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Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute

Daniel M. Tracer

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* Attorney, United States Department of Justice, Antitrust Division. The views stated herein do not necessarily reflect those of the United States Department of Justice.

ABSTRACT

Despite the strong judicial policy in favor of stare decisis—the norm of adhering to past precedent when approaching newer cases—the Supreme Court, in past decades, has not hesitated to overturn antitrust doctrines that were, in its view, no longer consistent with the goals of antitrust law and sound economic theory. Even after widespread acknowledgement of this trend by both the Court and commentators, the trend of a modified stare decisis in the realm of antitrust finds contradictory expression in the cases and leaves open serious jurisprudential questions. This Article addresses that void by analyzing the major relevant Supreme Court antitrust cases and isolating and critiquing the justifications given for departures from stare decisis. The Article argues that while it is undesirable to abruptly overrule antitrust precedent on the basis of contemporary economic trends, gradually departing from precedent is justified as part of the evolution of antitrust principles in much the same way as it occurs in other common law fields. Finally, this Article suggests three ways in which courts—including the Supreme Court—can continue to develop antitrust law while avoiding sharp doctrinal breaks with stare decisis and the detriments associated with a lack thereof.

I. INTRODUCTION

Students of introductory antitrust courses are exposed to a body of doctrine characterized by distinctly sharp and disjunctive contours. Unlike many other areas of the law, the body of federal antitrust law that has developed over the past 120 years is marked by numerous seemingly sudden adoptions and abandonments of substantive rules of law. In past decades, the Supreme Court has not hesitated to overturn antitrust doctrines that were, in its view, no longer consistent with sound competition policy or economic theory. What has resulted is a historical continuum of case law adopting certain rules and tests only to have those tests wiped away years or sometimes decades later. Despite the strong general judicial policy in favor of stare decisis—the norm of adhering to past precedent when approaching newer cases—the Supreme Court has expressly and impliedly opted to revise and reexamine the antitrust laws on numerous occasions.[1] While antitrust law's need to keep up with the rapidly changing pace of business and technology may require it to possess an enhanced degree of flexibility, it cannot be denied that a large break with stare decisis tends to erode the appearance of the rule of law and leave business entities hopelessly uncertain.

1. *See infra* Part II.

Following in the footsteps of the Supreme Court, scholars now take it for granted that stare decisis has a somewhat modified application in the area of antitrust. Though certain notable exceptions have persisted in the case law, scholars and practitioners are no longer sure that any particular rule or doctrine will survive the next grant of certiorari. While some scholars have highlighted the benefits and appropriateness of such a modified stare decisis in the antitrust realm, others have cited this trend with disapproval. Notable names in the field rely on this tendency to direct the crosshairs and divine what now-passé antitrust doctrine may be up next for retirement.[2]

Despite the widespread acknowledgement of this trend by both the Court and commentators, the idea of a modified stare decisis in the realm of antitrust remains to be fully addressed on its own terms. For one thing, the decision to override the normal rigors of stare decisis in any field is serious enough to warrant additional scrutiny and evaluation. Moreover, to the extent that the Supreme Court has grappled with this point—both explicitly and implicitly—the Court has failed to present a single and coherent justification for this practice or to apply the practice in a uniform manner. In fact, the Court has even contradicted itself, at times applying the strong form of stare decisis associated with statutory interpretation, while other times treating the Sherman Act as an open-ended common law statute. This Article tackles the question of stare decisis in antitrust by bringing together and analyzing what the Court has actually said—and to what ends—in major antitrust cases over the last few decades in the process of overruling formerly controlling legal rules. In doing so, the Article tracks the major relevant Supreme Court cases, isolates the various justifications for departures from stare decisis in antitrust, and gathers alternative understandings and insights into this trend.[3] In addition, this Article critically considers the strengths and weaknesses of those justifications and proposes ways in which antitrust jurisprudence may avoid some of the problems that stem from a perceived lack of stare decisis and the benefits associated therewith.[4]

In particular, this Article's analysis focuses on the distinction between abrupt overrulings based upon new economic theory—such as finding pro-competitive benefits in places where none were recognized earlier—and overrulings based upon doctrinal refinement. The latter occur, for example, when the Supreme Court acts to ensure that the legal scheme of antitrust continues to function in a smooth manner

2. *See infra* Part II.
3. *See infra* Part II.
4. *See infra* Parts III & IV.

consistent with the goals of the antitrust laws. This Article explores the Supreme Court's understanding of the Sherman Act as a "common law statute"[5] and the history of that adage. The Article concludes that it is undesirable to overrule established antitrust precedent without adequately addressing the stare decisis concerns generally recognized in common law fields. Likewise, it is inappropriate to rely on the "common law statute" maxim to hastily displace precedent on the sole basis of alternative economic understandings.

Part II.A of this Article provides a brief overview of the doctrine of stare decisis, followed by an synopsis of the now widely accepted understanding of its weaker applicability in antitrust in Part II.B. Part II.C closely reads the relevant precedents to parse out what the Court has both said and done in the process of repealing outdated antitrust doctrine. This elucidation focuses on a handful of major Supreme Court decisions since the 1970s that are most frequently cited as either expressly recognizing a diminished stare decisis in antitrust or effectively undermining longstanding antitrust principles. Part II.C also includes a discussion of the most noteworthy—and perhaps infamous—of the exceptions to the notion of a diminished stare decisis in antitrust. Part III then analyzes the purported justifications for a weaker version of stare decisis and weighs the validity of these approaches under both policy and economic standards. Finally, Part IV concludes by suggesting ways in which antitrust law can be made more consistent over time and how the problems associated with frequent departures from stare decisis can be ameliorated.

II. BACKGROUND

A. *Stare Decisis*

A complete discussion of stare decisis is both unnecessary to this Article's argument and beyond the scope of the discussion. However, it is helpful to engage in a concise review of the concept of stare decisis with the particular goal of understanding the benefits that tend to derive from a system of law that hues closely to precedent and to highlight the hardships that result from a lack thereof. This Part also takes note of the ample scholarly literature that has criticized the doctrine of stare decisis and emphasized some of its shortcomings. While the theory and application of stare decisis has engendered tomes of scholarship, the general notion that judges should apply prior precedent in

5. *See infra* Part III.C.

a consistent way is well-ingrained in American jurisprudence[6] and is constantly reaffirmed by the legal profession, all the way up to the justices of the Supreme Court.[7] Stare decisis is, in essence, the idea that cases should be decided on the basis of legal principles articulated in earlier cases rather than on the basis of novel legal doctrine in each instance.[8] While no two cases can ever be precisely the same, stare decisis dictates that a court ought to strive to arrive at outcomes in subsequent cases that are true to the principles and animating concerns established in prior cases.[9]

Stare decisis can refer to either horizontal or vertical stare decisis.[10] Horizontal stare decisis refers to a court's application of its own precedent to newer cases, whereas vertical stare decisis refers to a court's application of legal precedents developed in higher courts to cases that come before it.[11] There are, however, many nuances in the application of stare decisis. Thus, for instance, the Supreme Court has said that it will more strictly adhere to stare decisis in statutory as opposed to constitutional issues[12] and in substantive as opposed to procedural

6. *See, e.g.*, Welch v. Tex. Dep't. of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis.* Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.'") (quoting W. M. Lile, *Some Views on the Rule of Stare Decisis,* 4 VA. L. REV. 95, 97 (1916)); *see also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 9–37 (2001) (reviewing the history of stare decisis in the writings of the founding fathers as well as the early common law); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

7. *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 30 (2010) (collecting quotes from the confirmation hearings of Justice Roberts and Justice Alito).

8. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) (noting that it is a "most basic principle of jurisprudence that 'we must act alike in all cases of like nature.'") (quoting Ward v. James, [1966] 1 Q.B. 273, 294 (Can.)); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921) ("It will not do to decide the same question one way between one set of litigants and the opposite way between another.").

9. Some courts have even distinguished between "rule stare decisis," in which a court chooses what legal rule to apply to cases, and "result stare decisis," which involves applying the legal rule selected to the facts of newer cases. *See* Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1024 n.7 (Fla. 1994).

10. *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012).

11. *Id.* Courts will also often apply the legal principles of other courts with equal, but not binding, jurisdiction in order to further comity within the legal system. *Id.*

12. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *see also* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2641 (2011); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J. dissenting); United States v. Burwell, 690 F.3d 500, 504 (D.C. Cir. 2012) (noting that overruling cases involving statutory interpretation is limited to a "narrow range" of circumstances). For a general discussion and history of stare decisis in statutory interpretation, see William N. Eskridge, Jr.,

issues.[13] Further distinctions have also been recognized depending on which court is involved, for instance in lower courts as opposed to the United States Supreme Court.[14]

The basic tension within the concept of stare decisis is a complex version of the familiar tradeoff inherent in many of the most crucial dilemmas confronting legislators and judicial decision-makers: efficiency versus fairness. The Supreme Court often invokes the doctrine of stare decisis, noting, for instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it."[15] This quote, and many others like it, points to the most simple efficiency justification for stare decisis, namely, that judges would not have sufficient time and resources to tackle each dispute anew without being able to conveniently rely on how similar problems have been worked out in the past. The Court has further recognized stare decisis's "fundamental importance to the rule of law," noting that the pri-

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Overruling Statutory Precedents, 76 GEO. L.J. 1361 (1988). The primary purported justification for heightened stare decisis in statutory interpretation, namely congressional acquiescence as described in the above quote from *Illinois Brick*, is also subject to lively and robust scholarly debate. *See, e.g.*, Randal C. Picker, *Takes Two: Stare Decisis in Antitrust, The Per Se Rule Against Horizontal Price-Fixing*, Presented at the ABA Section of Antitrust Law Spring Meeting (Mar. 27, 2008) (John M. Olin Law & Economics Working Paper No. 398, 2008), *available at* http://www.law.uchicago.edu/files/files/398.pdf (noting that congressional acquiescence "dramatically overstates the ease with which Congress can overturn the Court's statutory interpretations"); Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767, 1771–77 (1996) ("Three Flaws in the Congressional Acquiescence Theory"). In contrast, in the zone of constitutional law, "[t]he doctrine of *stare decisis* . . . has only a limited application." Agostini v. Felton, 521 U.S. 203, 235 (1997) (quoting St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result)). It is now widely accepted to distinguish between three increasingly binding levels of stare decisis in different contexts: constitutional interpretation, common law rules, and statutory interpretation. *See, e.g.*, Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277, 277–78 (2004).

13. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 251 (1998) ("The role of stare decisis, furthermore, is 'somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior.'") (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

14. *See, e.g.*, Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 156 (2006) ("Whereas a three-judge panel of the United States Court of Appeal is bound to follow circuit precedent and the lower federal courts are bound to follow the decisions of the United States Supreme Court, the Supreme Court considers its own prior decisions as entitled to deference or a presumption of correctness but not as binding."); Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument For A Complete Overruling of the* National Parks *Test*, 61 GEO. WASH. L. REV. 1430, 1461 (1993) ("The notion of statutory stare decisis, however, is somewhat different in the context of the federal courts of appeals than in the Supreme Court.").

15. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (citing CARDOZO, *supra* note 8, at 149).

mary practical benefits of stare decisis include "stability, predictability, and respect for judicial authority."[16] In other words, adhering to stare decisis treats similarly situated individuals in the same way, fosters respect for the rule of law, and allows people to transact with others in reliance on settled rules of engagement.[17] In light of these considerations, it may be sensible to adhere to stare decisis even when a prior decision is later thought to have been wrongly decided[18] or would now be disfavored if decided anew by a court.[19] Moreover, stare decisis has also been justified on the ground that there is some form of "latent wisdom" or more correct substance in rules that have been passed on and accepted by many previous generations and scholars.[20] Thus, as a jurisprudential rule, the Supreme Court has repeatedly stated that it will generally not depart from stare decisis absent compelling justifications.[21]

However, the Court has recognized both in *Casey* as well as in subsequent decisions that stare decisis is not to be construed as an abso-

16. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (citing Vasquez v. Hillery, 474 U.S. 254, 265–66 n.9 (1986) ("[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.")); *see also* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2641 (2011); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) (noting that stare decisis promotes "'the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process.'") (quoting Payne v. Tennessee, 501 U.S. 808, 827, (1991)); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

17. *See* Freed, *supra* note 12, at 1767, 1767 n.3 (1996) (reviewing the justifications for stare decisis including "certainty, equality, efficiency, and the appearance of justice").

18. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) ("'[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.'") (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 258 (1970) (Black, J., dissenting) ("Having given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.").

19. *See, e.g.*, Radovich v. NFL, 352 U.S. 445, 452 (1957) (adhering to stare decisis despite recognizing that had the same question been presented now "for the first time upon a clean slate" the decision would surely be different); Vitro v. Mihelcic, 806 N.E.2d 632, 634–35 (Ill. 2004) ("This court also has recognized that it will not depart from precedent 'merely because the court is of the opinion that it might decide otherwise were the question a new one.'") (quoting Illinois v. Robinson, 719 N.E.2d 662, 664 (Ill. 1999)).

20. *See, e.g.*, Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007).

21. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 107, 202 (1991) (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of stare decisis demands special justification.")); *see also* Citizens United v. FEC, 558 U.S. 310, 362 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.").

lute command that the Court will always follow a prior rule.[22] In particular, the Court has held that stare decisis provides a balancing test that weighs the expected costs and benefits of adhering to prior precedent, taking into account whether: (1) the older holding has proven practically unworkable; (2) there has been significant reliance on the older holding; (3) new legal developments have rendered the old law, in effect, no longer binding; and (4) factual advancement has removed any justification the older holding had.[23] More recently, the Court has slightly reformulated the factors to be considered in evaluating the strength of stare decisis to include: (1) how old the precedent is; (2) the reliance interest at stake; (3) the reasonableness of the older decision; and (4) whether experience has revealed a precedent's shortcomings.[24] Although the Court has, on many occasions, laid out the framework for deciding when stare decisis applies, this has not prevented numerous commentators from opining that the true stare decisis calculus is often unprincipled and rather mysterious.[25]

Though stare decisis continues to hold its place in American jurisprudence, the rule has never been free of detractors. Perhaps just as famous as the notion of stare decisis itself is Judge Holmes' declaration that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[26] Indeed, over a hundred and fifty years ago Alexis de Tocqueville criticized the common law tradition for its prioritizing reliance on decided cases over

22. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisis is not an inexorable command, and certainly it is not such in every constitutional case.") (internal citations omitted); *see also* Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("'[*S*]*tare decisis* is not an inexorable command.'") (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

23. *See Casey*, 505 U.S. at 854–55.

