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In June 2015, the Supreme Court handed down several landmark decisions in controversial areas, such as same-sex marriage rights, the validity of Obamacare, capital punishment, and the use of the Confederate flag. Along with these decisions, the Court also issued an opinion that received less national attention but that was still important, clarifying its approach to stare decisis—Kimble v. Marvel Entertainment. Kimble included a dictum about the relative strength of antitrust precedents. Speaking through Justice Kagan, Kimble declared that the Court is more willing to overrule antitrust precedents than other precedents. The dictum possibly reflects the Justices’ current sentiments but it does not portray correctly the Court’s actual approach to antitrust precedents.

Stare decisis, the idea that the Supreme Court follows its own precedents, has produced specific applications in antitrust law. These applications follow five general patterns. The patterns can be loosely described as the traditional, post-traditional, methodological, anomalous, and neglected antitrust stare decisis:

1. The “traditional pattern” consists of the old per se illegality rules, which the Court was reluctant to overturn on stare decisis grounds.
2. The “post-traditional pattern” emerged in the late 1970s as a judicial policy that intended to update antitrust law by narrowing and even overruling precedents. The Court sometimes presents this pattern as its general antitrust stare decisis jurisprudence. Kimble’s dictum illustrates this tendency.
3. The “methodological pattern” is the practice of relying on judicial statements to structure antitrust analysis.
4. The “anomalous pattern” is comprised of antitrust doctrines, such as the baseball exemption, that were created because of peculiar beliefs and have survived because of stare decisis even though antitrust lawyers and economists generally consider them misguided.
5. The “neglected pattern” refers to the underdevelopment of antitrust stare decisis resulting from the Court’s limited interest in antitrust law.

In this essay, I explain the patterns of antitrust stare decisis and the relationships among them in light of Kimble’s dictum.

1 See Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (a 5–4 decision holding that the Constitution guarantees a right to same-sex marriage); King v. Burwell, 135 S. Ct. 2480 (2015) (a 6–3 decision holding that the Affordable Care Act authorized nationwide healthcare subsidies); Glossip v. Gross, 135 S. Ct. 2726 (2015) (a 5–4 decision holding that a disputed execution drug does not violate the 8th Amendment); Michigan v. EPA, 135 S. Ct. 2699 (2015) (a 5–4 decision holding that the EPA’s regulation of mercury emissions were unreasonable); Walker v. Texas Div. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) (a 5–4 decision holding that Texas was free to reject specialty license plates bearing the Confederate battle flag); Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmtyys. Project, Inc., 135 S. Ct. 2507 (2015) (a 5–4 decision holding that disparate impact claims are cognizable under the Fair Housing Act of 1968).

Are Antitrust Precedents Weaker than Others?

The Concept of Stare Decisis. Stare decisis is a legal concept the Supreme Court invokes inconsistently and which is not clearly circumscribed. Nevertheless, Justice Cardozo described the concept as "at least the everyday working tool of our law." Justice Brandeis articulated the general criteria guiding the application of stare decisis:

\[\text{Stare decisis is not } \ldots \text{ an inexorable command } \ldots \text{ Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right } \ldots \text{ even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.}\]

This classic formulation presents stare decisis as judicial policy and draws a distinction between statutory stare decisis—interpretations of statutes that Congress may amend through legislation—and constitutional precedents that Congress is unlikely to modify.

The Sherman and Clayton Acts created a framework for federal common law that develops through precedents. Accordingly, antitrust precedents are not statutory, and the Court is expected to reconsider them. However, it would be an exaggeration to claim that the Supreme Court consistently treats antitrust only as federal common law, because it does not. As explained below, the Court also gives certain antitrust precedents the protection of statutory stare decisis.

Kimble's Dictum. In Kimble, in a 6–3 decision, the Supreme Court used a challenge to a half-century old patent law precedent, known as the Brulotte rule, which has generally been accepted as erroneous, to issue a decision about statutory stare decisis. The majority declined an invitation to overturn the precedent, emphasizing that Congress had chosen not to amend it. In such situations, the Court held, a “superspecial justification” is needed to reverse precedents interpreting statutes.

