitivity to the limits of antitrust? Consideration of the justices’ questions at oral argument suggests an answer to that question. As Stone and Wright observe, much of the discussion at oral argument centered on the relative costs and benefits of intra-enterprise immunity and rule of reason adjudication as alternative means of screening out meritless antitrust conspiracy claims.³¹⁵ They assert that the Court “to its credit was very much focused on the ‘compared to what?’ question,” apparently seeking to construct screening mechanisms in a manner that would

³⁰⁹ *Id.* (emphasis in original; internal quotation, citation, and alteration omitted).

³¹⁰ See *supra* note 275 and accompanying text.

³¹¹ *American Needle*, 130 S. Ct. at 2214.

³¹² *Id.*

³¹³ *Id.* at 2216-17.

³¹⁴ *Id.*

³¹⁵ See Stone & Wright, *supra* note 266, at 391 (“At oral argument, the Court repeatedly stressed its concern with the relative efficiency and utility of Rule of Reason analysis, including various filters that might apply to screen out low-quality claims, versus the theoretically simpler – but heretofore unpredictable – *Copperweld* screen.”).

minimize administrative and error costs.³¹⁶ In the end, the Court surmised that *Copperweld*, which had generated tremendous confusion among the lower courts and had led to extensive and costly disputes over single-entity status, was not a very cost-effective screening mechanism.³¹⁷

There are, however, alternative methods for screening out antitrust conspiracy claims involving related entities whose combination would not seem to threaten consumer harm. The most obvious one, the focus of the justices' questioning,³¹⁸ is the rule of reason itself.³¹⁹ Since the time *Copperweld* was decided, courts and commentators have provided some "structure" to the rule of reason as applied to joint ventures, making the rule easier to administer, more predictable, and less prone to generate errors (and thus error costs).³²⁰

³¹⁶ *Id.* at 392.

³¹⁷ *See id.*

³¹⁸ *See id.* at 391-92 (describing questions from oral argument).

³¹⁹ Judge Boudin, who has taught antitrust at Harvard, had suggested that the rule of reason could substitute for intra-enterprise immunity as a means of weeding out meritless antitrust conspiracy claims based on complex business relationships that seem not to threaten harm. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58 (1st Cir. 2002). Having explained that many antitrust conspiracy cases present hybrid business arrangements somewhere between a single company and a cooperative arrangement among competitors, he wrote:

The law at this point could develop along either or both of two different lines. One would expand upon *Copperweld* to develop functional tests or criteria for shielding (or refusing to shield) such hybrids from section 1 scrutiny for intra-enterprise arrangements. This would be a complex task and add a new layer of analysis; but where the analysis shielded the arrangement it would serve to cut off similarly difficult, intrusive scrutiny of such intra-enterprise activities under extremely generalized rule of reason standards. It would also prevent claims, clearly inappropriate in our view, under *per se* rules or precedents dealing with arrangements between existing independent competitors.

The other course is to reshape section 1's rule of reason toward a body of more flexible rules for interdependent multi-party enterprises. Sports leagues are a primary example but so are common franchising arrangements and joint ventures that perform specific services for competitors (*e.g.*, a common purchasing entity). Certainly the trend of section 1 law has been to soften *per se* rules and to recognize the need for accommodation among interdependent enterprises.

Id. (internal citation omitted).

³²⁰ *See, e.g.*, *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984); *California Dental Ass'n v. Federal Trade Comm'n*, 526 U.S. 756 (1999); Hovenkamp, *supra* note 2, at 105-07 (eschewing open-ended rule of reason and explaining that economic analysis and modern court

Of course, rule of reason adjudication occurs after costly discovery, so the rule may not provide the optimal device for screening out patently meritless conspiracy claims. There is, though, another screen. As Stone and Wright emphasize, *Twombly*'s requirement that antitrust conspiracy plaintiffs plead a "plausible" claim, including a plausible theory of anticompetitive harm,³²¹ provides an additional mechanism for screening out meritless conspiracy actions.³²² They explain that "*Twombly* dismissals indeed satisfy both components of a workable substitute for *Copperweld* immunity – they both allow for an early [pre-discovery] dismissal of marginal antitrust cases and force antitrust plaintiffs to articulate theories of anti-competitive harm grounded in economics."³²³ Thus, the advent of a structured, more predictable, "cheaper" rule of reason, coupled with more stringent pleading standards requiring plaintiffs to set forth a "plausible" theory of anticompetitive harm, enabled the Court to jettison another costly screening mechanism. When *American Needle* is read, not in isolation but in light of the Court's entire Section 1 jurisprudence, it appears to be consistent with an effort to minimize the sum of decision and error costs related to antitrust adjudication.

