

SAFE HARBORS, SURE SHIPWRECKS

Forthcoming, 49 U.C. DAVIS L. REV. ____ (2016)

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ABSTRACT

In law, a safe harbor describes behavior that will not be penalized, and leaves other facts that fall outside the safe harbor to be judged case-by-case. A sure shipwreck, as I call it, is the mirror image. It describes behavior that violates the law as a matter of rule, and leaves other conduct to be judged by a standard. Prior literature analyzes rules and standards at length. But it has largely missed safe harbors and sure shipwrecks, even though these hybrids are everywhere in statutory, regulatory and even case law.

The analysis in this Article reveals that safe harbors and sure shipwrecks produce asymmetrical incentives. Safe harbors encourage those affected by them to converge on the safe harbor boundary from both directions. Sure shipwrecks encourage bunching immediately on the compliant side of the sure-shipwreck boundary as a result of the incentive to move out of the noncompliant space. Overinclusion and underinclusion risks, ex ante and ex post concerns, and interest group influence are some of the considerations that might affect safe-harbor and sure-shipwreck policies.

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INTRODUCTION

The choice between rules and standards has received lavish attention from legal scholars. But this choice fails to capture how the law actually works. On the ground, legal regimes use combinations of rules and standards. The interaction among rule and standard building blocks, as much as the choice between rules and standards, influences the behavior of those who are subject to legal regimes.

This Article analyzes safe harbors and, as I call them, sure shipwrecks. These hybrids between rules and standards exist everywhere in the law. Yet the literature lacks any theory that explores the effects, advantages and disadvantages of safe harbors and sure shipwrecks. This Article supplies such a theory.

This Article analyzes the relationship between rule and standard elements of safe-harbor and sure-shipwreck regimes. This is a new way of thinking about rules and standards.¹ Existing literature has only identified isolated features of these rule/standard hybrids,² even in cases where authors attempt a general analysis.³ No existing work comprehensively theorizes the choices and incentives presented by safe harbors and sure shipwrecks to persons subject to these ubiquitous hybrid legal regimes.

To briefly define the key terms:

¹ Existing literature theorizes rules and standards as a choice between two regime paradigms. *E.g.* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 520–38 (1988); Kathleen Sullivan, *The Justices of Rules and of Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 969 (1995). Under this paradigm, policy makers design a regime characterized by a point along a rule-standard continuum. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65 (1983).

² *See, e.g.*, Saul Levmore, *Double Blind Lawmaking and Other Comments on Formalism in the Law*, 66 U. CHI. L. REV. 915, 920 (1999) (“[S]afe harbors [may] minimize the problem of discontinuity.”); Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 371-75 (1993) (suggesting that safe harbor may increase certainty, reduce under/overinclusion, and/or serve transitional purpose).

³ *See* Emily Cauble, *Safe Harbors in Tax Law*, 47 CONN. L. REV. ____ (forthcoming 2015) , manuscript at 14-48 (arguing that safe harbors are more “forgiving” than bright-line rules and less likely to distort behavior); Andrew Stumpf Morrison, *Case Law, Systemic Law, and a Very Modest Suggestion*, 59 STATUTE L. REV. 159 (2013) (treating safe harbors and “unsafe harbors” as “synthetic case law” and arguing that such rules should address “easy cases” against the background of a standard); Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM L. REV., manuscript at 5-6 (forthcoming 2015) (analyzing a type of sure shipwreck, the “catalog,” defined as “an outright ban on a detailed, but incomplete, list of specific activities and a general prohibition of all activities falling into the same category.”).

A bright-line rule applies a categorical legal result to a set of facts. It provides the result *ex ante*, before the facts have arisen in a particular case. Examples include statutes of limitations and the requirement that drivers drive on one side of the road. An environmental law that prohibits emissions of a particular substance at or above 10 parts per million and permits emissions of that substance below 10 parts per million is a bright-line rule.

Standards provide general considerations for reaching a decision, but leave the determination of legal results to future decisionmakers. Standards produce legal results on an *ex post* basis. Examples include “undue burden” tests in constitutional law and the requirement of “just and reasonable” rates in the regulation of public utility monopolies. An environmental law that only allows “safe and healthy” emissions levels is a standard.