The Brulotte rule built on the old antitrust per se condemnation of leveraging “patent monopoly” through tying. The origins of the rule and the petitioner’s arguments inspired the Kimble Court to make several references to antitrust law. In dictum, the Kimble majority declared that “stare
decisis [has] less-than-usual force in cases involving the Sherman Act,”[10] which gives courts “exceptional law-shaping authority.”[11] The majority further explained:

We have . . . felt relatively free to revise our legal analysis as economic understanding evolves and . . . reverse antitrust precedents that misperceived a practice’s competitive consequences. . . . Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court’s rulings necessarily turned on its understanding of economics.[12]

Together with this dictum about the relative weakness of antitrust stare decisis, the Kimble majority recognized that the Court may apply statutory stare decisis even to “‘judicially created doctrine[s]’ designed to implement . . . federal statute[s] . . . [since all] interpretive decisions . . . are balls tossed into Congress’s court.”[13] Quite a few antitrust doctrines fit this characterization. Kimble was somewhat vague about the relationship between the Court’s willingness to overrule antitrust precedents and its commitment to certain doctrines.

Kimble settled concerns regarding potential applications of stare decisis following Leegin, where the Court overturned the century-old per se illegality rule against resale price maintenance.[14] The Leegin dissent criticized the decision, arguing that Leegin was “‘a statutory case,’”[15] stressing that “the Court applies stare decisis more ‘rigidly’ in statutory than in constitutional cases,”[16] and pointing out that the Court had never “overturned so well-established a statutory precedent.”[17] Leegin was handed down as the polarization in the Court was growing, and the dissent’s discussion of stare decisis cited two cases about campaign financing and abortion rights.[18] It appeared that the dissent was concerned with implications of stare decisis outside antitrust law. Kimble unambiguously distinguished antitrust precedents from others, especially statutory precedents,[19] implying that Leegin has no bearing on the Court’s general approach to stare decisis. This clarification, as was the case in Leegin, appears related to controversies over other decisions that the Court issued more or less together with Kimble.[20]

Kimble’s discussion of stare decisis joined several recent decisions in which the Court articulated its commitment to stare decisis and, specifically, to statutory stare decisis.[21] These decisions present stare decisis as the Court’s “preferred course,” declaring that this course “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judi-

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[11] Id. at 2413.
[12] Id. at 2412–13 (internal quotation marks omitted).
[13] Id. at 2409.
[16] Id. at 923.
[17] Id. at 918.
[20] See supra note 1 and accompanying text.
cial decisions, and contributes to the actual and perceived integrity of the judicial process.””22 They even portray stare decisis as “a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion.”23

Kimble’s dictum, therefore, addresses antitrust precedents but its context is the existing polarization in the Court and its effects on the stability of precedents.

Patterns in Antitrust Stare Decisis

The Traditional Antitrust Stare Decisis. Kimble’s recognition that the Court sometimes gives its own doctrines the protection of statutory precedents is consistent with the traditional antitrust per se illegality rules. These rules are irrebuttable presumptions that apply to “certain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue.”24 Such agreements and practices “are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry [of the rule of reason] as to the precise harm they have caused or the business excuse for their use.”25

The Court’s unwillingness to overturn outdated or misguided antitrust precedents considerably undermined the credibility of per se illegality rules. In theory, the Court adopted these per se rules only after acquiring “considerable experience” that a practice has primarily anticompetitive effects.26 However, until the late 1970s, even when experience showed that a condemned practice was actually procompetitive, the Court was reluctant to overrule per se rules, relying on stare decisis rhetoric. The prime example is the per se rule against resale price maintenance that survived 96 years even though the Court started narrowing the rule shortly after handing it down.27

The Court has been moving away from this “traditional antitrust stare decisis”—the reliance on stare decisis to justify per se rules—but has not entirely abandoned the approach. It still influences antitrust law.

At the very least, the per se rule against tying has escaped serious reconsideration because of stare decisis. More than 30 years ago, in Jefferson Parish, the Court declared that “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’”28 The Court has yet to reconsider this position expressly.