24. *See Citizens United*, 558 U.S. at 362–63 ("'Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.'") (quoting Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009)); *see also* Arizona v. Gant, 556 U.S. 332, 348 (2009) (noting that although "*stare decisis* is of course 'essential to the respect accorded to the judgments of the Court and to the stability of the law,'" it does not require following a "past decision when its rationale no longer withstands 'careful analysis.'") (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)); *see also Pearson*, 555 U.S. at 233.

25. *See, e.g.*, Trent B. Collier & Phillip J. DeRosier, *Understanding The Overrulings: A Response To Robert Sedler*, 56 WAYNE L. REV. 1761, 1767–70 (2010) (arguing that the Supreme Court does not follow a clear or methodical approach in its application of stare decisis); Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look At Stare Decisis*, 60 U. PITT. L. REV. 89, 94 (1998).

26. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

the "constituent principles of the law."[27] Moreover, contemporary scholars have recognized that adherence to established legal decisions may sometimes prevent a judge from pursuing his or her arguably more basic function—to search for the truth in a matter—thus achieving efficiency only at the considerable expense of justice.[28] In other words, stare decisis can sometimes require that formalistic insistence on established rules trumps a more equitable or mutually beneficial decision in the matter before the court. Likewise, stare decisis may be detrimental to the extent that it is antithetical to progress by, at times, preserving oppressive traditions while preventing the law from keeping up with contemporary notions of liberty and equality.[29] More recently, stare decisis has been further critiqued on the basis of behavioral science notions that stare decisis reflects a cognitive bias in favor of the status quo, thereby possibly stunting meaningful analysis.[30] While these arguments have hardly detracted from stare decisis's prestigious standing in the legal community, this Article now turns to the admittedly confused role that stare decisis plays in the federal antitrust realm.

B. *Stare Decisis's Diminished Role in Antitrust*

In the wake of recent antitrust case law,[31] scholars now take for granted the fact that stare decisis plays a diminished role in the area of antitrust.[32] In particular, the Supreme Court has understood the Sherman Act to implement a common law approach whereby antitrust law can adapt and change course as needed.[33] Scholars thus assume that

27. *See* Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOK. L. REV. 63, 64 (2009) ("Tocqueville wrote that the greatest outrage to an Anglo-American lawyer was accusing him of having an original thought. . . . The common law system and its reliance on precedent, he wrote, forced lawyers to argue as though all of the rationale for their clients' position was compelled by pre-existing case law.").

28. *See* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 415 (2011) (noting that in some circumstances a "trial judge may be forced to navigate between the Scylla of imperfect justice and the Charybdis of abrogating stare decisis").

29. *See, e.g.*, Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67 (1988) (describing stare decisis as an effort to preserve all decisions "'made against common justice and the general reason of mankind'") (quoting JONATHON SWIFT, GULLIVER'S TRAVELS 275 (Novel Library ed. 1947)).

30. *See* Jois, *supra* note 27, at 81–92.

31. *See infra* Part II.C.

32. Salil K. Mehra, *Paradise Is A Walled Garden? Trust, Antitrust, And User Dynamism*, 18 GEO. MASON L. REV. 889, 920 (2011) ("[I]f recent Supreme Court decisions are any guide, stare decisis appears to have waned compared to a quarter-century ago."); Picker, *supra* note 12, at 2–4 (reviewing the Supreme Court's approach to stare decisis in antitrust since the 1983 term).

33. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 21 (1997) ("As we have explained, the term 'restraint of trade,' as used in § 1, also 'invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.'") (quoting Bus. Elecs. Corp. v.

stare decisis is simply not as big of an obstacle to change in the antitrust context as it is in other legal contexts.[34] For instance, it is understood that antitrust precedent may not survive as long and that antitrust legal tests may frequently change.[35] Indeed, because of the widespread belief that antitrust's legal doctrine can and will be overruled and repealed as appropriate, scholars frequently attempt to predict which formerly binding rules of law will be abandoned next and which, if any, have staying power.[36]

To be sure, the diminished function of stare decisis in antitrust is a welcome development in the eyes of some. Those who subscribe to this understanding primarily highlight the flexibility that results from a weaker version stare decisis.[37] Accordingly, antitrust law is thought to

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Sharp Elecs. Corp., 485 U.S. 717, 732 (1988); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1705 (1986) ("The Sherman Act set up a common law system in antitrust. The statute and its legislative history authorize the ongoing transition on an efficiency-oriented approach."); *but see* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("In considering whether to cut back or abandon the *Hanover Shoe* rule, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."). This contradiction is further discussed below. *See infra* Part III.C.

34. *See, e.g.*, Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us A Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 716-17 (2010) ("Still, when it comes to antitrust, the normal principles of stare decisis do not apply with full force. Over the past few decades in particular, the Supreme Court has not hesitated to overrule its own antitrust decisions . . . ."); Timothy B. Dyk, *Does The Supreme Court Still Matter?*, 57 AM. U. L. REV. 763, 771 (2008) ("In the somewhat similar area of antitrust, the Supreme Court and the lower federal courts beginning in the 1970s felt quite free to change antitrust law without specific congressional authorization."); Alan Devlin, *On The Ramifications of* Leegin Creative Leather Products, Inc. v. PSKS, Inc.*: Are Tie-Ins Next?*, 56 CLEV. ST. L. REV. 387, 400 (2008) (noting the "weakness of stare decisis in the antitrust field").

35. *See* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 98–99 (2010) ("Stare decisis exerts a relatively weak gravitational pull in the antitrust realm, in part because the Sherman Act is a classic common law statute that leaves it to the judiciary to define optimal competition policy. Bad precedents—and there have been many—have been reversed left and right.").

36. *See, e.g.*, Gregory J. Werden, *Next Steps in the Evolution of Antitrust Law: What to Expect from the Roberts Court*, 5 J. COMPETITION L. & ECON. 49 (2009) (identifying (a) the absolute requirement of market delineation as a predicate for merger analysis, (b) the approach to market delineation of *Brown Shoe*, and (c) the formulation of the monopolization offense in *Grinnell* as three antitrust doctrines that are "ready for retirement"); Picker, *supra* note 12, at 1 (predicting that the Court will not directly abandon the per se rule against horizontal price fixing); David S. Evans, *Untying the Knot: The Case for Overruling* Jefferson Parish 13 (July 2006), *available at* http://www.usdoj.gov/atr/public/hearings/single_firm/comments/219224_a.pdf (advocating for the overruling of *Jefferson Parish*); Devlin, *supra* note 34, at 391 (predicting and advocating for the demise of the per se rule against product tying).

37. *See, e.g.*, Ryan T. Jardine, Note, *Economic Law—Vertical Minimum Pricing In* Leegin*—Adrift With The Rule Of Reason; Sinking With Stare Decisis;* Leegin Creative Leather Prod., Inc. V. PSKS, Inc.*, 127 S. Ct. 2705 (2007)*, 8 WYO. L. REV. 683, 701 (2008) ("There are significant benefits for flexibility in stare decisis for antitrust litigation. . . . By setting stare decisis aside the Court will modernize and put to rest aged antitrust law and adapt to new economic understand-

benefit from the Court's ability to more easily abandon precedent that no longer fits with contemporary economic views and the Court's ability to keep the antitrust laws up-to-date with economic thinking. In other words, this trend marks a triumph of economic reality over legalistic formality in the antitrust realm. Of course, one serious consequence of a weaker version of stare decisis is that the antitrust practitioner must also be an economist.[38] Thus stated, this view of stare decisis would hardly surprise students of the Chicago School and its understanding of antitrust law as nothing more than a branch of applied microeconomics.[39]

In contrast, a somewhat more dominant view of stare decisis takes a negative attitude of such a state of affairs. As an initial matter, scholars have criticized the predominance of economic theory over traditional legal reasoning in antitrust law due to a concern that judges may lack the proper expertise to fully base their decision on economic analysis. This concern goes beyond a judge's possible lack of formal economic training, taking into account the institutional impediments of a court in deciding economic matters and the lack of consensus among economic scholars themselves on the costs and benefits of various business practices.[40] Moreover, to the extent that the Court's antitrust decisions are in tension with stare decisis, the Court's tendency to overrule antitrust precedent goes against the Court's function to interpret law rather than promulgate policy.[41] The consequences of

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ing which benefits consumers."); Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 81 (2007) ("As economic understanding and awareness of market conditions have improved, and as alternative scenarios arise within different market conditions, courts have adapted antitrust law to account for and adjust to the different applications. This trend has eliminated many per se rules in favor of evaluative rules of reason, and has shifted away from adherence to legal category and stare decisis and instead explicitly pursues functional objectives.").

38. *See* Jardine, *supra* note 37, at 701 ("It is therefore instructive to practitioners and businesses to realize that building upon stare decisis in antitrust litigation is building upon an unstable foundation. It is much more reliable to stay abreast of modern economic scholarship.").

39. *See* John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 620 (2005) ("Judge Richard Posner has gone so far as to suggest that 'antitrust law has become a branch of applied economics.'") (quoting RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229 (1999)).

40. *See, e.g.*, Lance McMillian, *The Proper Role of Courts: The Mistakes of the Supreme Court in* Leegin, 2008 WIS. L. REV. 405, 450–51 (2008) ("On the whole, economists dispute among themselves the relative costs and benefits of resale-price maintenance as a device for the promotion of consumer welfare. . . . The Court lacks the ability of the legislative branch to commission a study to analyze the potential pluses and minuses of a given policy proposal in detail.").

41. *See id.* at 452–54 ("Stare decisis, by its very nature, connotes a respect for the past. Out of this respect flows stability. . . . If the meaning of the Sherman Act can constantly change on the basis of the composition of the Court, then it becomes a great reach for the Court to even pretend that it is interpreting law.").

failing to abide by stare decisis, especially in economic matters, include the following: the inability of businesspeople to confidently transact under the assumption of settled law,[42] diminished public confidence in the Court,[43] and a lack of fairness or evenhandedness in the way justice is administered, which tends to undermine the concept of the rule of law.[44] In other words, many of the benefits associated with stare decisis may be lacking in antitrust law.

One final perspective that has gained traction in recent years is the notion that weaker stare decisis in the field of antitrust flows—or ought to flow—from the regulatory nature of the antitrust laws.[45] Under this view, it is assumed that regulatory agencies, as opposed to courts, tend to change the rules and doctrines they apply very quickly, often reflecting shifting policies and priorities of incoming executive administrations as well as the technical expertise of the agency involved.[46] Thus, if one assumes there is some carryover in the way that

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42. *See id.* at 452–53 ("Part of law's function is to provide clear guidance so that citizens may reasonably understand their rights and obligations. Constant change of the law would undermine this type of reliance. By guarding against frequent swings in a country's governing rules, stare decisis protects an individual's expectations as a member of a broader society.").

43. *See id.* at 454–55 ("When this happens, raw political power, not a coherent antitrust jurisprudence, controls the disposition of particular antitrust cases at the Supreme Court level. In the long run, the Court's reputation suffers. Inconsistency invariably weakens public confidence in the law and legal institutions.").

44. *See* Andrew S. Oldham, *Sherman's March (In)To the Sea*, 74 TENN. L. REV. 319, 379–80 (2007) (concluding that "the federal antitrust regime is unconstitutional. What began as a codification of the common law in 1890 has mutated into a judge-made monstrosity that Senator Sherman and his fellow framers would not be able to recognize today. . . . [t]hus imperiling the separation of powers doctrine and basic principles of federalism."); David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 726 (2001) ("Dramatic change in the meaning and effect of statutory law [in antitrust], without legislative action, is a development that should arouse concern. Judicial conservatives, who view the proper function of courts as interpreting and applying the law, and eschew judicial lawmaking, should be especially concerned."); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266, 268 (1986) ("In short, the norms that govern other areas of statutory law go unobserved in antitrust, which imposes high costs on traditional rule-of-law values."); *see also* Elbert L. Robertson, *Does Antitrust Regulation Violate the Rule of Law?*, 22 LOY. CONSUMER L. REV. 108 (2009) (arguing that the vague and amorphous interpretations utilized under the Rule of Reason violate the basic principles of the rule of law).

45. *See, e.g.*, Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008) (noting that "[s]ince the Chicago School revolution in the 1970s, federal antitrust enforcement has become considerably less democratic and more technocratic. It has become increasingly separated from popular politics, insulated from direct democratic pressures, delegated to industrial-policy specialists, and compartmentalized as a regulatory discipline.").

46. *See* Mehra, *supra* note 32, at 920 (observing that "not only can the Court apply antitrust doctrine, but the FTC can as well, where regulatory interpretations can and do change rapidly"); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 677 (2009) (noting that one advantage of the FTC is that unlike the federal courts "it is less subject to the constraint of stare decisis"); *but see* E. H. Schopler, Comment Note, *Applicability of Stare Decisis Doctrine to Decisions of Ad-*

courts and the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are involved in the interpretation and enforcement of the antitrust laws, it may be somewhat less surprising that stare decisis should play a less pronounced role.[47]

In any event, for better or worse, stare decisis's diminished status in antitrust appears to be beyond real debate. While it is difficult to gather precise data on the relative frequency of cases being overruled by the Supreme Court, many well-known antitrust doctrines have been retired by the Court in the last five decades—at a time when the Court rarely hears more than one or two antitrust cases per term[48]—suggesting a unique willingness to override stare decisis in this area. Part II.C now turns to a sampling of cases that have overruled antitrust precedent and the justifications for these decisions.