A safe harbor combines a rule and a standard. It provides by rule that particular facts comply with the law and will result in no penalty. It leaves other facts to be judged by a standard. For example, handing a subpoena to a summoned individual is generally accepted as valid “delivery” of the subpoena. If a jurisdiction allows a court to conclude that other methods also qualify as a “delivery,” then handing a subpoena to an individual is a safe harbor from the perspective of the server. Other methods of delivery, such as showing the subpoena to the individual through the window of her home, will be judged according to a standard.⁴

A sure shipwreck also combines a rule and a standard. It is the converse of a safe harbor. A sure shipwreck describes conduct that will definitely violate the law, while other facts remain subject to a standard as applied by the *ex post* judgment of future decisionmakers. Automatic liability regimes generally function as sure shipwrecks. For example, a rule that provides for automatic liability when one driver rear-ends another car functions as a sure shipwreck. If a driver contributes to an accident, but does not hit another car from behind or otherwise fall within an automatic liability rule, her negligence will be judged according to a standard.

Safe harbors and sure shipwrecks are pervasive in the law. Statutory drafters, administrative regulators and judges constantly provide legal answers for specific fact patterns. But they do not provide all of the answers. Safe harbors and sure shipwrecks result. They provide boundaries on uncertain spaces in most legal regimes.⁵

An environmental law might permit emissions of a particular substance at or

⁴ [replace example?]

⁵ *Cf.* Richard Craswell & John F. Calfee, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 VA. L. REV. 965 (1984) (describing and analyzing uncertainty under legal standards).

below one part per million, and simultaneously prohibit emissions of a particular substance at or above ten parts per million. A later decisionmaker might determine whether emissions between one part per million and ten parts per million were acceptable under a “safe and healthy” emissions standard. The safe harbor and sure shipwreck provisions in this example limit the regime’s legal uncertainty to emissions between one and ten parts per million.

This Article shows that safe harbors and sure shipwrecks affect behavior differently, and indeed asymmetrically. Safe harbors encourage those subject to the rule to change their behavior so that their behavior converges on the boundary line drawn by the safe harbor. Sure shipwrecks do not work the same way. They encourage parties who are in the sure-shipwreck zone to change their behavior in order to avoid definite penalties, so that behavior bunches immediately on the compliant side of the line. But in most cases sure shipwrecks do not give persons outside the penalty zone reason to flock to the boundary line.

Consider a drunk driving rule that provides for misdemeanor criminal penalties if an individual drinks four drinks before driving. This is a sure shipwreck. Drivers will, on the margin, limit their drinking to less than four drinks. But the sure shipwreck generally will not encourage drivers to increase their drinking from, say, three drinks to four.

In contrast, consider a safe harbor law that provides that someone who drives after one drink cannot be charged with a driving offense related to alcohol use. Some drivers who without the safe harbor would abstain will instead have one drink before driving. Also, some drivers who previously drove after two drinks will have only one drink.

This Article proceeds as follows. Part I defines safe harbors and sure shipwrecks, as well as bright-line rules and legal standards. Part II presents the core thesis. It argues that placing a safe harbor against the background of a legal standard encourages two-way convergence, while placing a sure shipwreck against a legal standard encourages bunching immediately on the compliance side of the boundary line. Part III examines the possibility that the probability of liability within the general standard space might change as a result of the appearance of a safe harbor or sure shipwreck. Part IV raises several questions that might inform how policymakers use safe harbors and sure shipwrecks. It considers overinclusion and underinclusion features, ex ante and ex post considerations, and the vulnerability of safe harbors to interest group influence.

I. BRIGHT-LINE RULES, LEGAL STANDARDS,
SAFE HARBORS, SURE SHIPWRECKS

A. Key Terms

Policy makers have different kinds of rule/standard structures in their toolbox. These include not only bright-line rules and legal standards, which are the paradigm building blocks examined in the literature.⁶ They also include combinations of rules and standards, such as safe harbors and sure shipwrecks.