IV. SOME PREDICTIONS FOR THE FUTURE

In light of the decision-theoretic perspective that appears to underlie the Roberts Court's antitrust jurisprudence, what can we predict about the Court's future antitrust decisions? This question is

decisions support a structured rule of reason). Stephen Calkins has also observed that the rule of reason has become more predictable and easier to apply since *Copperweld* was decided:

Back in 1984 when *Copperweld* was decided, the Solicitor General pointed to the spectre of near-certain illegality that followed from finding a Section 1 conspiracy. Today, much of what was then viewed as almost automatically illegal is considered lawful under the rule of reason. This suggests that Judge Boudin's approach (as I read it) makes sense: today, there is less need to rely on expansive applications of *Copperweld* to permit procompetitive activity to continue, and there's more freedom to let the rule of reason distinguish the lawful from the unlawful.

Copperweld: The Basics and Beyond, ANTITRUST SOURCE 4 (March 2003) (available at <http://www.abanet.org/antitrust/at-source/03/03/copperweld.pdf>).

³²¹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (to survive motion to dismiss, antitrust plaintiff must plead "enough facts to state a claim to relief that is plausible on its face").

³²² See Stone & Wright, *supra* note 266, at 403-06.

³²³ *Id.* at 403.

slightly complicated by the fact that, during the drafting of this Article, the composition of the Supreme Court changed: On August 7, 2010, Justice Elena Kagan was sworn in to replace retiring Justice John Paul Stevens.³²⁴ That development, though, is unlikely to alter the degree to which the Court embraces the decision-theoretic approach. Even if Justice Kagan turns out to oppose the decision-theoretic perspective, she is unlikely to alter the balance of power on the Court. That is because Justice Stevens, whom she is replacing, was himself somewhat reluctant to afford decision theory a large role in antitrust adjudication. Indeed, he explicitly disavowed error cost analysis in his concurring opinion in *Credit Suisse*, where he wrote:

Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, that either the burdens of antitrust litigation or the risk ‘that antitrust courts are likely to make unusually serious mistakes,’ should play any role in the analysis of the question of law presented in a case such as this.³²⁵

I will therefore proceed on the assumption that the recent change in Court composition will either strengthen the influence of decision theory (if Justice Kagan turns out to favor such analysis) or leave it unchanged (if she, like her predecessor, is skeptical).

Assuming the Roberts Court stays the course, I predict that it will abrogate the per se rule against tying and hold that tie-ins must be evaluated under a rule of reason requiring the plaintiff to prove substantial tied market foreclosure. I also predict that the Court will eventually create certain safe harbors for loyalty rebates and bundled discounts that are, in some sense, “above-cost.”

a. Tying

As explained above, tying is currently subject to a quasi-per se rule, under which a tie-in is per se illegal if: (1) it involves two separate products, (2) the defendant has market power in the tying product market, and (3) it affects a “not insubstantial” dollar volume of commerce in the tied product market.³²⁶ Efficiency-minded antitrust scholars have long criticized this rule because it condemns even those tie-ins that do not foreclose a significant percentage of marketing opportunities in the tied product market, despite the fact that such foreclosure is necessary to augment the defendant’s market

³²⁴ See Peter Baker, *Kagan Is Sworn in as the Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES A13 (Aug. 8, 2010).

³²⁵ *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 287 (2007) (Stevens, J., concurring) (quoting *id.* at 282) (internal citation omitted).

³²⁶ See *supra* note 157 and accompanying text.

power.³²⁷ Those scholars have thus contended that tying, like exclusive dealing, should be evaluated under a rule of reason that focuses on the degree to which the practice forecloses otherwise available marketing opportunities.³²⁸ Because many business practices may be alternatively characterized as tie-ins or as instances of exclusive dealing,³²⁹ it makes sense to treat the two practices under a single liability rule that requires the plaintiff to establish all prerequisites to market power enhancement, including substantial market foreclosure.