C. *Major Supreme Court Cases Overruling Precedents And Their Internal Justifications*

While the majority of antitrust cases spend most of their time in the district courts and courts of appeal, the major antitrust doctrines ultimately come—sooner or later—from the Supreme Court. While the Supreme Court rarely addresses more than a single antitrust case per term, and sometimes not even that, when it does select an antitrust case for review, it is almost always to establish, modify, or repeal a major antitrust doctrine. This Part focuses on the major Supreme Court cases since the 1970s that have repealed important, and usually longstanding, antitrust rules or doctrines. While this survey is not ex-

ministrative Agencies, 79 A.L.R.2d 1126 (2011) ("Notwithstanding statements made to the effect that the doctrine of stare decisis does not, or does not fully, apply to decisions of administrative agencies, the fact is that administrative agencies, in the exercise of their determinative functions, follow, or, in an appropriate case, deviate from, their own precedents in a manner comparable to what the courts do under the doctrine.").

47. While the FTC is an independent federal agency with commissioners and administrative law judges, *see* 15 U.S.C. § 41 *et seq.*, and the Antitrust Division is not, each entity employs both lawyers and economists, and both entities are heavily involved in traditional enforcement as well as the regulatory side of competition law. *See, e.g.*, *About the FTC*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/ftc/about.shtm (last visited Jan. 2, 2014); *About the Antitrust Division*, DEPARTMENT OF JUSTICE, http://www.justice.gov/atr/about/mission.html (last visited Jan. 2, 2014).

48. *See* R. Hewitt Pate, Assistant Attorney General, U.S. Dept. of Justice, Antitrust Div., Address at the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004), *available at* http://www.justice.gov/atr/public/speeches/204136.htm ("Because there are so few Supreme Court antitrust decisions each year . . . each decision is an event of major significance for antitrust enforcers and the antitrust bar."). Of note, the Court has taken somewhat more cases in recent years. *See* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 872 n.2 (2011) (noting that "[t]he Rehnquist Court decided one antitrust case from 1993 to 1995, one each year from 1996 through 1999, and none from 2000 to 2003; the Roberts Court decided seven cases from 2006 to 2007").

haustive, it displays prime examples of the Court's willingness to overrule precedent in the name of developing competition policy, and it includes the major justifications that the Court has given for this practice. The cases are presented chronologically in order to demonstrate the erosion of stare decisis over four decades. For instance, this progression highlights the ascendency of neoclassical economic analysis in antitrust law and the way in which the Court has relied on older cases to justify repealing prior decisions despite stare decisis—itself a noteworthy, though perhaps circular, version of stare decisis. To round out the perspective presented here, this Part concludes with a discussion of the most notable exception to the notion of a weakened version of stare decisis: the Supreme Court's continuing commitment to Major League Baseball's exemption from antitrust law in the face of immense academic opposition.

1. *Sylvania*: The Demise of Per Se Illegality for Non-Price Vertical Restrictions

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[49] the Court held that non-price vertical restrictions, specifically geographic limitations imposed on retailers, were to be judged under the rule of reason rather than be condemned per se. In that case, Continental, an electronics retailer, sued Sylvania, a manufacturer, over its policies requiring retailers to limit their sales of Sylvania products exclusively to specified geographical zones.[50] The Court concluded that Sylvania's conduct had to be analyzed under the Rule of Reason and was not per se illegal. In doing so, the Court expressly overruled *United States v. Arnold, Schwinn & Co.*,[51] which just ten years prior had announced that non-price vertical restrictions were per se illegal so long as the transaction in question involved the passage of title.

The substantive reasons for overruling such a recent precedent are found in Section III of the *Sylvania* opinion. While the Court did not go through all the factors currently associated with stare decisis analysis, the Court did mention stare decisis[52] and even devoted a few paragraphs to justifying the sudden change in judicial course. First, the Court acknowledged that *Schwinn* was a relatively recent case, and, as such, it was not particularly entrenched precedent, which

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

50. *Id.* at 38–40. Enforcement of the antitrust laws by private parties whom have been injured by anticompetitive conduct is authorized by section 4 of the Clayton Act, 15 U.S.C. § 15 (2006).

51. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

52. *Sylvania*, 433 U.S. at 47 ("*Schwinn* is supported by the principle of stare decisis.").

weighed in favor of overruling.[53] However, the *Sylvania* Court proceeded to explain that the main reason for overruling *Schwinn* was based on an economic analysis. In doing so, the *Sylvania* Court cited to articles and texts that identified the particular economic efficiencies and "redeeming virtues" that may be inherent in a decision to impose non-price vertical restraints.[54] The Court stressed that rules of per se illegality are only appropriate where conduct has been shown, based on past experience and familiarity, to be wholly pernicious and lack any redeeming pro-competitive benefits.[55] Thus, in light of the more recently understood pro-competitive efficiencies that may be present in non-price vertical restrictions, the Court found the per se ban to be inappropriate.

In essence, the *Sylvania* Court's deviation from the normal rule of stare decisis was purportedly justified based upon new or improved economic understanding by the Court. The Court did not rely on changed circumstances, markets, or economic realities but, rather, on after-acquired economic comprehension. In other words, the Court conceded that *Schwinn* was wrong at the time it was decided and all that had changed was the majority of the Justices' understandings of the economic underpinnings of non-price vertical restrictions.[56] With the Court's subsequent realization—aided by contemporary legal and economic scholars—the per se rule was understood to no longer be appropriate. Moreover, to the extent that the Court did grapple with the concept of stare decisis as a barrier to such a change in the law, it noted briefly in a footnote that the "contracts in restraint of trade" addressed by the Sherman Act are subject to contextual reevaluation in like manner to the common law concept of restraints of trade.[57]

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53. *Id.* Indeed, *Schwinn* itself was in disagreement with a case decided four years earlier, refusing to endorse a per se rule against vertical restrictions. *See* White Motor Co. v. United States, 372 U.S. 253 (1963).

54. *Sylvania*, 433 U.S. at 54–57. The Court understood such efficiencies to include: the potential inducement for retailers to a carry a manufacturer's product based on the promised local intrabrand monopoly and an incentive for retailers to invest in advertising or other supplemental services without the fear of local free riders. *Id.*

55. *Id.* at 49–50 (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

56. In this case, the new economic understanding wasn't actually new. This understanding is featured prominently in Justice Stewart's dissent in *Schwinn*, 388 U.S. 365, 383–85 (1967), and in some of the articles cited in *Sylvania* that were actually authored before *Schwinn*, for instance, Lee E. Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROBS. 506, 511 (1965) (identifying pro-competitive elements in vertical restrictions), is cited in *Sylvania*, 433 U.S. at 55. This new economic understanding is now accepted by a majority of the Supreme Court.

57. *Sylvania*, 433 U.S. at 53 n.21 ("We quite agree with Mr. Justice Stewart's dissenting comment in *Schwinn* that 'the state of the common law 400 or even 100 years ago is irrelevant to the

In the same vein, it is interesting to note the types of sources the *Sylvania* Court relied upon to justify overruling the per se rule against non-price vertical restraints. The citations in Section III of *Sylvania* are mostly to prominent Chicago School advocates of economic analysis in antitrust, such as Robert Bork and Richard Posner, as well as citations to actual economic texts, such as Paul Samuelson's economics textbook.[58] Such heavy reliance on economics-based sources implies a different path from that of normal legal and doctrinal analysis. Instead, the Court was concerned with making sure that the antitrust laws were in sync with the justices' views on present economic theory.

2. *Copperweld*: The End of the Intra-Enterprise Conspiracy Doctrine

In *Copperweld Corp. v. Independence Tube Corp.*,[59] the Supreme Court held that, for the purposes of a Sherman Act section 1 conspiracy, a parent corporation and its wholly owned subsidiary were not legally capable of conspiring with one another. *Copperweld* involved a private antitrust competitor suit against a parent company, Copperweld, and its wholly owned subsidiary, Regal Tubing. The complaint alleged that Copperweld and Regal had conspired to illegally prevent plaintiff Independence Tube from obtaining tubing jobs by contacting plaintiff's potential business partners and banks to warn them that plaintiff's business venture was operating in violation of certain contractual agreements.[60] The jury found that Copperweld and Regal were distinct entities under the intra-enterprise conspiracy doctrine and that they had in fact engaged in a conspiracy in restraint of trade in violation of section 1.[61] The jury assessed damages for plaintiff accordingly.[62] The Seventh Circuit affirmed.[63]

In reversing the lower court, the Supreme Court first acknowledged that the intra-enterprise conspiracy doctrine—under which a parent and a subsidiary could be found guilty of a conspiracy as long as they acted as separate corporate entities—was supported by no fewer than six prior Supreme Court decisions.[64] The *Copperweld* Court found

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issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.'") (quoting *Schwinn*, 388 U.S. at 392).

58. *Id.* at 55–57.

59. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

60. *Id.* at 756–57.

61. *Id.* at 757–58.

62. *Id.* at 758.

63. *Id.*

64. Specifically, the Court recounted that the intra-enterprise conspiracy doctrine was supported, at least in dicta. United States v. Yellow Cab Co., 332 U.S. 218, 227–28 (1947) (concern-

that in all of those cases, however, the language concerning the intra-enterprise conspiracy doctrine was unnecessary to the decision.[65] Thus, the Court was free to reach the conclusion that a parent company could not legally conspire with a wholly owned subsidiary in violation of section 1 of the Sherman Act without fully overruling and disagreeing with the outcomes or merits of earlier cases. Nonetheless, the Court recognized that it was, in effect, overruling prior cases to the extent that they disagreed, and it was certainly establishing a doctrinal change by abandoning the intra-enterprise conspiracy doctrine. This doctrine had, in fact, been the dominant rule of law for approximately four decades in both the Supreme Court as well as the courts of appeal.[66]

In making this doctrinal change, the Court did not mention the rule of stare decisis or even pay lip service to any benefit that might come from continued adherence to the intra-enterprise conspiracy doctrine.[67] However, the Court did spend time laying out policy and thematic arguments that supported overruling the intra-enterprise conspiracy doctrine. In *Copperweld*, there was no focus on novel economic understandings or on previously misunderstood statutory text. Moreover, reliance was not heavily placed on economic material—

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ing an antitrust enforcement action against a manufacturing company and multiple operating companies all under single ownership and noting that unreasonable restraint "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent"); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116 (1948) (concerning an antitrust enforcement action in the motion picture industry and holding that "[t]he concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent"); United States v. Griffith, 334 U.S. 100, 101 (1948) (concerning an antitrust enforcement action against motion picture operators and finding a conspiracy between "four affiliated corporations and two individuals who are associated with them as stockholders and officers"); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951) (involving a private antitrust suit against two wholly owned subsidiaries of a liquor distillers and holding that "common ownership and control does not liberate corporations from the impact of the antitrust laws"); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (concerning an antitrust enforcement action against an American corporation and its British and French affiliates and holding that "common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws"); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 141–42 (1968) (concerning a private antitrust suit against a parent corporation and three subsidiaries and holding that the "fact of common ownership could not save [the defendants] from any of the obligations that the law imposes on separate entities").

65. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 760–66 (1984).

66. *Id.* at 777 ("To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled.").

67. Indeed, only the dissent mentioned stare decisis and engaged in a forthright discussion about the limited circumstances that justify overruling precedent. *See id.* at 779–84 (Stevens, J., dissenting).

only a bare minimum was even cited—and the Court did not grapple very much with statutory language or history.[68] Instead, the dominant thrust of the Court's opinion focused on policy and the overarching principles of the Sherman Act. The Court placed great weight on the fact that parents and subsidiaries have a unity of purpose and maintain joint resources and goals.[69] The Court compared this unity to the unity of two corporate officers who might make a decision together—a situation in which no one would believe that a conspiracy in restraint of trade was afoot.[70] To the extent that economic concerns weighed upon the Court, it acknowledged that such internal coordination promotes effective management within an enterprise. Moreover, the statutory text itself only played a role in the Court's determination inasmuch as the Court bolstered its conclusion with the Sherman Act's central distinction between unilateral and concerted action.[71] Specifically, because the statute is so careful to distinguish between unilateral and coordinated action, and to limit sanctions on cases of unilateral action to those involving actual or threatened monopolization, the statute could not have meant to make almost all decisions involving two people or entities eligible for conspiracy. Finally, the Court noted that to allow liability for wholly owned subsidiaries but not for mere internal sub-divisions of a company would lead to a formal substanceless distinction within antitrust law.[72]

In sum, the *Copperweld* Court justified its departure from past antitrust doctrine as a way of keeping a tab on and fine-tuning underlying antitrust policy in accordance with the spirit of the antitrust laws. The Court believed that the older doctrine—intra-enterprise conspiracy—needed to be reevaluated in light of commercial realities, and *Copperweld* presented the opportunity to do so. In other words, the Court was engaged in doctrinal analysis and refinement, or the project of developing the law as it expands, to handle ever new situations, such as the greater complexity of corporate structure.

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68. In fact, the Court suggests that the language of the statute is totally ambiguous, and the plain language of a "conspiracy" might in fact be understood to include any two economic actors at all, even members of a single integrated enterprise. *See id.* at 769 n.15.

69. *Id.* at 771–72.

70. *Copperweld*, 467 U.S. at 769.

71. *Id.* at 768–69 ("The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination . . . or conspiracy' in § 1.").

72. *Id.* at 772–74 (noting that "[realities] must dominate the judgment") (quoting Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933)).

3. *ARCO*: The Introduction of Antitrust Injury

Atlantic Richfield Co. v. USA Petroleum Co. (ARCO)[73] built upon a line of Supreme Court cases introducing and developing the requirement of "antitrust injury" in private antitrust suits.[74] *ARCO* involved a suit against ARCO by a competitor, USA Petroleum, alleging illegal vertical maximum price maintenance.[75] At the time, vertical maximum price maintenance was illegal per se.[76] However, although ARCO had engaged in prohibited anticompetitive conduct, the Court held that USA Petroleum, as a competitor rather than a customer or a link in ARCO's chain of distribution, was not injured by the component of ARCO's behavior that made that behavior anticompetitive.[77] In fact, USA Petroleum might theoretically have been helped by ARCO's policy of setting maximum resale prices.[78] In other words, the Court limited the zone of potential antitrust plaintiffs to those who are harmed because of dampened competition in a market, at times apparently excluding a competitor from suing based on anticompetitive conduct.[79]

In expanding the notion of antitrust injury to preclude suit by a competitor—even a suit involving per se illegal conduct—absent a larger injury to competition itself, the Court implicitly overruled, or at least significantly curtailed, the holdings of prior cases permitting competitor suits without immediate proof of harm to the overall competitive process. Most notably, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*[80] and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[81] the Supreme Court refused to dismiss competitor suits alleging that the plaintiffs had been forced out of their respective markets by a standard setting trade organization in *Radiant Burners* and by a com-

73. Atlantic Richfield Co. v. USA Petroleum Co. (ARCO), 495 U.S. 328 (1990).

74. The birth of the concept of antitrust injury is generally associated with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), and further developed in *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *see generally* Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years Of Antitrust Injury: Down The Alley With* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273 (1998) (discussing the history of the antitrust injury requirement).