Topco offers another example. The Topco Court applied a per se rule to condemn a territorial restraint of a joint venture of small businesses believing that the restraint was “a horizontal one.”29
Committed to stare decisis, the Court ruled that “[w]hether or not we would decide this case the same way under the rule of reason . . . is irrelevant.”\(^{30}\) The Topco majority described per se rules as statutory precedents necessary for business certainty and explained that “[s]hould Congress . . . determine that predictability is unimportant . . . it can . . . make per se rules inapplicable in some or all cases.”\(^{31}\) Topco is inconsistent with subsequent decisions of the Court, prominently California Dental Association,\(^ {32}\) but inconsistency does not seem to repudiate per se rules in antitrust.

The traditional antitrust stare decisis reflects mechanical formalism, which in antitrust means commitments to interpretations of the antitrust laws that require courts to discount and even disregard relevant competitive effects.\(^ {33}\) High degrees of such formalism cannot serve competition well. Still, it is important to recognize that per se rules, such as the prohibition on price fixing, that rest on settled economics rather than stare decisis can be quite useful in antitrust.

**The Post-Traditional Antitrust Stare Decisis.** By depicting antitrust stare decisis as relatively weak, the Kimble majority followed a description that the Court has used many times since the late 1970s. This narrative allows the Court to overturn outdated antitrust precedents, while departing from the traditional antitrust stare decisis. The Court, however, does not feel required to reconsider all outdated precedents, let alone to overturn them.

The “post-traditional antitrust stare decisis” emerged when the Supreme Court started reshaping antitrust in the late 1970s. The Court used two rationales for reversing outdated precedents: (1) antitrust is federal common law,\(^ {34}\) and (2) the Court’s evolving understanding of economics may justify reconsideration of antitrust precedents.\(^ {35}\) The Court invoked these rationales when overturning per se illegality rules against vertical restraints,\(^ {36}\) narrowing the scope of per se horizontal and vertical illegality rules,\(^ {37}\) and blurring the distinction between per se rules and the rule of reason analysis.\(^ {38}\) In Khan, the Court combined the rationales and presented a general formulation for antitrust stare decisis:

> [T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. . . . [T]he Court . . . recon-
stare decisis utilizes formalism to structure the analysis, supposedly without influencing substance, as it does not define impermissible conduct. Such formalism is needed in law to economize the costs of litigation and administrative processes. 46 But the idea has obvious limitations: the methodology is often used to influence substance. The rise of proceduralism in antitrust illustrates both the value and perils of methodological stare decisis.

Methodological Antitrust Stare Decisis. Methodological stare decisis is “the practice of giving precedential effect to judicial statements about methodology,” namely, “turn[ing] a set of interpretive rules into a controlling interpretive framework.”42 For example, courts’ interpretations of Standard Oil,43 Chicago Board of Trade,44 and related early antitrust precedents contributed to the development of the rule of reason. Similarly, the construction of Interstate Circuit, American Tobacco, and Theatre Enterprises established that proof of concerted action requires direct evidence of communication or indirect evidence that goes beyond parallel conduct (“plus factors”).45 Methodological stare decisis utilizes formalism to structure the analysis, supposedly without influencing substance, as it does not define impermissible conduct. Such formalism is needed in law to economize the costs of litigation and administrative processes.46 But the idea has obvious limitations: the methodology is often used to influence substance. The rise of proceduralism in antitrust illustrates both the value and perils of methodological stare decisis.

Three 1977 decisions—Sylvania, Brunswick, and Illinois Brick—shaped the direction of methodological stare decisis. In Sylvania, the Supreme Court ruled that “departure from the rule of rea-

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40 Leegin, 551 U.S. at 899.
41 See, e.g., Jefferson Parish, 466 U.S. at 9; Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (analyzing Section 4 of the Clayton Act and stating 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.”); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n.29 (1992) (holding that even if economic analysis does not support the ruling regarding market power in aftermarkets, the ruling is supported by stare decisis; analyzing Section 1 of the Sherman Act and stating that “[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done”); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 769 (1984) (Brennan, J., concurring).
43 Standard Oil Co. v. United States, 221 U.S. 1 (1911).
44 Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).
46 See, e.g., Northern Pacific, 356 U.S. at 5 (“Th[e] principle of per se unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.”)
son standard must be based upon demonstrable economic effect.” In *Brunswick*, the Court established the antitrust injury standard. And, in *Illinois Brick*, the Court formulated the direct purchaser doctrine. These 1977 precedents created standing requirements in antitrust and shaped the evolution of antitrust methodology in recent decades. Examples of subsequent methodological standards developed by the Court include false positives as a principal inference criterion, new pleading and summary judgment standards (with specific applications for Section 1), and a revised analysis of implied immunity. These methodological developments offer considerable advantages, but, as the literature demonstrates, the advantages are not always balanced against their costs. By and large, procedural methodology in antitrust influences—and even appears to be intended to influence—substance by favoring defendants.