A rule constrains a decision maker's discretion *ex ante* by requiring a particular result to follow from a particular set of facts. True, or bright-line, rules divide conduct between that which complies and that which does not. Bright-line rules include time deadlines for court filings, minimum education prerequisites for professional practice, and the requirement that liquid cosmetics must fit into three-ounce bottles at airport security checkpoints.

A legal standard allows a decision maker discretion to apply a general legal policy to a particular situation after the facts of the situation have developed.⁷ This *ex post* feature of legal standards permits answers to be specifically tailored. At the same time, standards present regulated parties with *ex ante* uncertainty about what the results will be. For example, an "undue burden" standard developed under Constitutional law limits state regulation of abortion clinics.⁸ And the common law negligence standard serves as a background standard at common law and also under some statutes, for example in the maritime employment context.⁹

This Article seeks to contribute to a developing literature that theorizes the behavior of persons subject to irreducible uncertainty presented by legal standards.¹⁰ Safe harbors and sure shipwrecks provide boundaries for this uncertainty.

⁶ See *supra* note 1. This Article sets aside the question of the moral or normative source of authority for rules or standards. Compare, e.g., H.L.A. HART, *CONCEPT OF LAW* (1961) with Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). [soften, add Fuller cite]

⁷ See Kaplow, *supra* note 1, at 568–69 (contrasting *ex ante* costs of promulgating rules with *ex post* costs of applying standards); Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. L. ISS. 804, 804 (2005) (calling "tediously familiar" the distinction between rules, "which reflect choices made by the rule-maker;" and standards, which "leave most of the important choices to be made by the subject, the enforcer, or the interpreter . . . at the moment of application"); Sullivan, *supra* note 1, at 58-59 (drawing similar distinction).

⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁹ See 46 U.S.C. § 688 (Jones Act) (extending common law of personal injury); 45 U.S.C. §§ 51, 53 (providing employees with negligence actions).

¹⁰ See, e.g., Alex Raskolnikov, *Rational Decisions Under Legal Uncertainty* (working paper, 2015) (modeling persons' optimal behavior choices under uncertainty, including accounting for costs).

A safe harbor guarantees compliance for described behavior, without foreclosing the possibility that activities outside the safe harbor are also compliant.¹¹ The activity described by the safe harbor is subject to a rule; other activities are subject to a standard. Election law includes a famous example of a safe harbor, in the provision that guarantees that Congress will accept a state's list of electors in a Presidential election if the list is submitted by an appointed day in early December.¹² Safe harbors emerge from case law, statutory law, and regulatory and adjudicatory administrative action. They are particularly visible in administrative action, in part because they are often labeled as such. The Federal Register typically reports 15 or more unique "safe harbor" references every month.

Sure shipwrecks¹³ provide that activity within the sure shipwreck is definitely noncompliant, while activity outside the space described by the sure shipwreck may or may not be compliant. Thus the activity described by the sure shipwreck is subject to a rule, while activities outside the sure shipwreck remain subject to a standard. When the European Union prohibits the sale of fish caught by vessels flagged in certain jurisdictions, it creates a sure shipwreck. The sale of fish caught by other vessels may also be prohibited, depending on the application of the EU's legal standard applicable to illegal, unreported and unregulated fishing.¹⁴

B. Constant Accumulation of Safe Harbors and Sure Shipwrecks

Court decisions and regulatory action constantly populate legal standards with networks of safe harbors and sure shipwrecks. For example, the Fourth Amendment provision prohibiting "unreasonable searches and seizures"¹⁵ is a standard. The series of Supreme Court decisions permitting police officers to conduct warrantless searches of areas close to the location of a stop or arrest – for example, within the "passenger compartment" of a car¹⁶ -- are "safe harbor rules" from the perspective of

¹¹ This definition is consistent with others' descriptions of safe harbors. *See, e.g.,* Cauble, *supra* note 3, Morrison, *supra* note 3; Swire, *supra* note 2, at 370.