In *Jefferson Parish Hospital District No. 2 v. Hyde*,³³⁰ the Court came quite close to adopting a foreclosure-focused rule of reason for tying, with four concurring justices expressly calling for abrogation of the per se rule.³³¹ Given economists' relentless criticism of the rule³³² and the Roberts Court's apparent willingness to upset precedent to align antitrust doctrine with economic learning,³³³ the Court is likely to reconsider this issue in the future. If it does so, it will likely be confronted with a set of arguments defending the quasi-per se rule on the ground that tying may allow a defendant to price discriminate and thereby extract greater consumer surplus, even if the tie-in could not extend the scope of the defendant's market power.³³⁴ In light of these potential effects, defenders of the quasi-

³²⁷ See, e.g., 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1701, at 16, ¶ 1703d3, at 38; Posner, *supra* note 11, at 198.

³²⁸ See, e.g., Hovenkamp, *supra* note 2, at 198-206; Christian Ahlborn, David S. Evans, & A. Jorge Padilla, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, *ANTITRUST BULL.* 287 (Spring-Summer 2004).

³²⁹ See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45 (O'Connor, J., concurring) (observing that tie-in at issue could also be analyzed as exclusive dealing). See generally Hovenkamp, *supra* note 2, at 200 (observing that exclusive dealing arrangements can often be characterized as tying, thereby permitting plaintiffs to take advantage of the stricter quasi-per se rule).

³³⁰ 466 U.S. 2 (1984).

³³¹ See *id.* at 35 (O'Connor, J., concurring).

³³² See, e.g., U.S. DEPARTMENT OF JUSTICE, *COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 89* (2008) [hereinafter, "Section 2 Report"] (observing that no panelist participating in extensive series of hearings on exclusionary practices had endorsed Supreme Court's current tying rule and that many had singled it out for criticism).

³³³ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS Inc.*, 551 U.S. 877 (2007) (overruling the 1911 *Dr. Miles* precedent based on economic learning since decision was rendered).

³³⁴ Einer Elhauge recently articulated this argument in his widely noted article, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*. See Elhauge, *supra* note 40, at 403-13 (discussing the so-called "power effects" of tie-ins).

per se rule will likely argue, the Court should maintain the existing tying doctrine so as to protect consumers from harm.³³⁵

So how would one expect the Roberts Court to rule? If the Court is as committed to decision theory as the foregoing analysis suggests, it will reject the reasoning of the status quo defenders and will hold that tying, like exclusive dealing, must be evaluated under a foreclosure-focused rule of reason. Price discrimination – particularly of the metering variety that tying often facilitates – frequently enhances market output (and total efficiency) by bringing into the market groups of low-valuation customers who would not pay the defendant’s profit-maximizing, uniform (i.e., nondiscriminatory) price.³³⁶ By discriminating in favor of those customers, charging them an above-cost price that is below their reservation price, a defendant can increase its own profits and expand market output and will often, though not always, enhance static efficiency by increasing total (consumer + producer) surplus.³³⁷ Perhaps more importantly, the freedom to engage in tying-induced price discrimination may promote *dynamic* efficiencies: By increasing the reward for producing an offering for which consumers will pay above-cost prices, such price discrimination encourages consumer-friendly efforts to develop new, unique products and to differentiate products in ways consumers find desirable.³³⁸

In light of the efficiency benefits tie-ins frequently confer, attempts to regulate instances of tying that do not involve substantial tied market foreclosure but may nonetheless facilitate price discrimination would entail significant error costs. And, of course, attempts to constrain error costs by identifying those relatively uncommon tie-ins that do not enhance static efficiency would create significant decision costs. To minimize the sum of decision and error costs, then, the Court would do best to hold that tie-ins not involving substantial tied market foreclosure – even if they may facilitate price discrimination – are legal. The Court’s observation in *Independent Ink* that price discrimination is common in competitive

³³⁵ *Id.* at 425 (observing that if tying’s price discrimination and surplus extraction effects are deemed anticompetitive, “the focus on tying market power and tied dollar amount does not mean that the doctrine fails to require evidence of anticompetitive effects. That focus instead means that tying doctrine correctly requires proof of the elements necessary to achieve anticompetitive effects.”).

³³⁶ Even Elhauge, perhaps the leading academic defender of current tying doctrine, concedes that most metering tie-ins will increase output in the tying product market and enhance total surplus. *See id.* at 433, 481.