75. *ARCO*, 495 U.S. at 331.

76. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968). *Albrecht* was later overruled. *See infra* Part III.C.

77. *ARCO*, 495 U.S. at 345.

78. *Id.* at 336–37 ("Respondent was *benefited* rather than harmed if petitioner's pricing policies restricted ARCO sales to a few large dealers or prevented petitioner's dealers from offering services desired by consumers such as credit card sales.") (emphasis added).

79. *Id.* at 337–39 ("The antitrust laws were enacted for 'the protection of *competition, not competitors.*'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)) (emphasis in original).

80. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

81. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

petitor's agreement with suppliers in *Klor's*. In these earlier cases, the Court had held that anticompetitive harm to a competitor alone was enough to justify a private antitrust suit.[82] In fact, in *Klor's*, the Court explicitly rejected the defendant's argument and the Ninth Circuit's conclusion that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured."[83] Thus, while the *ARCO* Court—as well as the prior antitrust injury cases—did not so much as mention its impact on the earlier case law, it put substantial restrictions on future competitor suits.[84]

Because the *ARCO* Court did not see itself as overruling prior precedents, the Court never addressed the issue of stare decisis and its applicability or lack thereof. Nonetheless, the Court provided specific reasoning as to why competitor harm alone would no longer state an antitrust cause of action. In contrast to *Sylvania*, the *ARCO* Court did not rely on particularized economic models or theoretical advances. Instead, the Court's focus was doctrinal. The Court concentrated on sharpening the element of proper enforcement within antitrust,

82. *See, e.g.*, *Radiant Burners*, 364 U.S. at 660 (stating that anticompetitive conduct is "'not to be tolerated merely because the victim is just one [manufacturer] whose business is so small that his destruction makes little difference to the economy.'") (quoting *Klor's*, 359 U.S. at 213). Of further interest, in addition to *Klor's* and *Radiant Burner*'s holdings concerning proper plaintiff antitrust standing, it appears that more recent Supreme Court precedent has eroded *Klor's* and *Radiant Burner*'s other significant holdings concerning concerted refusals to deal. In *Radiant Burners* and *Klor's*, as well as numerous earlier cases, there was no question that a concerted refusal to deal was per se illegal. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210–20 (1940); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941); N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); *Klor's*, 359 U.S. at 207 (1959); *Radiant Burners*, 364 U.S. at 656 (1961). The entire premise of the per se rule of illegality, of course, is that conduct—here a concerted refusal to deal—is prohibited without inquiring into the specific pro-competitive justifications that may be put forth in a particular case. Since then, however, the Supreme Court held in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), that the per se rule concerning concerted refusals to deal has only been applied to cases that coercively cut parties out of business relationship, denied parties access to crucial business needs and "were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Id.* In other words, after *Northwestern Wholesale*, the per se rule may not apply to group boycotts when plausible pro-competitive justifications can be offered. Thus, while *Northwestern Wholesale* merely purports to define that group boycotts are per se illegal, its reasoning can—in an analogous manner to *ARCO*—be construed to have effectively undermined a crucial portion of the holding of *Radiant Burners*. For instance, at least one court has noted that "[t]he apparent rule [after *Northwestern Wholesale*] is that concerted refusals to deal are violations per se of § 1 where there is no plausible argument that the refusal to deal accentuates efficiency . . . ." Tacker v. Wilson, 830 F. Supp. 422, 427 (W.D. Tenn. 1993).

83. *Klor's*, 359 U.S. at 210 (quoting Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214, 233 (1958)).

84. *See, e.g.*, Jacobson & Greer, *supra* note 74, at 273 ("*ARCO*'s reasoning and result made it very clear that *Radiant Burners* had been overruled.").

namely ensuring that antitrust law focused on the integrity of the competitive process and not the viability of individual competitors. This concern manifests itself in the Court's rule, limiting the scope of proper antitrust plaintiffs, and is visible in many portions of the opinion. First, the Court placed the primary emphasis of its reasoning on parsing out the harms inherent in vertical maximum price maintenance and establishing that those particular harms did not apply to a competitor like USA Petroleum.[85] Second, the Court devoted Section II.C of its opinion to explaining that it was appropriate to dismiss USA Petroleum's suit inasmuch as there were other, more proper parties out there with the incentive to complain about the alleged anticompetitive conduct.[86] Furthermore, the Court situated its decision within a line of gradually developing case law, bringing antitrust doctrine into line with the principles underlying the Sherman Act—protecting the competitive process. These decisions developed over more than two decades with an emphasis on underlying legal objectives rather than on updated economic theory.[87] Taken together, these elements of the opinion suggest that the primary justification of the *ARCO* Court's application of the antitrust injury rule—even in the context of a per se violation—was its concern with ensuring that the antitrust laws coherently advanced the protection of the competitive process. The Court did this by limiting private enforcement of antitrust laws to cases that represented real competitive harm. In other words, the Court repealed, or at least restricted, prior holdings in the name of further doctrinal refinement by chipping away at legal elements that detracted from the goals of protecting competition.

4. *State Oil*: Rejecting Per Se Illegality for Maximum Resale Price Maintenance

In *State Oil Co. v. Khan*,[88] the Supreme Court finally began to explicitly play down the role of stare decisis in the realm of antitrust. *State Oil* involved a private antitrust suit by the lessee and operator of a gasoline station against the defendant, State Oil, the owner of the station. The complaint was based on State Oil's practice of controlling the prices that plaintiff could charge for gas, in effect imposing a maxi-

85. ARCO, 495 U.S. 328, 334–41 (1990).

86. *Id.* at 345–46.

87. The *ARCO* Court did, in fact, cite to articles by many scholars affiliated with the Chicago School's notions of law and economics, such as Robert Bork and Frank Easterbrook. However, the primary emphasis, especially at the beginning of Section II and II.A where the Court justifies the application of the antitrust injury rule, was on the general goal of protecting competition and bringing this case in line with prior decisions.

88. State Oil, Co. v. Khan, 522 U.S. 3 (1997).

mum resale price maintenance scheme on the plaintiff. Thus, the case came squarely under the Supreme Court's ruling twenty-nine years earlier in *Albrecht v. Herald Co.*,[89] which had held that maximum resale price maintenance was per se illegal. The question before the Court, therefore, was whether or not *Albrecht* should be overruled.

Ultimately, the *State Oil* Court unanimously overruled *Albrecht*, thereby returning cases involving maximum resale price maintenance to the rule of reason framework.[90] In sum and substance, though, the Court's justification for breaking with stare decisis is based on its improved understanding of economic analysis—the pro-competitive benefits of maximum resale price maintenance. This perspective is discernable in all three stages of the Court's justification for its departure from the rule stare decisis: (1) the erosion of *Albrecht*, (2) the explicit reliance on economic reasoning, and (3) the notion that the Sherman Act gives the Court common law powers when adjudicating antitrust matters.

First, the Court provided formal justification for its decision to overrule a nearly three-decade precedent based on the fact that *Albrecht* had already been heavily undermined by Supreme Court decisions since it was originally decided.[91] In particular, the Court relied heavily on the fact that *Albrecht* relied greatly on *Schwinn*'s holding, which imposed per se illegality on non-price vertical restrictions, and *Schwinn* itself was overruled by *Sylvania*.[92] The Court also emphasized the fact that cases prior, but very close, to *Albrecht* had refused to adopt a per se rule[93] and that cases after *Albrecht* had generally subjected vertical restrictions to less scrutiny than horizontal restrictions.[94] Therefore, the Court believed that, because *Albrecht* had already been so weakened, overruling it was not, in fact, a full break with stare decisis. This entire erosion of *Albrecht*, however, was built upon economic theory. For instance, the *State Oil* Court noted that its overruling of *Schwinn* was heavily based on a review of "scholarly works supporting the economic utility of vertical nonprice restraints."[95] Likewise, the *State Oil* Court believed that its decision in

89. Albrecht v. Herald Co., 390 U.S. 145 (1968).

90. *State Oil*, 522 U.S. at 21–22.

91. *Id.* at 10 ("A review of this Court's decisions leading up to and beyond *Albrecht* is relevant to our assessment of the continuing validity of the *per se* rule established in *Albrecht*.").

92. *See supra* Part II.C.1.

93. *State Oil*, 522 U.S. at 11–12 (citing White Motor Co. v. United States, 372 U.S. 253 (1963) (noting its refusal to impose a per se rule in *White Motor* only five years before *Albrecht*).

94. *Id.* at 14 (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, (1982) (noting that "vertical restraints are generally more defensible than horizontal restraints").

95. *Id.* at 13 (restating the economic basis in *Sylvania* for overruling *Schwinn*).

ARCO further displayed the erosion of *Albrecht* based on the recognition "that vertical maximum price fixing may have procompetitive interbrand effects, and . . . [that] the procompetitive potential of a vertical maximum price restraint is more evident . . . than it was when *Albrecht* was decided."[96] In other words, the very reason that *Albrecht*'s per se rule against maximum resale price maintenance had eroded was because the Court had embraced a new or better understanding of the economic pro-competitive effects of the practice. Thus, heightened economic awareness justified a departure from stare decisis.

Second, the Court justified its decision to overrule *Albrecht* on the basis of economic reasoning.[97] In particular, section II.B of the Court's decision details the ways in which the practice of maximum resale price maintenance has potential pro-competitive impacts and the ways in which the per se rule against it may even harm consumers.[98] Moreover, the discussion contains citations to prominent Chicago school advocates, urging that economic analysis play a serious role in antitrust analysis.[99]

Finally, in overruling *Albrecht*, the Court invoked the idea that the Sherman Act is a common law statute that gives the Court power to develop antitrust law in a flexible and dynamic fashion.[100] While this idea has roots in earlier case law,[101] *State Oil* used this mantra to overrule precedent that was no longer in line with contemporary economic paradigms, thereby disallowing the usual, gradual development that is

96. *Id.* at 14–15 (further noting *ARCO*'s citation to "several commentators identifying procompetitive effects of vertical maximum price fixing") (internal quotations and citations omitted).

97. *Id.* at 15 ("Thus, our reconsideration of *Albrecht*'s continuing validity is informed by several of our decisions, as well as a considerable body of scholarship discussing the effects of vertical restraints.").

98. *State Oil*, 522 U.S. at 18 ("Not only are the potential injuries cited in *Albrecht* less serious than the Court imagined, the *per se* rule established therein could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers.").

99. For instance, the Court cites to the work of Robert Bork, *id.* at 16, Frank Easterbrook, *id.* at 17, and Richard Posner, *id.* at 20.

100. *Id.* at 21 ("As we have explained, the term 'restraint of trade,' as used in § 1, also 'invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.'") (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988).

101. *See, e.g.*, Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406, (1911) ("With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions."); Gibbs v. Consol. Gas Co., 130 U.S. 396, 409 (1889) (observing that older English cases concerning "the foundation of the rule in relation to the invalidity of contracts in restraint of trade . . . [were] made under a condition of things, and a state of society, different from those which now prevail, [however] the rule laid down is not regarded as inflexible, and has been considerably modified").

often associated with the common law. Specifically, the Court did not find, for example, that the per se rule against resale price maintenance was no longer justified because price maintenance was now employed in new commercial contexts or served newer business needs. Rather, the Court found that, based on enhanced economic understanding, the per se rule was never the correct economic approach to resale price maintenance from the day *Albrecht* was decided.[102] Therefore, the incorrectness of *Albrecht*, combined with the common law nature of the Sherman Act, justified a departure from stare decisis.

In sum, similar to the Court's approach in *Sylvania*—and at least partially based on it—the *State Oil* decision rejected an established legal precedent on the grounds of better economic understanding and newer notions of pro-competitive benefits. Also, as in *Sylvania*, the Court invoked the common law nature of the Sherman Act to justify relying on the newer economic models. While the *State Oil* Court did engage in some formal legal analysis of the extent to which *Albrecht* had been gradually eroded, the goal of that analysis was only to show that older rules concerning resale price maintenance were out of line with newer economic understandings concerning the empirical benefits associated with that practice.

5. *Illinois Tool Works*: Patents No Longer Create a Presumption of Market Power

In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[103] the Court dealt with the question of whether a patent confers market power for antitrust purposes on the patent holder.[104] *Illinois Tool* involved a private antitrust claim against a printing systems manufacturer, alleging that the defendant used its monopoly power in the tying product—patented printing mechanisms and ink containers—to force others to buy defendant's unpatented ink—the tied product.[105] However, the plaintiff did not put forth evidence of defendant's market power in the

102. *State Oil*, 522 U.S. at 21 ("*Albrecht* has been widely criticized since its inception. With the views underlying *Albrecht* eroded by this Court's precedent, there is not much of that decision to salvage.").

103. Ill. Tool Works, Inc. v. Indep., Inc., 547 U.S. 28 (2006).

104. Market power is an essential ingredient in certain antitrust claims, such as tying and section 2 monopolization claims. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–14 (1984) ("Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market."); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under [section] 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.").

105. *Ill. Tool*, 547 U.S. at 31–32.

tying market other than to show that the defendant had valid patents on those tying products. The Court noted that, while tying arrangements used to be subject to per se condemnation in virtually all cases,[106] tying was only illegal per se if market power in the tying product was established.[107] In terms of the requirement of establishing market power, however, the Court acknowledged that at least six prior Supreme Court cases had held that a showing of a defendant's patent on a tying product was alone sufficient to establish market power in that market.[108] Thus, under these established antitrust precedents, plaintiffs would have put forth enough evidence to state a claim of unlawful tying.