¹² In reversing the Florida Supreme Court's Presidential election recount order, the Court majority put significant weight on the assumption that the Florida legislature meant to take advantage of this election law the safe harbor. *See* Bush v. Gore, 531 U.S. 98, 110 (2000) (articulating assumption based on statement by Florida Supreme Court). *But see* Bush v. Gore, 531 U.S. 98, 143 (2000) (Ginsburg, J., dissenting) ("[The] safe harbor lacks the significance the Court assigns it."); Bush v. Gore, 531 U.S. 98, 149 (2000) (Breyer, J., dissenting) (emphasizing that the "safe harbor" statute is not a "mandate").

¹³ I use "sure shipwreck" as the descriptive mirror image of "safe harbor" rather than other terms previously used. *See, e.g.,* Cauble, *supra* note 3 (using "dangerous cliff"); Morrison, *supra* note 3 (using "unsafe harbor").

¹⁴ *See* Council Regulation (EC) No. 1005/2008 of 29 September 2008.

¹⁵ U.S. Const. Am. IV.

¹⁶ New York v. Belton, 453 U.S. 454, 463 (1981).

the police officers.¹⁷ In contrast, decisions limiting officers' warrantless searches produce sure shipwrecks.¹⁸ Outside safe-harbor and sure-shipwreck facts covered by existing case law, a defendant may raise the argument that a search violates the Fourth Amendment, and a court will decide the matter according to the background Constitutional standard of unreasonableness.

As another example, consider a background negligence standard in tort law. A court might decide that a ship owner that employs dock workers is negligent and liable for injuries resulting from the precarious stacking of lumber on deck.¹⁹ To the extent binding, this precedent creates a sure shipwreck from the perspective of maritime employers. In contrast, a safe harbor can result from case law holding that a ship owner is not negligent if it, say, fails to provide a light switch to illuminate a cargo space with an open hatch.²⁰

Safe harbors and sure shipwrecks also develop as an administrative agency interprets a legal standard set forth in a statute. For example, a federal tax statute requires a taxpayer to recognize taxable gain if the taxpayer enters into a "constructive sale" transaction. The statute provides that a derivative transaction known as a short sale against the box produces a constructive sale.²¹ This is a sure shipwreck. Internal Revenue Service guidance provides that a constructive sale will not result if an owner retains exposure to the value of an underlying asset between 100% and 125% of the asset price at the time of a derivative transaction.²² This is a safe harbor.

Between the sure shipwreck and the safe harbor lie a range of transactions that do now mimic a short sale against the box, and also do not leave the asset's owner with the value of the asset between 100% and 125% of its value. Within this space of remaining uncertainty, a background standard that turns on a transaction's "substantial similarity" to a sale²³ helps future decisionmakers determine results.²⁴

¹⁷ Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Criminal Procedure*, 99 MICH. L. REV. 1030, 1044-47 (2001). See also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 918 (1991) ("In a damages system, warrants can correct overdeterrence problems by providing a safe harbor for police.").

¹⁸ See *Arizona v. Gant*, 556 U.S. 332, 344 (2009) (limiting *Belton* where police could not reasonably think that detainee could access car at time of search).

¹⁹ Cf. *Beadle v. Spencer*, 298 U.S. 124 (1936) (holding that contributory negligence did not need to be included in jury instructions as a defense to employer negligence in Jones Act-based tort case).

²⁰ See *Henry v. Moore-McCormack Lines*, 134 F. Supp. 71, 73 (S.D.N.Y. 1995).

²¹ See I.R.C. 1259(c)(1)(A).

²² Rev. Rul. 2003-7.

²³ [Need statutory cite again]

²⁴ *Anschutz case*.

Another federal statute charges the Occupational Safety and Health Administration (OSHA) with ensuring “safe and healthful” workplaces.²⁵ When OSHA concludes that the maximum permissible exposure limit for formaldehyde is 2 parts per million for a 15-minute exposure, it has produced a sure shipwreck.²⁶ Other procedural, information, training and medical attention requirements may produce a violation even if an employer ensures that formaldehyde exposure stays below the legal maximum.²⁷ If an employer complies with all of OSHA’s procedure, information, training and medical attention requirements, the employer will fit within a safe harbor and avoid liability for an OSHA violation.

C. The Issue of Precision

Some safe harbors and sure shipwrecks are specific²⁸ and “transparent.”²⁹ For example, an individual who spends 500 hours or more in a year actively working in a business activity avoids the undesirable “passive activity loss” tax rules.³⁰ This safe harbor leaves little doubt as to whether a person falls inside or outside it.