³³⁷ *See generally* Klein & Wiley, *supra* note 177, at 612-15 (explaining why the static efficiency effects of metering price discrimination are likely to be positive).

³³⁸ *Id.* at 615-19 (explaining why metering price discrimination is likely to promote dynamic efficiency).

markets,³³⁹ coupled with its consistent adherence to decision-theoretic principles, suggests that this is the direction in which it is headed.

b. Loyalty Rebates

A loyalty rebate occurs when a seller grants a price cut on all units a buyer has purchased from it, once the buyer purchases some specified quantity of units (frequently set forth in terms of a percentage of the buyer's requirements).³⁴⁰ Because they involve price cuts, loyalty rebates always provide consumer benefit in the short run,³⁴¹ and one might thus expect them to be evaluated under straightforward *Brooke Group* standards (i.e., illegal only if the discounted per unit price is below cost and there is a likelihood of recoupment via supracompetitive pricing).³⁴² Some scholars have argued, though, that loyalty rebates may occasion anticompetitive harm even if they result in above-cost pricing.³⁴³ Accordingly, those scholars contend, they should be evaluated under a more nuanced liability rule.³⁴⁴

The harm these scholars hypothesize occurs when the discount at issue enables the discounter to usurp so much business from its rivals that it reduces their output below minimum efficient scale.³⁴⁵ Assume, for example, that a market consists of two brands, that the current market share of the brands (reflective of consumer demand) is 60% for the dominant brand and 40% for its nondominant rival, that the product at issue costs each manufacturer \$.90 per unit to produce and is sold by each to retailers for \$1 per unit, and that minimum efficient scale in this market occurs at a level of production equal to 35% of market demand. Suppose, then, that the

³³⁹ See *infra* notes 171 - 174 and accompanying text.

³⁴⁰ See Section 2 Report, *supra* note 332, at 106.

³⁴¹ See *id.*

³⁴² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993).

³⁴³ See, e.g., Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L. J. 615, 627 (2000); Robert H. Lande, *Should Predatory Pricing Rules Immunize Exclusionary Discounts*, 2006 UTAH L. REV. 879, 886-90. See generally Section 2 Report, *supra* note 332, at 107 (summarizing potential anticompetitive effects of loyalty rebates).

³⁴⁴ See, e.g., Tom, et al., *supra* note 343, at 638; Lande, *supra* note 343, at 892-97.

³⁴⁵ See Section 2 Report, *supra* note 332, at 107; 3 PHILLIP E. AREEDA & HERBERT H. HOVENKAMP, ANTITRUST LAW ¶ 749b, at 248 (recognizing that there may be situations in which an above-cost single-product discount “increases the dominant firm’s sales so much that it denies rivals economies of scale because they cannot get their own output high enough”).

dominant manufacturer offers retailers a 10% loyalty rebate on all their purchases (back to the first dollar spent) if they purchase 70% of their requirements from that manufacturer. The discounted price (\$.90 per unit) is not below the dominant manufacturer's cost and thus would not run afoul of *Brooke Group*. Yet, such a loyalty rebate could cause anticompetitive harm by driving an equally efficient rival from the market. That is because the non-dominant rival could avoid losing market share (and thus falling below minimum efficient scale) only if it matched the full dollar amount of the dominant brand's discount on its smaller base of sales, and it would not be able to do so without pricing below its cost.³⁴⁶

Given the potential for this sort of scenario, a number of commentators have argued that *Brooke Group*'s safe harbor for above-cost discounts should not apply to loyalty rebates.³⁴⁷ For example, Willard Tom, David Balto, and Neil Averitt – writing when they were officials at the Federal Trade Commission – asserted that “the cost test of predatory pricing does not automatically apply” to loyalty rebates.³⁴⁸ Instead, they maintained, “one must conduct a case-by-case analysis of the actual effects of the particular practice to determine whether anticompetitive outcomes are likely.”³⁴⁹

From the standpoint of decision theory, though, straightforward application of the *Brooke Group* safe harbor for loyalty rebates that result in above-cost prices is a far wiser course. As an initial matter, any rival that is as efficient as the discounter *and* engages in aggressive price competition from the outset can avoid being foreclosed by a loyalty rebate that does not result in below-cost discounted prices.³⁵⁰ All it must do is maintain its price at or near

³⁴⁶ Consider, for example, a typical retailer that initially (before the rebate announcement) satisfied its requirements by purchasing 60 units of the dominant brand for \$60 and 40 units of the rival for \$40. After implementation of the rebate plan, the retailer could meet its requirements by spending \$63 to obtain 70 units of the dominant brand and \$30 to obtain 30 units of the rival's brand. In order to prevent a loss of market share that would drive it below minimum efficient scale, the nondominant manufacturer would need to match the dominant seller's \$7 discount. But to do so, it would have to lower its \$1 per unit price by 17 ½ cents ($$.175 * 40 = \7.00), which would require it to price below its cost of \$.90 per unit.