In *Illinois Tool*, however, the Court—again unanimously—reversed course and held that patents would no longer be sufficient to show that a defendant possessed market power in the context of an alleged tying scheme.[109] In setting aside the older case law, the Court did not address the impediment of stare decisis by name nor did it pay any

106. *Id.* at 35 ("Our early opinions consistently assumed that '[t]ying arrangements serve hardly any purpose beyond the suppression of competition'") (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305–06 (1949)).

107. *Id.* at 36–38. As noted earlier, in light of the trend toward decreased scrutiny of tying arrangements in *Illinois Tool* as well as Justice O'Connor's concurrence in *Jefferson Parish*, it is unclear how much longer tying arrangements will be treated as per se violations under any circumstances. *See supra* note 36 and accompanying text.

108. Earlier Supreme Court cases clearly set out this rule, either in their holdings or in dicta. *See Jefferson Parish*, 466 U.S. at 16 ("[I]f 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."); United States v. Loew's Inc., 371 U.S. 38, 45 n.4 (1962) ("This is even more obviously true when the tying product is patented or copyrighted, in which case, as appears in greater detail below, sufficiency of economic power is presumed."); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 608 (1953) ("The patents on their face conferred monopolistic, albeit lawful, market control, and the volume of salt affected by the tying practice was not 'insignificant or insubstantial.'") (internal citations omitted); Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 304 (1949) ("[*International Salt*], at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences once it has been established that 'the volume of business affected' is not 'insignificant or insubstantial' and that the effect of the contracts is to 'foreclose competitors from [a] substantial market.'") (quoting Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947); *Int'l Salt Co.*, 332 U.S. at 395–96 (finding an illegal tying arrangement under the Sherman and Clayton Acts without any finding of market power other than defendant's patent in the tying product); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 491–92 (1942) (holding that using sales of a patented device to force a purchaser to buy unpatented parts is unconditionally prohibited as an illicit extension of a lawful monopoly).

109. Ill. Tool Works, Inc. v. Indep., Inc., 547 U.S. 28, 46 (2006) (holding "that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product" independent of the existence of a legitimate patent). In fact, the Court went so far as to deny that there was even "a rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee." *Id.* at 43.

attention to factors that might support consistency in the application of legal rules. That said, the Court did squarely address and acknowledge the substantive concerns and justifications that warranted abrogating the older cases that treated patents as absolute evidence of market power.[110] Specifically, the Court relied on an interesting mix of rationales to support its holding, including both a dose of doctrinal refinement as well as the notion that the opinions of the FTC and the DOJ should play a role in competition policy. Still, though, the primary ground for the new rule seemed to find support in economic justification: the newly understood potential pro-competitive benefits of tying arrangements.

On the one hand, the initial thrust of the Court's analysis focuses on the historical fact that the notion that patents grant some sort of automatic market power derives from the patent misuse doctrine, rather than from antitrust law.[111] It was only decades later in *International Salt* that the Court allowed that presumption to be used offensively for the purpose of showing an antitrust violation.[112] However, the *Illinois Tool* Court observed that Congress had recently eliminated the "patent-equals-market-power presumption" with the enactment of its 1988 amendments to the Patent Code.[113] In other words, under the

110. *Id.* at 40 (noting that the Court was prepared to engage in a "reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product").

111. The origins of the patent misuse doctrine are attributed to Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (overruling Henry v. A.B. Dick Co., 224 U.S. 1 (1912), which had earlier approved of the practice). The *Motion Picture* case involved a patent infringement suit by a manufacturer of patented motion picture machinery that was using the leases of such patented equipment to force purchasers or lessees to also buy unpatented film. Thus, the doctrine was originally a defense to a patent infringement claim whereby a defendant could avoid allegations of infringement by showing that the patent-holder had abused its patent by using the patent to force purchasers or lessees to exclusively use unpatented materials made by the plaintiff. *See, e.g.*, *Morton Salt Co.*, 314 U.S. at 490 (framing the question before the Court as "whether a court of equity will lend its aid to protect the patent monopoly when respondent is using [the patent] as the effective means of restraining competition with its sale of an unpatented article").

112. Int'l Salt Co. v. United States, 332 U.S. 392 (1947) (holding that leases of patented machines requiring the lessees to use the defendant's unpatented salt products violated section 1 of the Sherman Act and section 3 of the Clayton Act); *see also* United States v. Columbia Steel Co., 334 U.S. 495, 522–23 (1948) ("For example, where a complaint charges that the defendants have . . . licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal per se.").

113. *See* 35 U.S.C. § 271(d)(5) (1988) ("No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.")

amended Patent Code, patent misuse was a valid defense to infringement only when market power was actually shown. Thus, the Court believed that it would be a mistake not to continue to keep the status of a patent vis-à-vis market power symmetrical under both patent misuse and the antitrust laws.[114] Under this line of reasoning, the Court was essentially engaged in a form of doctrinal refinement by ensuring symmetry in the law and ensuring that concepts do not spill over from one area of law to another in a way that goes beyond the scope of the law's original intent.

The Court also briefly noted that it found the views of the federal antitrust bodies persuasive on the patent question. In 1947, the government had urged the Court in *International Salt* to treat tying arrangements involving patented products as per se illegal.[115] However, the Court noted that by 1995—well before *Illinois Tool* was pending—both the FTC and the DOJ had publically taken the position that they would "not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner."[116] Though the Court noted that this was in no way binding, it was a decisive factor in the Court's decision.[117] From this perspective, one might understand that the Court was giving deference to the role that the antitrust bodies play in the federal antitrust system. In other words, the fact that the Sherman Act,[118] Clayton Act,[119] and FTC Act[120] are partially policed by the DOJ and FTC—both thought to possess an expertise on competition law—constitutes a valid reason for the Court to be somewhat more flexible in antitrust law and override stare decisis in light of changing regulatory approaches.

However, the dominant theme in the Court's justification for overruling the patent-confers-market-power doctrine was altered economic understanding. First, the Court explicitly mentioned the fact that current economic thinking advocates against the automatic conferral of market power.[121] Moreover, the Court relied on additional

114. *Ill. Tool*, 547 U.S. at 42 ("[G]iven the fact that 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.").

115. *Id.* at 39 (citing the Brief for the United States in *Int'l Salt Co.*, 332 U.S. at 392 (No. 46)).

116. *Id.* at 45 (quoting U.S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (Apr. 6, 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.pdf).

117. *Id.*

118. 15 U.S.C. § 1 (2006).

119. 15 U.S.C. § 12 (2006).

120. 15 U.S.C. § 41 (2006).

121. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 43 n.4 (2006) (collecting sources and noting that the "vast majority of academic literature" supports the Court's holding). Indeed,

academic literature to support its new economic understanding that "tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market."[122] The Court did not delve into an in-depth analysis of the pro-competitive advantages and the ways that tying can co-exist with competitive markets as it did in, for instance, *Sylvania*. However, the Court's opinion explicitly noted that it was influenced by recent economic advancements related to the topic.[123] Furthermore, the other two changes that the Court pointed to—the curtailment of the patent misuse doctrine and the policy changes of the DOJ and FTC—were themselves based on developing economic understandings. In curtailing the patent misuse doctrine, the legislative history leading up to the eventual passage of patent misuse reform confirms Congress's concern that the broadness of the doctrine had made it unsound based on current economic understanding.[124] Likewise the FTC and DOJ guideline cited by the Court was based on the understanding that there will often be close substitutes for the patented products in question.[125] In sum, the *Illinois Tool* Court was mostly convinced by heightened economic understanding that the existence of a patent simply did not confer market power and that there might be genuine pro-competitive benefits to forms of bundling that include patented products. In this case, though, the economic justifications for departing from stare decisis were buttressed by arguments that found support in the development of the patent misuse doctrine and were publically supported by the DOJ and FTC.

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earlier cases that questioned the soundness of the patent misuse doctrine were also clearly based on economic grounds. *See, e.g.*, USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 510–11 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983) (questioning whether there really is any economic advantage to the practices that had been labeled as patent misuse).

122. *Ill. Tool*, 547 U.S. at 45.

123. *Id.* at 33 ("Our review is informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws.").

124. *See* S. REP NO. 100-83, 1987 WL 967478 (1987) ("[T]he patent misuse doctrine has been applied in a manner inconsistent with sound economic principles. . . . And recent law review commentary has condemned certain applications of the misuse doctrine as inherently anticompetitive. . . . [T]he doctrine's potential for impeding pro-competitive arrangements, are major causes for concern."). The same legislative history also makes clear that the DOJ greatly supported the efforts to amend the patent misuse doctrine in 1987.

125. *See* U.S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (Apr. 6, 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.pdf.

6. *Leegin*: Abolishing Per Se Illegality in Resale Price Maintenance

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,[126] addressed the question, left open after *State Oil*, of whether minimum resale price maintenance should remain illegal per se. *Leegin* involved a suit by a retailer of women's apparel against Leegin, a manufacturer of leather goods and accessories. Leegin refused to sell to plaintiff after plaintiff was found to be selling Leegin's products at discounts from the manufacturer's suggested price.[127] Plaintiff brought suit, alleging that Leegin's policy constituted minimum resale price maintenance and was illegal per se.[128] Minimum resale price maintenance had been illegal per se since the Supreme Court's famous 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[129] On the strength of *Dr. Miles*, plaintiff prevailed in the lower court, and the Fifth Circuit affirmed.[130] Finally, the case forced the Supreme Court to confront a precedent with ninety-six years of standing, evoking an extended dialogue on stare decisis in both the majority and an impassioned dissent.

The majority in *Leegin* justified its decision to overrule such weighty precedent on contemporary economic understandings. In many places, the Court explicitly relied on current economic analysis in finding that *Dr. Miles* inappropriately condemned minimum resale price maintenance.[131] Likewise, the Court cited a great deal of academic economic literature as a foundation for its conclusion concerning resale price maintenance.[132] Specifically, the Court listed the procompetitive effects that are now understood to be potentially associated with minimum resale price maintenance, including enhanced retailers' investment and consumer choice.[133] In light of this understanding, the Court concluded that a per se ban—reserved for

126. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007).

127. *Id.* at 882–85.

128. *Id.*

129. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

130. *Leegin*, 551 U.S. at 884.

131. *See, e.g., id.* at 889 ("[I]t is necessary *to examine, in the first instance, the economic effects of vertical agreements* to fix minimum resale prices and to determine whether the *per se* rule is nonetheless appropriate.") (emphasis added).

132. *See, e.g., id.* at 889–90 (noting prominent economic sources as well as amicus curiae briefs in the case based on contemporary economic theory).

133. *See id.* at 890. Additional benefits were thought to include the elimination of free-riding, the promotion of interbrand competition, and increased ease of entry. *Id.* at 891–92. While the Court also admitted that much potential for abuse with minimum resale price maintenance exists—most notably the potential for a disguised form of horizontal price fixing—the Court concluded that such a balance between potential benefits and abuses was best resolved through the rule of reason analysis. *Id.* at 892.

conduct that has zero pro-competitive benefits—was not appropriate for minimum resale price maintenance.[134]

After flushing out the economic analysis underlying its decision, the majority then dealt head on with the problem of stare decisis—in this case, overruling a long-lived and highly influential prior decision. As in *State Oil*, the Court noted that the role of stare decisis in antitrust cases is weaker than in other areas because of the character of the Sherman Act as a "common law statute," which allows the Court to adapt the rules to "meet the dynamics of present economic conditions."[135] In other words, federal courts have the ability to constantly reevaluate and redefine terms like "restraint of trade" to adapt to changing economic realities. However, the only actual developments that the Court spoke of to justify overruling *Dr. Miles* under a gradual "common law approach" were a pair of decisions from the 1980s that limited the scope of the per se rule against resale price maintenance[136] and general demonstrations that vertical agreements were treated differently than horizontal arrangements.[137] There was, by contrast, no showing that *Dr. Miles* was unworkable or that it was shown to be an inappropriate rule for any particular instance of minimum resale price maintenance.

Additionally, the Court mentioned a few other types of justifications that supported overruling prior precedent. First, the Court noted that, just as in *Illinois Tool*, both the FTC and the DOJ supported overruling *Dr. Miles* in *Leegin*.[138] Thus, the Court was justified in taking these entities' expertise into account in developing sound competition policy. Second, the Court recounted the multiple cases since *Dr. Miles* that had given the Court a license to overrule antitrust precedent.[139] The Court also recounted certain laws passed during the twentieth century that did not manifest any intent by Congress to adhere to the per se rule against minimum resale price maintenance.[140]

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134. *Id.* at 899.

135. *Leegin*, 551 U.S. at 899 (citing Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 98, n.42 (1981); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978)).

136. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) (declining to apply the per se rule to an agreement to terminate a price cutting distributor); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (requiring a plaintiff to present evidence excluding the possibility of independent action of a manufacturer and retailer).

137. *See Leegin*, 551 U.S. at 900–01.

138. *See id.* at 900.

139. *See id.* at 901–05 (citing, among other sources, *Sylvania* and *State Oil* to support the notion that updated economic understanding has provided insight into previously overlooked pro-competitive elements of vertical business practices).

140. *See id.* at 904–08 (discussing the repeal of the Miller–Tydings Fair Trade Act and the McGuire Act).

However, primary support for the majority's conclusion rested in the academic literature that had rendered *Dr. Miles* incorrect and outdated.

Of the cases reviewed in this Article, *Leegin* contains the most detailed and prominent dissent.[141] As an initial matter, the fact that *Leegin* was so closely split in the first place suggests that there is some uneasiness about overruling stare decisis in the name of heightened economic understanding. Moreover, the rationales followed in the dissent, as well as the overall tenor of the dissent's argument, suggest that many of the assumptions made in the majority opinion are subject to serious debate.