Sometimes the “safe harbor” label is used to describe a less specific regime that requires the application of a multifactor test. Multifactor safe harbors include the Rule 10b5-1³¹ safe harbor under insider trading law and the Digital Millennium Copyright Act safe harbor insulating internet service providers from liability for the posting of certain online content.³² Sure shipwrecks can also take a less specific, multifactor form, as does the 8-factor general anti-avoidance rule, or GAAR, applicable in Australian tax law.³³

²⁵ 29 U.S.C. § 651.

²⁶ See 29 C.F.R. 1910.1048 (setting formaldehyde limits).

²⁷ See 29 C.F.R. 1910.1450 (providing standards for the operation of chemical labs).

²⁸ See Ehrlich & Posner, *supra* note 1, at 259 (describing rules and standards as existing along a “specificity-generalness axis”).

²⁹ See Diver, *supra* note 1, at 67 (stating that “transparent” rules use “words with well-defined and universally accepted meanings within the relevant community”).

³⁰ See Temp. Treas. Reg. § 1.469-5T(a) (providing 500-hour safe harbor and also “regular, continuous, and substantial” material participation standard).

³¹ See 17 CFR § 240.10b5-1 (providing, inter alia, an “affirmative defense” for the purchase or sale of a security made according to a “written plan” that exists before a person is “aware of ... information” where the person is not allowed “to exercise any subsequent influence over ... purchases or sales.”).

³² See 17 USC § 512(a) (insulating service provider against liability if each of five requirements are met, including requirement that another person initiated content transmission and that service provider does not select material).

³³ The Australian tax general anti-avoidance rule, or GAAR, voids some transactions with “the dominant purpose” of avoiding tax. *Income Tax Assessment Act, 1997* s. 177A(5) (Austl.). The statute offers an eight-part balancing test to determine the dominant purpose of the transaction. *Income Tax Assessment Act, 1997* s. 177D (Austl.).

Less *ex ante* specificity and/or transparency makes a safe harbor or sure shipwreck less rule-like.³⁴ But if there is more *ex ante* specificity and/or transparency in the safe harbor or sure shipwreck compared to the adjacent standard space, the regime is precise enough for purposes of the definition of safe harbor or sure shipwreck as used here. Also, the incremental precision offered by a multifactor safe harbor or sure shipwreck may prompt the formation of more specific and transparent market rules, such as compliance plans adopted by private firms.³⁵ Or the availability of a multifactor safe harbor or sure shipwreck test may facilitate adjudications that begin to populate the space with more specific and transparent examples.³⁶

D. Safe Harbors Give “Good” Results, Sure Shipwrecks Give “Bad” Results

In this discussion of safe harbors and sure shipwrecks, it is assumed that persons subject to a legal regime desire a “compliance” result. For example, a safe harbor does not merely give assurance that a person fits into category A as opposed to category B, where both categories might provide acceptable answers.³⁷ Rather, a person that falls within a safe harbor obtains the favorable result of compliance, meaning the person will not face liability or a penalty for violating the law. Similarly, a person that fits within a sure shipwreck will face an undesirable noncompliance result.

These assumptions of a “good” safe harbor result and a “bad” sure shipwreck result support the core thesis of this Article, developed below in Part II. In many cases of interest, these assumptions are reasonable.

³⁴ Some work uses the background assumption that rules and standards produce the same legal results. That assumption is too strong for purposes of this Article. *See* Kaplow, *supra* note 1, at 570 (“It should be emphasized that the “appropriate” content is taken to be the same *ex ante* and *ex post*.”). *See also* Ehrlich & Posner, *supra* note 1, at 281 (defining efficient rules to “exclude any rules that ... list the ‘wrong’ set of conditions and circumstances to which a legal sanction is attached”).