³⁴⁷ See, e.g., Tom et al., *supra* note 343, at 638; Lande, *supra* note 343, at 885, 890-92.

³⁴⁸ Tom, et al., *supra* note 343, at 638. When their article was published, Tom, Balto, and Averitt were, respectively, the deputy director of the FTC's Bureau of Competition, the bureau's assistant director for policy and evaluation, and an attorney within the bureau.

³⁴⁹ *Id.*

³⁵⁰ See Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841, 845-49. As Hovenkamp explains:

the level of its marginal cost.³⁵¹ Moreover, the sort of case-by-case analysis urged by those who hypothesize instances of anticompetitive loyalty rebates would involve extremely high decision and error costs. Such an approach would require a court to ascertain minimum efficient scale within a market and to determine whether the discount at issue would tend to drive the output of rivals below that level.³⁵² Such determinations are extremely difficult to make, requiring loads of discovery, extensive expert testimony, etc.³⁵³ False convictions would be inevitable, and businesses, anticipating such errors (and the treble damage awards that follow), would be discouraged from giving any rebates that might be subject to challenge.³⁵⁴ Consumer welfare would suffer.

[W]hen a discount is offered on a single product (whether a quantity or market share discount) the discount should be lawful if the price, after all discounts are taken into account, exceeds the defendant's marginal cost or average variable cost because such discounts are covered by antitrust's ordinary predatory pricing rule. One of the factors driving the predatory pricing rule is that, as long as prices are above the relevant measure of cost, the discounts cannot exclude an equally efficient rival. The same is true of single product discounts.

Id. at 844.

³⁵¹ In the hypothetical above, for example, the dominant firm's discounted price, \$.90 per unit, was equal to both firms' cost of production. Had the nondominant rival charged that price prior to implementation of the dominant firm's loyalty rebate, it likely would have grown its market share to a point at which its rival's loyalty rebate strategy could not drive it below minimum efficient scale. Moreover, a strategy that would prevent a nondominant but equally efficient firm from being harmed by a dominant rival's above-cost loyalty rebate would be for the non-dominant firm to give its own loyalty (i.e., volume) discounts from the outset, securing up-front commitments from enough buyers (in exchange for discounted prices) to ensure that its production stayed above minimum efficient scale. Such a strategy, which would obviously benefit consumers, would be encouraged by a rule that evaluated loyalty rebates under straightforward *Brooke Group* principles and thereby signaled to manufacturers that they must take steps to protect themselves from above-cost loyalty rebates. In the end, then, any equally efficient rival that is committed to engaging in vigorous price competition ought not to be excluded by a dominant seller's above-cost loyalty rebate.

³⁵² Hovenkamp, *supra* note 350, at 843.

³⁵³ *See id.* (observing that the approach would "make impossible informational demands on courts").

³⁵⁴ As I have elsewhere explained:

The problem with this open-ended approach, of course, is that it offers virtually no guidance to businesses. In practice, it would require antitrust counselors to predict whether a judge (or, worse yet, a jury) would conclude that an above-cost purchase target discount was merely "competition on the merits" or was likely to be so successful (i.e., to win so much business from rivals) that it would harm competition by reducing rivals' efficiencies. The crystal ball nature of this inquiry, coupled with the fact that a

In a challenge to loyalty rebates, then, the Roberts Court would be confronted with the facts that (1) an above-cost loyalty rebate is unlikely to foreclose or impair the efficiency of any equally efficient rival that engages in aggressive price competition, (2) any anticompetitive harm that does result is likely to self-correct as supracompetitive pricing attracts new entrants into the market, and (3) efforts to capture any stray instances of such harm would be costly to administer and would likely chill procompetitive price reductions. In light of those facts, the approach that would cause the least harm – that would minimize the sum of decision and error costs – would be to evaluate loyalty rebates under straightforward *Brooke Group* principles, immunizing those rebates that result in above-cost prices. That is the tack the Roberts Court would likely take on loyalty rebates.