After reviewing the economic literature as well as administrative concerns as applied to minimum resale price maintenance—and concluding that such considerations were ultimately not conclusive[142]—the dissent reached its primary concern: the effects and importance of stare decisis in the case. Specifically, the dissent laid out factors that are normally considered in deciding whether overruling precedent is appropriate: (1) the age of the precedent and the obviousness of the error; (2) the workability of the regime created by the precedent; (3) the extent to which a body of law is settled; (4) reliance interests; and (5) the law's place in cultural norms.[143] Here, the dissent found that all these factors weighed against overruling *Dr. Miles* inasmuch as it was old statutory precedent that created a workable and settled body of law.[144] Moreover, the dissent noted that both the age and the settled nature of the law had created plentiful support for upholding it.[145]

The dissent also fundamentally disagreed with the majority's assumption that the "common law statute" nature of the Sherman Act makes it relatively easy to set aside disfavored precedent. Instead, the dissent adhered to the notion that, when interpreting a statute, the Court should apply a stronger level of stare decisis inasmuch as Congress is free to alter the results.[146] Indeed, the dissent cited to prior cases construing the very same antitrust laws but that had applied the

141. In light of the strong dissent in *Leegin*, the unanimity of *State Oil* is somewhat surprising notwithstanding the distinctions set out in the *Leegin* dissent, namely that *Albrecht* was younger and less supported than *Dr. Miles*. *Id.* at 927.

142. *See Leegin*, 551 U.S. at 910–18. Like the majority's analysis, this initial portion of the dissent reviews a considerable amount of academic economic literature in fully analyzing the practice of minimum resale price maintenance.

143. *See id.* at 923–27 (citing FEC v. Wis. Right To Life, Inc., 551 U.S. 449, 499–503 (2007) (Scalia, J., concurring in part and concurring in the judgment)).

144. *Id.* at 925–26.

145. *Id.* at 926–27.

146. *See id.* at 918, 923–24.

statutory level of stare decisis.[147] Moreover, the dissent emphasized that even within the context of the common law, stare decisis is an integral part of the legal system and does not provide a basis for more easily overruling established and settled rules of law.[148] Ultimately, the dissent urged that general legal principles governing the way in which cases build on one another must trump sudden reversals of prior law based on novel economic theory.[149] In sum, after reading the dissent, one might think that stare decisis does not play any sort of diminished role in antitrust law after all.

7. The Major League Baseball Exception: Stare Decisis Lives On

While so many of the Supreme Court's major antitrust decisions in recent years have been devoted to overruling past precedent, the history of the Sherman Act contains at least one major exception. In 1922, the Court first dealt with a private action under the Sherman Act, alleging that the National League of Professional Base Ball Clubs and the American League of Professional Base Ball Clubs acted illegally by colluding to deny a third club, the Federal League of Professional Base Ball Players, from engaging in professional baseball at a national level.[150] The Court easily found that baseball was not covered by the antitrust laws inasmuch as it was wholly intrastate activity,[151] and to the extent that it involved crossing state lines, baseball exhibitions did not constitute commerce.[152] Thus, the Court dismissed the case, setting a clear precedent that professional baseball was not covered by the Sherman Act. Indeed, thirty-one years later, the Court declined to overrule *Federal Baseball*—over a substantively convincing dissent—in a brief per curiam opinion solely on the basis of the

147. *See Leegin*, 551 U.S. at 918 (citing and quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("noting, in declining to overrule an earlier case interpreting § 4 of the Clayton Act, that 'considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation'")).

148. *See id.* at 927–28 ("The Court suggests that it is following the common-law tradition. . . . But the common law would not have permitted overruling *Dr. Miles* in these circumstances.") (internal citations omitted).

149. *See id.* at 928 ("[A] Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling.").

150. *See* Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

151. *See id.* at 208 ("The business is giving exhibitions of base ball, which are purely state affairs.").

152. *See id.* at 209 ("[Baseball exhibitions] although made for money would not be called trade of commerce in the commonly accepted use of those words."). The same legal conclusion was reached almost a decade earlier by the New York State Supreme Court in *American League Baseball Club v. Chase*, 149 N.Y.S. 6, 15–17 (1914).

precedential effect of *Federal Baseball* and the related theory of congressional acquiescence.[153]

Courts continued to rely on *Federal Baseball* despite the fact that economic circumstances and understandings had changed and despite the fact that the term "commerce," as used in the commerce clause, had expanded considerably since 1922.[154] In fact, in refusing to extend baseball's antitrust exemption to professional boxing,[155] theatre,[156] football,[157] and basketball,[158] the Court itself noted that the staying power of *Federal Baseball* was "unrealistic, inconsistent, or illogical" if not for the strong considerations underlying stare decisis.[159] Nonetheless, in the most recent Supreme Court iteration of the baseball-antitrust doctrine in 1972, the Court continued to stand by the precedential effect of *Federal Baseball*.[160] In doing so, the Court continued to recount the Congressional attempts and failures to intervene with the Court's decisions on baseball.[161] Ultimately, however, the Court relied exclusively on stare decisis in justifying the decision to continue the baseball exemption and deny such status to other sports. And in a similar fashion to *Toolson*, *Flood* was countered by a strong pair of dissents that emphasized the changed legal understanding of

153. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) ("Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation . . . . Without re-examination of the underlying issues, the judgments below are affirmed on the authority of [*Federal Baseball*] . . . ."). The dissent, by contrast, engaged in a brief overview of the state of professional baseball in 1953 and would have concluded that "[w]hatever may have been the situation when the *Federal Baseball Club* case was decided in 1922," it was by then obvious that no one could conclude "that organized baseball, in 1953, [was] still . . . not engaged in interstate trade or commerce." *Id.* at 357.

154. *See, e.g.*, Salerno v. Am. League of Prof. Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) ("We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' . . . However . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions.").

155. *See* United States v. Int'l Boxing Club of N.Y., 348 U.S. 236 (1955) (declining to extend antitrust exemption to professional boxing).

156. *See* United States v. Shubert, 348 U.S. 222 (1955) (declining to extend antitrust exemption to theatre productions); Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271 (1923) (declining to extend antitrust exemption to vaudeville performances).

157. *See* Radovich v. NFL, 352 U.S. 445 (1957) (declining to extend antitrust exemption to professional football).

158. *See* Haywood v. NBA, 401 U.S. 1204, 1205 (1971) (in chambers opinion) (noting that no antitrust exemption applied to professional basketball). The Court has also since noted that hockey and golf similarly enjoy no exemption from antitrust. *See* Flood v. Kuhn, 407 U.S. 258, 283 (1972).

159. *Radovich*, 352 U.S. at 452.

160. *See Flood*, 407 U.S. at 258.

161. *See id.* at 273–74, 281–83.

commerce,[162] the irrelevance of Congressional inaction,[163] and the economic realities prevailing in 1972.[164]

As the dissents in both *Toolson* and *Flood* made clear, many justifications would support overruling *Federal Baseball*.[165] Likewise, baseball's antitrust exemption has been extensively critiqued in the academic community with the majority of scholarly writings on the topic concluding that baseball's exemption from antitrust is no longer valid.[166] To this day, however, the exemption appears firmly rooted in antitrust jurisprudence.[167] Thus, while the Supreme Court has overruled multiple prominent antitrust precedents over the last few de-

162. *See id.* at 286 (Douglas, J., dissenting) ("In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era . . . the whole concept of commerce has changed.").

163. *See id.* at 287–88 (Douglas, J., dissenting) (noting that relying on congressional inaction is out of line with the Court's normal practice of declining to infer congressional intent from mere inaction) (citing Helvering v. Hallock, 309 U.S. 106, 119–21 (1940)).

164. *Id.* at 291 (Marshall, J., dissenting) ("The Commissioner of Baseball admits that under present concepts of interstate commerce defendants are engaged therein. There can be no doubt that the admission is warranted by today's reality.") (internal citations omitted).

165. Indeed, even in 1970 the Second Circuit noted that "we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled." Salerno v. Am. League of Prof'l Baseball Club, 429 F.2d 1003, 1005 (2d Cir. 1970). Likewise, the Supreme Court acknowledged more recently in *State Oil* that the baseball exemption is "an aberration . . . resting on a recognition and an acceptance of baseball's unique characteristics and needs." State Oil Co. v. Khan, 522 U.S. 3, 19 (1997) (internal citations omitted).

166. *See, e.g.*, Brittany Van Roo, *One Trilogy That Should Go Without A Sequel: Why the Baseball Antitrust Exemption Should Be Repealed*, 21 MARQ. SPORTS L. REV. 381 (2010); Carol Daugherty Rasnic & Dr. Reinhard Resch, *Limiting High Earnings of Professional Athletes: Would the American Concept of Salary Caps Be Compatible With Austrian and German Labor Laws?*, 7 WILLAMETTE SPORTS L.J. 57, 58 (2010) (referring to the Court's "inexplicable, exemption of professional baseball from the antitrust laws"); Stephen J. Matzura, Comment, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule Of Reason Steps to the Plate*, 18 WIDENER L.J. 975, 994 (2009) ("[T]his judicially-constructed exemption that has no compelling reasons for its existence, beyond slavish adherence to precedent, remains an aberration."); Morgen A. Sullivan, Note, *"A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1275 (1999) ("After recognizing that the positive inaction doctrine lacks the strength to justify perpetuating the original *Toolson* holding, the Court should apply the *State Oil* analysis to reverse *Flood* and eliminate baseball's illogical antitrust exemption."); Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress And The Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627, 660 (1994) ("[T]he exemption is a judicial aberration without justification."). At the same time, there is a minority of writers who have expressed support for the exemption. *See, e.g.*, Nathaniel Grow, *In Defense Of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211 (2012); *see also* Flood v. Kuhn, 407 U.S. 258, 280 n.16 (1972) (collecting extensive and mixed commentary on the various sports' relations to antitrust from before 1972).

167. *See, e.g.*, MLB v. Crist, 331 F.3d 1177, 1188 (11th Cir. 2003) (relying upon the antitrust exemption despite its "dubious premise" and potentially anticompetitive effects). Moreover, an outright exemption may no longer even be needed in light of the fact that the Court has recognized in an analogous sports context that the nature of athletic competition—and the inherent need for coordinated competition therein—is proper to take into account in an otherwise normal rule of reason analysis. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984)

cades—even without absolute or near consensus regarding the doctrines in question—despite the shield of stare decisis, it has consistently clung to the one doctrine which almost everyone seems to believe is justified only by stare decisis. Specifically, it seems as though the Court, by passing the ball to Congress, has treated this exemption as an example of the strong form of stare decisis normally associated with statutory interpretation.[168] As such, the Court has refused to incorporate updated economic analysis and has failed to treat the Sherman Act as a "common law statute" in the baseball exemption context.

III. ANALYSIS: IN SEARCH OF THE PROPER ROLE OF STARE DECISIS IN ANTITRUST LAW

Having reviewed the major cases in which the Supreme Court either implicitly or explicitly set aside concerns of stare decisis while overturning antitrust precedent, this Part takes up the relative strengths and weaknesses of the justifications for doing so. As the case law reveals, the most prominent explanations for overriding stare decisis have been new economic understandings as well as refinements to the way antitrust law functions. Additionally, the cases allude to the notion of the Sherman Act as a "common law statute," and, more recently, attention has been paid to the positions of the relevant antitrust agencies in antitrust cases—even in the context of private antitrust suits.

A. *New Economic Findings Used to Justify New Rules*

Of the cases surveyed, a shift in contemporary economic understanding was used as a primary justification for departing from established precedent in *Sylvania*, *State Oil*, *Illinois Tool*, and *Leegin*.[169] Indeed, in *Sylvania*, *State Oil*, and *Leegin* it was the only substantive reason given for overruling prior law.[170] However, overruling cases in the name of heightened economic understanding, without gradual

(noting that a rule of reason analysis was appropriate because some forms of horizontal restraint in a sports context "are essential if the product is to be available at all").

168. *See supra* note 12 and accompanying text; Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 235 n.114 ("The Court's most famous and enduring example of adhering to a statutory interpretation of increasingly lessening viability involved [*Federal Baseball*] . . . . The basis for this 'super-strong presumption' of validity for *Federal Baseball* was that it was a statutory interpretation decision and Congress could have, but did not, override it.").

169. *See supra* Part II.C.

170. *See, e.g.*, Lopatka, *supra* note 39, at 633–34 (noting that *Sylvania* was decided primarily, if not exclusively, based on economic literature).

case law progression, is not without its problems. It might thus be reserved only for the most extreme cases in which there is virtual economic consensus that a prior rule is not merely non-ideal but, rather, that the older rule is demonstrably anticompetitive. This is not to say that economic theory plays no role in adjusting antitrust law—it surely does and should.[171] Rather, this Part argues that contemporary economic trends should not lead to abrupt breaks with stare decisis without sufficient time for the doctrine or economic consensus to develop.

As a practical matter, overruling antitrust precedent in the name of contemporary economic trends is not a suitable or fair endeavor for the legal counsel or judicial institutions involved in a case. For instance, to the extent the Supreme Court is willing to overrule precedent on the basis of economic trends, all parties involved will have to be steeped in economic literature and may be required to come to conclusions that mainstream economists have themselves failed to agree upon.[172] While it is generally fair to expect antitrust counsel to understand the business context and general commercial strategies of a client, it would seem odd to create a system where all antitrust counsel must be trained microeconomists. The problem, however, is not merely that lawyers or judges may lack economic backgrounds—undoubtedly some do and some do not—the more important point is that private lawsuits and case-by-case resolution may not be an institutionally effective way to handle large economic decisions.[173] While courts could, and do, take expert testimony in a case and use that in lieu of institutional research, the choice and contents of expert reports will generally be a decision of the private parties in an antitrust suit and, thus, may leave out factors that would be relevant to the broader

171. The practice of "adjusting antitrust doctrine to reflect advances in economic theory has a solid pedigree." Alan J. Meese, *Economic Theory, Trader Freedom, and Consumer Welfare:* State Oil Co. v. Khan *and the Continuing Incoherence of Antitrust Doctrine*, 84 CORNELL L. REV. 763, 781 (1999).

172. Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 786 (2004) ("'[I]n too many instances antitrust tribunals are simply not up to handling Post-Chicago theory. Judges do not know enough economics; the economics itself is insufficiently capable of sorting out anticompetitive from competitive or harmless explanations; the American jury system turns complex fact findings into chaos.'") (quoting Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 275 (2001)).