Perhaps the most complicated example of methodological antitrust stare decisis is the development of the structured rule of reason. Until the late 1970s, antitrust was governed by “two complementary categories of antitrust analysis”: per se rules that established the traditional antitrust stare decisis and the rule of reason analysis that was an unstructured inquiry. Under the traditional rule of reason analysis, as described by the *Sylvania* Court, “[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” A few years earlier, in *Topco*, Justice Marshall portrayed the rule of reason as “leav[ing] courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.” The unstructured rule of reason perhaps used the rhetoric of *Sylvania* but it often had the characteristics described by Justice Marshall.

As explained, post-traditional antitrust stare decisis narrowed the scope of traditional stare decisis. The Court facilitated this transition mostly by overruling vertical per se illegality rules and by making their proof more difficult. Quite notably in this trend, the *California Dental Association* Court emphasized that categorical analysis is somewhat artificial and that functional analysis without benchmarks can be vague. It announced 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.” Quoting Professor Areeda, the Court also stressed that “[t]here is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for.”

The erosion in the distinction between per se and rule of reason was accelerated by lower courts and the agencies that tried to promote various approaches of “continuum” (the spectrum

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53 *NSPE*, 435 U.S. at 692.
54 *Sylvania*, 433 U.S. at 49.
55 *Topco*, 405 U.S. at 609 n.10.
56 *CDA*, 526 U.S. at 779.
57 Id. at 780.
of evidentiary burden spreading between per-se styled limited burden and heavy burden needed in elaborate rule-of-reason inquiries). 58 Courts first applied a structured analysis utilizing a burden-shifting framework in cases arising under Section 1 of the Sherman Act. 59 A similar framework was then applied in Section 2 cases. 60 This contemporary analysis supposedly treats stare decisis as “experience” from which courts may construct a condensed rule of reason and presumptions. 61 Courts and the agencies developed such methodologies while drawing on Supreme Court precedents, or more precisely, on dicta. 62 The Supreme Court appears to endorse these interpretations of dicta, 63 although stare decisis technically does not apply to dicta. 64 A necessary methodological stare decisis formed to eliminate the mechanical formalism of the traditional antitrust stare decisis and the vagueness of the unstructured rule of reason. Professor Areeda’s warning, however, remains valid: the methodology often creates a misleading appearance of precision. 65

In The Antitrust Enterprise, Professor Hovenkamp criticized traditional antitrust stare decisis and argued that the “proper rule” for antitrust stare decisis is methodological. 66 Such a rule, he argued, would “stabilize a method of analyzing antitrust restraints.” 67 The present methodological antitrust stare decisis is much broader than Professor Hovenkamp’s prescription and has distorting effects on antitrust law. Under present law, antitrust procedure is often used to bar plaintiffs and protect defendants.

**Anomalous Antitrust Stare Decisis.** Anomalous antitrust stare decisis describes a pattern of precedents whose primary justification is the precedent itself. Unlike traditional antitrust stare decisis that rests on certain perceptions of competitive effects, this pattern consists of precedents that were never seriously related to beliefs about competitive evils. They are truly anomalous, yet enjoy

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60 See United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

61 See, e.g., FTC v. Actavis, Inc., 133 S. Ct. 2223, 2237 (2013) (“[A]bandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”) (internal quotation marks omitted).


63 See, e.g., Actavis, 133 S. Ct. at 2236–38 (internal quotation marks omitted) (“An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason . . . . [T]here is always something of a sliding scale in appraising reasonableness, and as such the quality of proof required should vary with the circumstances.”).

64 See, e.g., United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J.) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”).