c. Bundled Discounts

Like loyalty rebates, bundled discounts are conditional price cuts. They occur when a seller offers discounts on the condition that buyers purchase from the seller multiple products from different product markets.³⁵⁵ They, too, generally provide immediate consumer benefit, so courts should use caution in regulating them.³⁵⁶ But bundled discounts differ from loyalty rebates in that they do have the potential to exclude equally efficient, aggressive rivals, even if they result in above-cost prices. Nonetheless, decision theory

mistaken prediction could result in treble damages, would likely overdetter by chilling many proconsumer discounts.

Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1709-10 (2005). See also Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 266-67 (2003) (“These sorts of risks [created by open-ended liability rules] cannot help but chill investments to create product offerings with a sufficient quality or cost advantage over preexisting market options. . .”).

³⁵⁵ See Lambert, *supra* note 354, at 1688.

³⁵⁶ Einer Elhauge has argued that bundled discounts need not provide any consumer benefit at all. He hypothesizes a situation in which the seller first raises the unbundled price above the amount it would charge absent the discount (i.e., above the “but for” price) and then “discounts” the bundle to a price at or above the aggregate price that would have prevailed absent the bundled discount scheme. See Elhauge, *supra* note 40, at 450-51. While such phony discounts are theoretically possible, Elhauge points to no empirical evidence suggesting that they are common (or that they exist at all in the real world). As I have argued elsewhere, the sort of phony discount that so worries Elhauge would be relatively easy to identify, so courts could exempt them relatively easily from any generally prevailing approach to evaluating bundled discounts. See Lambert, *supra* note 354, at 1753-55.

suggests that there should be a price-cost safe harbor for bundled discounts.

As a number of courts and commentators have explained, a bundled discount that results in an above-cost price for the bundle (an “above-cost bundled discount”) may exclude from the market an equally efficient rival that does not produce as diverse a product line as the discounter and would thus have to match the entire dollar value of the bundled discount on its less extensive product line.³⁵⁷ The classic example of the problem involves a bundled discount on shampoo and conditioner.³⁵⁸ Suppose that manufacturer *A* sells both shampoo and conditioner, is a monopolist in the conditioner market, and competes in the shampoo market against manufacturer *B*, which sells only shampoo. *B* is the more efficient shampoo manufacturer, producing shampoo at a cost of \$1.25 a bottle compared to *A*’s cost of \$1.50 per bottle. *A*’s cost of producing a bottle of conditioner is \$2.50. If purchased separately, *A*’s per-bottle prices for shampoo and conditioner are \$2.00 and \$4.00, respectively. But *A* offers customers a \$1.00 bundled discount, charging only \$5.00 for the shampoo/conditioner package. While this discounted price is still above *A*’s cost for the bundle (\$4.00), it could tend to exclude *B*. Assuming that shampoo buyers must also buy conditioner (in equal proportions), buyers would have to pay *A*’s unbundled conditioner price of \$4.00 if they purchased *B*’s shampoo and would thus be unwilling to pay more than \$1.00 for the *B* brand of shampoo. That price, though, is below *B*’s \$1.25 cost. Thus, *A*’s bundled discount would tend to exclude *B* from the market even though (1) the discounted price (\$5.00) is above *A*’s aggregate cost for the bundle (\$4.00), and (2) *B* is the more efficient shampoo producer.

In light of this concern that a bundled discount “when offered by a monopolist ... may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer,”³⁵⁹ the U.S. Court of Appeals for the Third Circuit, sitting en banc, famously condemned a bundled discount program by defendant 3M. The court upheld a \$68 million antitrust judgment in favor of 3M’s rival, LePage’s,³⁶⁰ even though the discounted prices 3M offered were above its costs and LePage’s conceded (through its expert) that

³⁵⁷ See, e.g., Section 2 Report, *supra* note 332, at 96; Lambert, *supra* note 354, at 1695-96; *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 467 (S.D.N.Y. 1996); *LePage’s Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (en banc).

³⁵⁸ See *Ortho*, 920 F. Supp. at 467 (setting forth a version of the hypothetical presented in the text above, albeit with slightly altered price and cost data).