173. *See, e.g.*, Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1270 (2011) (noting that the Supreme Court may have trouble reaching economic conclusions "because the Justices misunderstand economic theory and data, they sometimes make errors in their economic analysis" and because "without the right mechanisms for gathering information, the Court sometimes makes decisions without considering all the relevant data"). Perhaps legislatures, agencies, or other bodies with suitable fact-finding capabilities are better suited to address unresolved economic quandaries.

commercial practice in question.[174] Likewise, excessive reliance on amicus briefs may undermine the integrity of the adversarial proceeding.[175]

Moreover, if antitrust is left to develop through the adoption and overruling of legal doctrine, lawyers and judges will have to master more than just background economics. They will also have to remain up-to-date on contemporary economic trends in order to be able to argue that doctrines should be overruled at the proper time on behalf of a client. Requiring parties to ask the Court to overrule prior case law as a way to resolve litigation seems unfair because such parties will now be up against a steep hill to alter the status quo.[176] Likewise, leaving it to parties to constantly request changes in the law will not lead to an efficient and smooth administration of justice in the antitrust area. Thus, although the law often leaves it to private litigants to push for the reversal of law in other contexts, this should not be made the norm in antitrust litigation.

Additionally, allowing for frequent overruling in antitrust ignores many of the benefits that stare decisis usually confers. For instance, allowing parties to re-litigate settled questions of law may greatly increase the already heavy administrative costs associated with antitrust litigation.[177] This is especially true when the former legal scheme has not proved unworkable or impractical to apply in the first place. Furthermore, as a matter of fairness, this approach ignores the potentially weighty reliance interests on a whole slew of parties who may have expended effort and resources to conform their conduct to established rules of law. Thus, abrupt overruling of established precedent on the basis of contemporary economic trends should be disfavored. An exception, if any, might be appropriate for cases where there is virtual economic consensus that a prior rule is wholly anticompetitive and has little or no utility in advancing sound competition policy.

For instance, the Court in *Leegin* overruled a rule of law that was not demonstrated to be always inappropriate or unworkable as a

174. *See generally* Lopatka, *supra* note 39 (examining the role of expert testimony in antitrust cases).

175. *See* Haw, *supra* note 173, at 1259–66 (listing problems with the Court relying on amicus briefs in antitrust adjudication).

176. *See, e.g.*, State v. Mauchley, 67 P.3d 477, 481 (Utah 2003) ("'Those asking us to overturn prior precedent have a substantial burden of persuasion' due to 'the doctrine of stare decisis.'") (quoting State v. Menzies, 889 P.2d 393, 398 (Utah 1994)).

177. *See, e.g.*, FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 30 (4th ed. 2004) ("Antitrust litigation can . . . involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money. . . . Antitrust trials usually are long, and there often are controversies over settlements and attorney fees.").

scheme.[178] Although the Court cited to two cases imposing some limitations on the per se rule, it pointed to no declining influence of the per se rule against resale price maintenance.[179] As the dissent noted, there was also no consensus among economists concerning the full economic impacts of resale price maintenance.[180] Other than noting that stare decisis was less of a concern in antitrust, the Court did not deal with the substantive concerns that usually counsel against overruling precedent. For example, the dissent suggested that there was substantial reliance on *Dr. Miles* coupled with no prior indications that *Dr. Miles* was of diminished precedential value.[181] In fact, older cases that have been continually affirmed are thought to have greater precedential value.[182] Thus, the decision overruling *Dr. Miles* arguably disrupted the appearance of the consistent rule of law and upset settled private expectation interests. At the very least, the Court would have been more justified in focusing on what particular factual elements, if any, of the *Leegin* case made a per se rule inapplicable, thereby setting the stage for a potential gradual erosion of the per se rule against resale price maintenance.

B. *Doctrinal Refinement Compels Overruling*

In *Copperweld*, *ARCO*, and *Illinois Tool*, the Court explained its departure from stare decisis based upon doctrinal changes and the desire to keep elements of the law consistent with the underlying aims

178. *See* McMillian, *supra* note 40, at 452 (noting how the Court "ignored the principles behind stare decisis and injected more tumult into an already-unpredictable area of the law" by overruling *Dr. Miles* on the basis of its understanding of the economics of resale price maintenance).

179. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 918 (2007).

180. *See id.* at 915 (finding no "economic consensus" concerning the "harms" and "benefits" of resale price maintenance) (Breyer, J., dissenting). Furthermore, some factions of Congress, as well as certain state legislators, continue to believe in the need for a per se rule. *See, e.g.*, S. REP. NO. 111-227, at 2, 2010 WL 2880189 (July 21, 2010) (describing proposed federal legislation attempting to restore the per se ban against minimum resale price maintenance); O'Brien v. Leegin Creative Leather Prods., Inc., 277 P.3d 1062, 1082–83 (Kan. 2012) (holding that resale price maintenance is illegal per se under state law). Likewise, at least some other countries continue imposing harsher rules against minimum resale price maintenance. *See, e.g.*, EUROPEAN COMMISSION, GUIDELINES ON VERTICAL RESTRAINTS § 2.10 (Apr. 20, 2010), *available at* http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf ("[R]esale price maintenance (RPM) . . . [is] treated as a hardcore restriction. Including RPM in an agreement gives rise to the presumption that the agreement restricts competition.").

181. *Leegin*, 551 U.S. at 925–26 (Breyer, J., dissenting).

182. *Id.*; *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 769 (1984) (Brennan, J., concurring) (noting that *Dr. Miles* "has stood for 73 years, and Congress has certainly been aware of its existence throughout that time . . . . Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act").

and purposes of the Sherman Act.[183] Aspects of change grounded in theoretical economic updates and doctrinal refinement do, or course, significantly overlap and are not divided by any bright line. However, the distinction between economic theory and doctrinal refinement may be meaningful for courts and antitrust practitioners to bear in mind in evaluating the continued validity of older rules. As described earlier, overruling a case based on economic trends can sometimes involve abruptly declaring older settled rules incorrect. This approach is often characterized by primary reliance on academic economic works as well as by abstract discussions of economic consequences. In contrast, doctrinal refinement is a mode of legal reasoning familiar to many other areas whereby courts refine legal rules over time to ensure that they continue to serve the underlying function of the discipline in question. This method is characterized by concern with how relevant precedent should or would apply to a case as well as by addressing the concrete facts as alleged in the case. In fact, this is the essence of the common law reasoning.[184] Such changes tend to be gradual and emphasize the way in which rules slowly erode to make room for new law that takes into account modern realities and practices. In other words, the process of doctrinal refinement does not focus on the incorrectness of prior doctrine but, rather, on the way that older rules may no longer be appropriate in contemporary settings.

Although this Article cautions courts to proceed slowly in overruling cases based on heightened economic understanding alone, it is appropriate and often necessary for courts to update the law in order to make sure it continues to serve its function in ever-changing social and commercial realities.[185] This is not to say that new economic models should not be noted. After all, sometimes new economic understanding can coincide with a situation that is ripe for doctrinal change. For instance, in *Illinois Tool*, economic factors as well as other factors—such as parallel changes in the patent misuse doctrine and DOJ and FTC positions—suggested that a particular doctrine that was ripe for retirement.[186] However, such changes should take into account all the concerns implicated by the rule of stare decisis. For example, the slow evolvement of doctrinal advancement ensures that reliance interests are not displaced too hastily. Moreover, this legal mode of reasoning does not require all antitrust counsel to become trained economists to

183. *See supra* Part II.C.

184. *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 461 (2001) (noting that the "foundation of the common law system" is "the incremental and reasoned development of precedent").

185. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988).

186. *See supra* Part II.C.5.

understand the development of the law. Instead, informed members of the bar and the judiciary will be able to track legal rules and doctrines as they develop in order to ensure sound competition policy. Likewise, limiting overruling to gradual doctrinal refinement will create an environment where parties will know when it is appropriate to argue for legal rules to be overturned—namely, when they have been eroded over time by practical changes, not just when economic theory demonstrates potential pro-competitive elements. Finally, the administrative costs associated with relitigating settled questions of law would be limited to the extent that overruling precedent would be a rarer phenomenon.

The decision in *Copperweld* demonstrates how it may be appropriate to overrule precedent when the Court acts to ensure that antitrust rules keep up with modern reality and that those rules continue to implement the guiding principles of the Sherman Act. *Copperweld* first focused on the notion that the intra-enterprise doctrine had not been fully addressed in its own right; rather, it had crept into the case law as a sort of unstated assumption, thereby weakening the doctrinal foundation for the intra-enterprise doctrine.[187] Furthermore, the Court primarily relied on some of the guiding principles of the Sherman Act—the crucial distinction between unilateral and collusive conduct.[188] Inasmuch as the illegality of contracts in restraint of trade is addressed to collusive conduct, the Court found that, as a policy matter, it would be inappropriate to penalize conduct that arose through decisions of actors within the same entity.[189] Finally, the Court stressed the fact that modern business arrangements must be taken into account and that, just as a company might legitimately decide to organize itself into unincorporated subdivisions, it might choose to organize as a series of parent and subsidiary corporations.[190] Thus, it would be unfairly formalistic to penalize the latter but not the former. In sum, the decision to overrule the intra-enterprise doctrine in *Copperweld* was a proper function of the Court's role to refine antitrust doctrine and ensure that it remained up-to-date with ever evolving business conditions and economic realities.

187. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 760 (1984) ("In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.").

188. *See id.* at 767–69.

189. *Id.* at 769.

190. *Id.* at 770.

C. *The Sherman Act as a Common Law Statute*

Both *Leegin* and *State Oil* invoked the common law nature of the Sherman Act to justify a departure from established legal rules.[191] In doing so, the Court used this common law element to overrule antitrust precedent that was no longer believed to be rooted in sound economic theory.[192] The Court applied this logic not because of changed circumstances but, rather, because the economic rule announced in the earlier case was not economically accurate. Likewise, some commentators believe that the common law nature of the Sherman Act justifies gutting established precedent in order to implement up-to-date economics.[193] However, as discussed earlier, this approach to overruling cases should be disfavored and, in any event, it reflects an unwarranted use of the Sherman Act's common law nature.

Near the beginning of Sherman Act enforcement, there was concern about whether terms incorporated within the Act retained their meaning from the common law prohibitions against restraints of trade.[194] In any event, though, the Supreme Court believed that, subsequent to adopting the Sherman Act, the antitrust laws would change to accommodate newer realities.[195] More recently, the Supreme Court has consistently held that the Sherman Act promotes a common law approach to the law whereby antitrust law includes the potential

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191. *See supra* Part II.C.

192. *See supra* notes 92–93 and accompanying text.

193. *See, e.g.*, Meese, *supra* note 34, at 717 ("Surely, the common law delegation to antitrust courts is sufficiently capacious to empower judges to, for instance, abandon a total welfare premise in favor of one focused on the welfare of purchasers in the relevant market.").

194. While some of the earlier cases denied that the statute incorporated the common law, *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 327 (1897) ("We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute" and not as defined in the common law.), many subsequent decisions appeared to assume that the central terms of the Sherman Act were intended to incorporate the common law concepts. *See, e.g.*, Nash v. United States, 229 U.S. 373, 377 (1913); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50–51 (1911) ("It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question."); United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911). In any event, legislative history tends to support the notion that the Sherman Act codified the common law against restraints of trade. *See, e.g.*, Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 503-04 (2009) ("Senator Sherman described his remedial statute 'to enforce by civil process in the courts of the United States the common law against monopolies.'") (quoting HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 181 (1955)).

195. *See, e.g.*, Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911) ("With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions.").

to grow and cover ever changing realities.[196] Such an approach is highly sensible, especially in light of the concise wording of the Sherman Act and its omission of any type of specific behavior or arrangement.

However, as the dissent in *Leegin* emphasized, even if the Sherman Act is intended to function as the common law would, no one suggests that stare decisis is inapplicable in the common law.[197] Indeed, stare decisis is essentially a common law principle.[198] The common law functions through incremental modifications to existing doctrine, not through wholesale rejections of prior legal rules. Thus, using the common law nature of the Sherman Act to permit blunt repudiations of doctrines based on new economic models is unfaithful to the concept of the common law.

The idea of the Sherman Act as a common law statute is best understood as expressing the notion that the high level of stare decisis normally associated with statutory construction does not apply to the Sherman Act.[199] This approach is particularly fitting in interpreting the Sherman Act when the Court is not interpreting detailed statutory instructions but, rather, making sense out of a broad mandate to promote economic welfare. The Court, therefore, need not always wait for Congress to step in and alter the Court's interpretation of the Sherman Act. However, when the Court does change course, it should do so in a way that is deliberate and predictable. Specifically, the Court should be attuned to the institutional nature of the law wherein courts refrain from engaging in policymaking due to their in-

196. *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988) ("The term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances.").

197. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, at 926 (2007) (Breyer, J dissenting)

198. *See* Jeffrey J. Brookner, Note, Bankruptcy Courts and *Stare Decisis*: The Need for Restructuring, 27 U. MICH. J.L. REFORM 313, 313 (1993) (noting that "stare decisis" is "a cornerstone of the common law").

199. As already noted, the Court has, at times, relied on the "strong form" of stare decisis associated with statutory interpretation even in antitrust cases. *See, e.g.*, Square D Co. v. Niagara Frontier Tariff Bureau, Inc. 476 U.S. 409, 424 (1986) ("We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute."); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("In considering whether to cut back or abandon the *Hanover Shoe* rule, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."). Such statements, however, would appear to be totally at odds with a conception of the Sherman Act as a common law statute. The approach advocated in this article can be thought of as a middle ground between rigid statutory stare decisis and open-ended policy making.

ability to receive broad input and take multiple segments of society into account in policymaking. In other words, the common law nature of the Sherman Act authorizes the Court to engage in doctrinal refinement of antitrust law but not to sit as a legislature constantly promulgating and repealing laws as it sees fit.[200]

For example, the common law nature of the Sherman Act would be a proper justification for the Supreme Court to overrule *Federal Baseball* and eliminate the infamous professional baseball exemption from antitrust. In *Flood*, the Court left the option of including baseball under the Sherman Act to Congress's discretion, notwithstanding the fact that the entire basis for the holding in *Federal Baseball* has been eroded by the reality of commercial sports as well as the failure to give any other sport an exemption.[201] It was also widely accepted that commerce had taken on a broader meaning by 1972.[202] In other words, even if *Federal Baseball* made sense in an earlier era, the Court would have been fully justified in updating the law to account for modern realities. Similarly, the fact that Congress has tried and failed to legislatively overrule the baseball exemption should not be taken to tie the hands of the common law.[203] Moreover, by the 1970s it would have been no surprise to lower courts or academics if the Court had reversed *Federal Baseball*—the holding had been gradually eroded by the Court's failure to apply a similar exemption to a number of other professional sports.[204] Thus, eliminating the baseball exemption would have been a valid application of the common law nature of the Sherman Act in order to refine and adapt competition policy to ad-

200. It is generally accepted that stare decisis is even weaker in the area of constitutional law. *See supra* note 12 and accompanying text. While a full discussion of stare decisis in the realm of constitutional law is beyond the scope of this article, the more cautious approach advocated here may not be appropriate in constitutional law where Congressional action to amend the constitution to address judicial decisions is exceedingly rare. *See e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 152 (2010) ("Normally, the only practical way to change a constitutional decision is for the Court to reconsider it.").