65 Supra note 57 and accompanying text.

66 HOVENKAMP, supra note 26, at 120.

67 Id. at 120–21.
“a super-strong presumption of correctness.”68 Two key examples are the baseball exemption and the filed-rate doctrine. The baseball exemption shields Major League Baseball from the reach of the antitrust laws.69 The filed-rate doctrine immunizes regulated firms from antitrust challenges to rates filed with regulatory agencies.70 Neither doctrine can be justified other than by the reluctance of the Court to overrule it.

Another anomalous antitrust precedent is footnote 17 in Goldfarb, which gave learned professions a special status in antitrust law.71 The Court has referred to this regrettable dictum as binding precedent.72 In North Carolina State Board of Dental Examiners, the Court expressed skepticism about self-regulation of professional organizations but did not expressly overrule this precedent or withdraw from this position.73

**Neglected Antitrust Stare Decisis.** The developments in patterns of antitrust stare decisis discussed thus far were shaped by the transformation of antitrust since the late 1970s. Another phenomenon critical to the evolution of antitrust stare decisis is the Court’s limited interest in antitrust law and its unwillingness to review substantive antitrust issues.74 The dramatic decline in the docket of the Supreme Court during the Rehnquist Court era,75 which has continued during the Roberts Court, partially accounts for the phenomenon. But trends in the Court’s approach to its docket do not define its oversight responsibilities of the Court. The Court is still entrusted with overseeing the development of antitrust law by guiding lower courts, resolving conflicts among the circuits, and updating the law. Too often, however, it simply neglects the task.76 For example, in the area of mergers, Philadelphia National Bank’s 1963 presumption established methodological stare decisis.77 The Court has not reviewed any case in this area since the 1970s.

The neglect of antitrust stare decisis has not been an expression of confidence in the state of antitrust or in lower courts. The Court recognized that “antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries” and it may “prove difficult for those many different courts to reach consistent results.”78 The Court even went as far as stating that “antitrust courts are likely to make unusual-
ly serious mistakes." Yet, in *Actavis*, the Court ruled that reverse settlement agreements should be analyzed under the rule of reason, instructing lower courts to structure their analysis, but without offering guidance:

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences... We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.

A split among the circuits was inevitable as a consequence of this form of neglected stare decisis. The pattern of neglected antitrust stare decisis, therefore, is well recognized. Yet, despite the impact and persistence of this pattern, it is not one that the Supreme Court writes about. Rather, the Court tends to present its active approach to antitrust precedents—the post-traditional pattern—as its general antitrust stare decisis jurisprudence. *Kimble*'s dictum illustrates the point.

**Conclusion**

The concept of stare decisis presumes that settled law offers advantages that may outweigh the costs of its imprecision. The study of antitrust stare decisis reveals five distinct approaches, which can be loosely described as the traditional, post-traditional, methodological, anomalous, and neglected patterns. The post-traditional and methodological patterns intend to offer practical paths for the development of antitrust law, the traditional and anomalous patterns reflect outdated sentiments, and neglected stare decisis appears to reflect the Court's general approach to antitrust. The proper interpretation and development of antitrust law require understanding of these patterns.

*Kimble*'s dictum summarized a familiar narrative that the Court occasionally uses to describe antitrust stare decisis. This description is imprecise. It aligns with the theoretical characteristics of antitrust as federal common law that is governed by economic analysis. The law in practice, however, has different characteristics and is considerably more nuanced. The dictum appears to suggest that neglected stare decisis, which troubles many antitrust experts, does not exist.

Ultimately, *Kimble*'s dictum offers a convenient quote for certain purposes and is likely to be used as such. Litigating parties cite the Court's references to the post-traditional pattern to challenge and defend antitrust precedents. *Kimble*'s dictum will appear in briefs in such contexts. In terms of likely implementation, during the past four decades, the Court has used the post-traditional narrative primarily to narrow the scope of antitrust, but the Court could also do so in the opposite direction. Since law progresses in waves, it may well be that *Kimble*'s dictum will be used to narrow and overrule limiting precedents and instead expand antitrust implementation.

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79 Id. at 282.
80 *Actavis*, 133 S. Ct. at 2238.