³⁵⁹ *LePage’s*, 324 F.3d at 155.

³⁶⁰ *Id.* at 157.

it was a less efficient producer of the products it sold in competition with 3M.³⁶¹ The court’s evaluative approach – hardly a model of clarity – included no safe harbors for sellers contemplating bundled discount offers.³⁶² Not surprisingly, the business community was aghast.³⁶³

In contrast to the Third Circuit, the Ninth Circuit has crafted a clear safe harbor for certain bundled discounts. In *Cascade Health Solutions v. PeaceHealth*,³⁶⁴ the Ninth Circuit adopted a safe harbor based on a “discount attribution” test. Under that court’s approach, liability will not result from a bundled discount that results in above-cost pricing of the competitive product (i.e., the one the discounter sells in competition with its single-product rival) after the entire amount of the discount is attributed to that product.³⁶⁵ If a bundled discount passes muster under that test, then any equally efficient single-product seller of the competitive product could match the discount. The only sellers that would lose sales because of that discount would be either (1) less efficient than the bundled discounter, or (2) unwilling to lower price to the level of cost (which is where it would be in perfect competition). Competition is not harmed when rivals that are less efficient or less willing to compete are excluded from the market. Compared to the Third Circuit’s amorphous approach, the Ninth Circuit’s approach therefore reduces error costs by eliminating the potential for liability based on discounts that could not impair competition. Moreover, the Ninth Circuit’s approach imposes relatively low decision costs on business planners (though perhaps not on courts evaluating challenged discounts), for, as the *PeaceHealth* court observed, “A seller can

³⁶¹ *Id.* at 177 (Greenberg, J., dissenting).

³⁶² The *LePage’s* court appeared to hold that (1) bundled discounts are presumptively exclusionary if the discounter is bundling products not sold by its rivals and is winning business from those rivals, but (2) the presumption may be rebutted if the discounter proves a “business reasons justification” for the bundled discounts, meaning that the bundling saves costs approaching the amount of the total discount. See Lambert, *supra* note 354, at 1720-21 (parsing the reasoning of the *LePage’s* decision to discern the court’s evaluative approach).

³⁶³ See Mike Meyers, *One Big, Sticky Mess*, STAR TRIB. (Minneapolis), Nov. 10, 2003, at D1 (“[C]ompanies nationwide are glued to the case.”). The following businesses and trade groups joined amicus briefs asking the Supreme Court to reverse the decision: BellSouth Corp.; Boeing Co.; Brunswick Corp.; the Business Roundtable; Caterpillar Inc.; the Coca-Cola Co.; Eastman Kodak Co.; Honeywell International Inc.; Hormel Foods Corp.; Intel Corp.; Johnson & Johnson, Inc.; Kimberly-Clark Corp.; Morgan Stanley; the National Association of Manufacturers; Nokia Inc.; Northwest Airlines, Inc.; the Procter & Gamble Co.; Schering-Plough Corp.; Staples, Inc.; Verizon Communications; and Xerox Corp. See Lambert, *supra* note 354, at 1690, n. 7.

³⁶⁴ 515 F.3d 883 (9th Cir. 2008).

³⁶⁵ *Id.* at 906.

easily ascertain its own prices and costs of production and calculate whether its discounting practices run afoul of the rule we have outlined.”³⁶⁶

From a decision-theoretic perspective, then, the Ninth Circuit’s approach to evaluating bundled discounts is far superior to that followed by the Third Circuit. *At a minimum*, the Roberts Court, if it decides to resolve the current circuit split on how to evaluate bundled discounts, will likely endorse the discount attribution safe harbor. It may go further, immunizing bundled discounts that result in an above-cost price for the bundle itself,³⁶⁷ or requiring a plaintiff to prove either below-cost pricing of the entire bundle or its equivalent efficiency and likelihood of exclusion.³⁶⁸ The downside of the former approach is that it may create significant error costs from false negatives (because of the fact that above-cost bundled discounts may exclude efficient, competitive rivals);³⁶⁹ the downside of the latter approach is that it imposes high decision costs on courts *and business planners*, who must estimate their rivals’ efficiencies.³⁷⁰ Either approach *may* optimally minimize the sum of decision and error costs,³⁷¹ and the Roberts Court would certainly take a hard look at both. I have elsewhere suggested an alternative approach that avoids both difficulties and would keep decision and error costs in check.³⁷² I would, of course, be pleased if the Court were to adopt my proposal. My focus here, though, is prediction, and I predict with confidence that the Roberts Court, if called upon to prescribe a liability rule for bundled discounts, will, at a minimum, provide a safe harbor for discounts that are above-cost under the discount attribution test.