201. Flood v. Kuhn, 407 U.S. 258, 282–85 (1972).

202. *See, e.g.*, Burke v. Ford, 389 U.S. 320, 321 (1967) ("For it is well established that an activity which does not itself occur in interstate commerce comes within the scope of the Sherman Act if it substantially affects interstate commerce.") (emphasis omitted).

203. *See, e.g.*, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation.") (internal quotations omitted).

204. *See, e.g.*, Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970); Barton J. Menitove, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. L. REV. 737, 746 (1971) ("In light of the foregoing problems, the Supreme Court should at least reconsider the matter of baseball with a view towards weighing all the equities involved.").

vance the basic policies of the Sherman Act without running roughshod over the concerns implicated by stare decisis.

D. *Stare Decisis in the Regulatory Context of Antitrust*

Some have argued that the administrative context in which antitrust enforcement agencies play a large role in the policing of competition policy can justify the lower standard of stare decisis applied to the antitrust laws.[205] However, to the extent that this argument relies on a weaker version of stare decisis in administrative proceedings, the impact on antitrust would seem to be limited. For one thing, it is not entirely clear that a lesser standard of stare decisis applies in administrative proceedings at all.[206] Moreover, even if that were demonstrably the case, most big antitrust disputes are ultimately decided by Article III courts. First, private suits—a primary tool for enforcement of antitrust laws under the federal scheme—are only brought in district courts. Second, the DOJ, which has half of the responsibility of enforcing the antitrust laws, has no internal trial-like proceedings. Instead, civil and criminal cases are brought only to federal courts. Thus, of the many big antitrust cases brought, only those brought by the FTC have a chance of going through some stage of administrative litigation.[207] Thus, Article III courts will, and should, stick to conventional jurisprudential approaches—including stare decisis—in adjudicating antitrust cases.[208]

That is not to say that the existence of antitrust agencies does not matter at all. As discussed earlier, for instance, the Court took notice of the position of the DOJ and the FTC in both *Illinois Tool* and *Leegin* in order to bolster support for a major change in antitrust law.[209] Thus, in private cases it may appropriate for the Court to accept the positions of the DOJ and the FTC as persuasive authority. Certainly, however, when the federal agencies are parties to a suit, their positions cannot be taken by the court as impartial persuasive

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205. *See supra* Part II.B.

206. *See supra* note 46 and accompanying text.

207. For a discussion on the basics of FTC administrative litigation, see D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319 (2003). In contrast, the DOJ is not an administrative agency and has no independent internal judicial function.

208. Some scholars have noted that, even in the judicial setting, antitrust cases are treated like administrative proceedings because of the reliance on outside participation, such as amicus briefs. *See, e.g.*, Haw, *supra* note 173, at 1255 ("When the Supreme Court relies on amici for economic arguments in deciding an antitrust case, it acts like an agency soliciting comments on a proposed rulemaking.").

209. *See supra* Part II.C.

authority. Still, however, antitrust agencies may play some enhanced role in antitrust law's stable development.[210]

IV. SOME SUGGESTIONS GOING FORWARD

The last portion of this Article provides constructive ideas and suggestions that are intended to ensure that the case law remains coherent and cohesive despite the accepted understanding that stare decisis has a diminished role in antitrust. First, as noted earlier, courts can strive to avoid overruling cases based solely on newer economic models and instead rely on slow doctrinal development. However, inasmuch as antitrust law needs to keep up with rapidly changing commercial realities while at the same time upholding the rule of law and respecting reliance interests, some suggestions and innovations may help further those goals. For example, the Supreme Court—as well as district and circuit courts—can try to preemptively avoid situations in which overruling precedents will become a routine component of the law. Moreover, the Court can take greater care in shaping antitrust jurisprudence to give citizens a more stable base of reliance and to ensure that doctrinal changes are not unduly sharp and abrupt.

A. *Moving From Per Se Rules to the Sliding Scale*

In recent years, much of the Supreme Court's activity in overruling precedent has concerned the repeal of per se rules. For instance, *Sylvania*, *State Oil*, and *Leegin* involved the overruling of per se rules of conduct, and *Illinois Tool* abrogated an automatic presumption of market power. While this may be apparent only in hindsight, the idea of compartmentalizing antitrust scrutiny into tight boxes like per se rules versus the rule of reason does not seem to have served antitrust well and has led to the perceived need to overrule antitrust precedents with relative frequency. In fact, the Supreme Court, as well as numerous commentators, has more recently acknowledged that antitrust scrutiny should focus more on the ultimate harm to consumers with a sliding scale approach that takes into consideration the severity, overtness, and alternative potential purposes of the conduct that is alleged to be in restraint of trade.[211] This has particularly come to the fore

210. *See infra* Part IV.B.

211. In other words, antitrust scrutiny is not merely composed of two rigid layers of per se rules and the rule of reason. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that 'there is often no bright line separating *per se* from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-

with the acceptance of additional levels of review, such as the "quick look."[212]

Thus, it appears that, moving forward, courts might do better by exhibiting more caution before imposing blanket restrictions—like per se rules—that go beyond the facts of a case in front of them.[213] Doing so may alleviate the need to overrule precedent solely on the basis of later economic advancements that suggest that a previously illicit practice has some redeeming pro-competitive virtues. Instead, courts will be free to focus more on the substance of various business practices, such as the evils inherent in particular contractual arrangements as well as the pro-competitive benefits, if any, that an entity is actually pursuing by engaging in that conduct. In some cases, this approach will indeed lead to more complex litigation and associated costs, but it is nonetheless preferable to a jurisprudence that leads to a cycle of rigid rules followed by frequent overruling leading to a state of legal flux. Importantly, a per se rule—or at least an approach including a bare minimum analysis—should remain appropriate in instances of "hard core" price fixing, bid rigging, or the like, inasmuch as that leaves the government sufficient room to enforce egregious

called '*per se*' condemnation is justified.") (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984)); *see also* Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW. 435, 436 (2012) ("The Rule of Reason is best viewed as a continuum."); Spencer Weber Waller, *Justice Stevens and the Rule Of Reason*, 62 SMU L. REV. 693, 700 (2009) (crediting Justice Stevens for the development of a "comprehensive view of the rule of reason" wherein "the rule of reason is not a stark choice between per se illegality and an endless exploration of intent, effects, and balancing," but, rather, it should be regarded as a "continuum where some conduct is presumed to unreasonably restrict competition (and is hence unlawful) where no potential justifications are permitted"); Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1216 (2008) ("Some antitrust commentators depict the relationship between per se and rule of reason analysis as less a dichotomy than a continuum.") (internal quotation omitted); Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 688 (1991) ("A synthesis between the . . . [per se rule and the rule of reason] can be achieved by viewing the per se rule and rule of reason not as opposite approaches to antitrust analysis but as related parts of a continuum. The objective under both approaches should be to judge the competitive purpose and effect of the defendant's conduct.").

212. "Quick look" was recognized by the Court as an intermediate mode of antitrust scrutiny reserved for conduct that is "so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability." Texaco, Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006). The Court has recognized that quick look was the appropriate mode of review in three prominent cases. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (concerning agreement to withhold dental services); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (concerning agreements limiting the number of college games that could be televised); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (concerning agreement forbidding discussions of price).

213. Indeed, courts have already cautioned for decades against "overzealous application of the per se doctrine." Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Adver. Ass'n, Inc., 672 F.2d 1280, 1284 (7th Cir. 1982).

violations without taking the time to re-litigate the anticompetitive nature of the most basic evils proscribed by the antitrust laws.[214]

B. *A Greater Role for the Antitrust Agencies*

Another innovation that courts can utilize in order to assure stability in the development of antitrust law is greater emphasis on the opinions of antitrust enforcement agencies. Most, if not all, of the major antitrust doctrines are still developed by the courts. Thus, stare decisis should remain an important constraint on rapidly changing rules of law. That said, the Supreme Court does, and should, play a continuing role in refining antitrust doctrine to make sure that competition policy serves its goals in the twenty-first century and beyond. However, the Supreme Court does not have to act alone. Both the DOJ and the FTC are active in disseminating research and opinions about how antitrust laws are and ought to be enforced. Moreover, both agencies make an effort to ensure that their opinions and data are publically available. Thus, it is appropriate that the Court often takes note of the antitrust agencies' views in deciding cases, and it would be beneficial for that interplay to continue.[215]

Taking the antitrust agencies' views into account in deciding antitrust cases—especially in matters where the Court overrules precedent—may help alleviate many of the problems that arise when stare decisis is ignored. For example, reliance concerns underlying stare decisis might be alleviated if the Court overrules a case in accordance with the public opinion of antitrust agencies. In such a case, those with an interest in antitrust matters would already be publically warned against over-reliance on an established rule of law. Additionally, the public work of antitrust agencies in reaching their conclusions may simplify the case by allowing the parties to focus their analysis on the issues as presented by the antitrust agencies.

For instance, in *Illinois Tool*, the fact that the DOJ and the FTC had publically come to the conclusion that patents should not automatically confer market power properly alleviated some of the concerns that the Court would normally face in overruling precedent. The Court stated that it found the common position of both the DOJ and

214. For example, "[v]irtually all criminal prosecutions brought under the [Sherman] Act involve offenses governed by the per se rule." Kathryn K. Dyer & Garrett M. Liskey, *Antitrust Violations*, 45 AM. CRIM. L. REV. 195, 200 (2008) (internal quotation omitted).

215. Some suggest going even further and giving an antitrust administrative agency greater power to interpret the antitrust laws in a binding manner. *See* Haw, *supra* note 173, at 1285 (advocating a plan to give the FTC "the power to interpret the Act to an expert agency"); Crane, *supra* note 45, at 1211 (advocating placing greater antitrust enforcement powers "to nonideological, expertized, and problem-solving modalities"); Dibadj, *supra* note 172, at 840-60.

the FTC convincing on the question of patents and that it mattered that the DOJ and FTC had both publicized this information in materials on their websites.[216] As such, there were already public signals that patent cases might be treated differently and that reliance interests had less significance. Moreover, allowing private plaintiffs to rely on legal assumptions that antitrust agencies have abandoned is arguably unfair inasmuch as part of the goal of private suits is to supplement the agencies' enforcement of uniform and consistent competition policy.[217]

C. *Using the Facts to Anchor the Common Law*

Finally, courts can enhance the continuity of antitrust law by engaging in analysis that focuses on the actual conduct in question rather than on potential or theoretical economic aspects of conduct.[218] For instance, in determining whether a particular economic arrangement is in restraint of trade, the court should focus on the actual motivations and results of the economic arrangement, rather than asking what potential or hypothetical pro-competitive virtues might result from the practice.[219] Focusing on the former will allow the law to develop in a way that prohibits or permits particular arrangements with attention to the facts or circumstances that tend to make a practice more or less reasonable. Such a focus promotes reliance on the law as people and entities know what circumstances favor a finding of restraint of trade. Additionally, focusing on the actual motivations and results of economic arrangements obviates the need to overrule cases inasmuch as each case is tightly based on the facts before it. In contrast, deciding cases based on hypothetical economic models has tended to lead to broader legal rules. This practice, in turn, leads to the overruling of prior cases when the hypothetical models change based on novel economic understandings.

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216. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2006).

217. *See, e.g.*, Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 13 (1995) (noting that "[t]he substantive policy goals of antitrust enforcement remain the same whether enforcement is public or private").

218. *See, e.g.*, Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 341 (2010) ("Instead of focusing on the theoretical plausibility of the defendant's alleged conduct, courts should determine whether there is sufficient evidence from which a reasonable jury could conclude that the conduct in fact happened, whether rational or not.").

219. In a similar vein, some have suggested that the Court approach Sherman Act section 2 allegations by focusing on the "substantive competitive purpose" in question rather than "on the outward form of allegedly anticompetitive conduct." *See, e.g.*, Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 845 (2000).

For instance, part of what precipitated the perceived need for overruling the per se rules against resale price maintenance in place before *State Oil* and *Leegin* was the new recognition that resale price maintenance could serve potential pro-competitive ends. Moving forward, however, the proper focus of the inquiry concerning resale price maintenance should not be on what an entity *could* do by imposing resale price maintenance but, rather, on what it *has* done in terms of attempting to curtail market forces or to promote interbrand competition. Such attention to the facts of each case will serve to promote case-by-case adjudication wherein broad legal rules do not need to be constantly reevaluated or overturned.

V. CONCLUSION

Antitrust law faces the formidable challenge of protecting economic freedoms while at the same time keeping up with ever changing commercial and economic realities. However, as the legal profession has long recognized, the law must maintain some semblance of continuity to maximize both efficiency and fairness. Thus, whatever substance antitrust law takes, society will be best served by a doctrine that properly promotes coherent policy goals while not abruptly breaking with precedent in each new case. To do so, courts—and especially the Supreme Court—should overrule prior cases only where there have been meaningful and gradual shifts that justify legal change. By contrast, it is usually unsettling and unfair to overrule cases based only on newer economic trends that point to theoretical justifications. On balance, the common law nature of the Sherman Act is best recognized by allowing it to adjust in much the same way as the common law itself does—through a deliberate process of doctrinal refinement.