CONCLUSION

³⁶⁶ *Id.* at 907.

³⁶⁷ This is the so-called “aggregate discount” rule. *See id.* at 904-05; Lambert, *supra* note 354, at 1700-05. Herbert Hovenkamp endorses this approach, on decision-theoretic grounds, in his own work (though not in the Antitrust Law treatise). *See* Hovenkamp, *supra* note 2, at 172-73.

³⁶⁸ This is the approach endorsed by the *Ortho Diagnostic* court. *See* *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 469 (S.D.N.Y. 1996).

³⁶⁹ *See* Lambert, *supra* note 354, at 1705 (describing potential error costs of aggregate discount approach).

³⁷⁰ *See id.* at 1729-30 (describing high administrative costs of *Ortho* rule).

³⁷¹ *See, e.g.*, Lambert, *supra* note 260, at 175-77 (explaining how discount aggregation rule, while potentially underdeterrent, may nonetheless be optimal from the standpoint of decision theory).

³⁷² *See* Lambert, *supra* note 354, at 1739-53.

Judge Harold Leventhal famously compared examinations of legislative history to looking across a crowded room in search of one's friends – in both inquiries, one is sure to find what one is looking for.³⁷³ The same can no doubt be said of endeavors to analyze the jurisprudence of a “Court” whose beginning is determined in a somewhat arbitrary fashion (with the confirmation of a new chief justice) and whose composition is constantly changing. When it comes to the Roberts Court's antitrust decisions, scholars sympathetic to the Chicago School have discerned trends reflective of that school's insights and methodologies.³⁷⁴ Scholars associated with the Harvard School have done the same.³⁷⁵ I must confess that the trend I have noted – a recognition of the limits of antitrust and a consequent effort to structure rules so as to limit the sum of decision and error costs (sometimes referred to as a “Neo-Chicago” approach³⁷⁶) – is an old friend of mine.³⁷⁷ Accordingly, I cannot rule out the possibility that I have seen in these decisions just what I wanted to see. Yet, the degree to which the Roberts Court's antitrust decisions comport with decision theory's insights – often quite explicitly – is striking.

In any event, this Article's analysis has debunked the oft-heard characterization of the Roberts Court's antitrust jurisprudence as being reflexively pro-business, anti-consumer, and “radical.” That meme is overly simplistic and betrays both a severe naivety about the inherent limits of the antitrust enterprise and a lack of understanding of the intentionally evolutionary nature of antitrust doctrine. In light

³⁷³ Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (recounting Judge Leventhal's observation about legislative history).

³⁷⁴ See Wright, *supra* note 1.

³⁷⁵ See Elhauge, *supra* note 1.

³⁷⁶ See, e.g., Daniel Crane, *Chicago, Post-Chicago, Neo-Chicago*, 76 U. CHI. L. REV. ___, __ (2009) (describing a “Neo-Chicago” approach that would “rearticulat[e] [the Chicago School's] second article of faith,” by emphasizing that “competitive practices that cause harm cannot be controlled without doing damage to similar competitive practices that do good” and that “the good that would be chilled through antitrust is better than the bad that would be prevented”); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005) (setting forth an error cost approach to crafting rules governing unilateral practices). Note, though, that some scholars have disputed whether there is a real difference between the Neo-Chicago approach and the traditional Chicago School approach as emphasized by such lions of the Chicago School as Judge Easterbrook. See Josh Wright, *Neo-Chicago Meets Evidence-Based Antitrust*, Posting to Truth on the Market (May 12, 2009) (available at <http://truthonthemarket.com/2009/05/12/neo-chicago-meets-evidence-based-antitrust/>).

³⁷⁷ See, e.g., Lambert, *Dr. Miles Is Dead*, *supra* note 54; Lambert, *A Decision-Theoretic Rule*, *supra* note 54.

of antitrust's limits, which must be respected if the body of law is to provide maximum long-term benefit to consumers, the Roberts Court's antitrust decisions, while generally rendering antitrust a more "modest" enterprise, have moved the law in a salutary direction.