³⁵ Both the insider trading safe harbor and the Digital Millennium Copyright Act (“DCMA”) safe harbor described above apparently have had this market rule effect. *See, e.g.*, DavisPolk, Client Memorandum: Rule 10b5-1 Plans: What You Need to Know 2 (January 18, 2013), *available at* davispolk.com (listing “practical guidelines” for companies who develop “10b5-1 plans”); White & Case, Client Alert, Intellectual Property: Second Circuit Clarifies DCMA Safe Harbor in *Viacom v. YouTube 3* (April 2012), *available at* whitecase.com (advising online service providers to “examine internal policies and procedures” following the reported case).

³⁶ Many cases have been decided under the multifactor Australian tax general anti-avoidance rule. *See, e.g.*, C. John Taylor, *Form and Substance in Tax Law*, 87 CAHIERS DE DROIT FISCAL INT’L 95, 114-117 (2002) (giving examples of decided GAAR cases).

³⁷ This distinguishes safe harbors and sure shipwrecks from elections. *See, e.g.*, Heather M. Field, *Choosing Tax: Explicit Elections as an Element of Design in the Federal Tax System*, 47 HARV. J. LEGIS. 21, 23 (2010) (analyzing implicit and explicit elections, which extend to taxpayers the right to choose between different tax treatments).

For example, a regulated party that fits within a safe harbor permitting a certain pollutant level will experience avoiding adverse administrative action as a “good” result. Perhaps someone will become ill because of the permitted level of emissions, which is an inextricably linked “bad” result. But it cannot be said that the person who becomes ill is “subject” to the rule; the rule does not target the behavior of the person who becomes ill, but rather seeks to influence directly the behavior of the polluter. So such a pollution rule functions as a safe harbor, and features the key incentive for regulated parties to seek to fit within it, as explored further below.

Sometimes, a rule/standard hybrid produces a good result for some persons subject to the regime and a bad result for other persons subject to the regime. Conclusive evidentiary presumptions,³⁸ such as the historic presumption that a man that lives with his wife is the father of her child,³⁹ produce this result. Such a presumption produces an advantage for one party in litigation and an offsetting and explicit disadvantage for the opposing party in litigation. Such a presumption is a safe harbor from the perspective of one litigant and a sure shipwreck from the perspective of the other litigant.

A rule of contract drafting may also produce a good safe harbor result for some contract parties and a bad sure shipwreck result for others. Consider a rule that enforces an arbitration clause in an employment contract if the clause is worded in a certain way. If an arbitration clause lacks the magic words, it is subject to generally applicable contract drafting standards to determine its enforceability. This rule/standard arbitration clause enforcement regime, let us assume, systematically advantages employers and systematically disadvantages employees.⁴⁰ It is a safe harbor from the perspective of an employer and a sure shipwreck from the perspective of an employee.

When a rule/standard hybrid produces a good result for some persons subject to the regime and a bad result for other persons subject to the regime, it may function as a safe harbor or as a sure shipwreck, depending on the relative power of the

³⁸ See generally W. Page Keeton, *Statutory Presumptions – Their Constitutionality and Legal Effect*, 10 TEX. L. REV. 34, 34 (1931) (“In many instances rules of law have originated by means of the adoption of the fiction of a conclusive presumption.”).

³⁹ See *Michael H. v. Gerald D.*, 492 U.S. 937 (1989) (upholding conclusive presumption of paternity under California law). Due to advances in technology, genetic evidence can now serve to rebut this presumption. [add cite]

⁴⁰ See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 631 (2012) (arguing that class action waivers embedded in arbitration provisions, if upheld, would practically foreclose aggregate litigation in contractual relationship including employment) (citing *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011)).

different groups.⁴¹ Consider the rule enforcing an employment contract arbitration clause written in a certain way. If the employer presents contracts to hourly seasonal workers not represented by a union, the employer will likely act as if the arbitration clause enforcement provision is a safe harbor, and the employees will not resist. But if an employer negotiates with a highly-sought-after CEO, and the CEO views the rule as a sure shipwreck, the CEO may have the negotiating power to ensure that the employment contract is missing the arbitration clause with the magic words, because that would be a sure shipwreck from the CEO's perspective.

II. SAFE HARBORS AND SURE SHIPWRECKS AFFECT BEHAVIOR INCENTIVES

A. *Convergence for Safe Harbors; Bunching for Sure Shipwrecks*

The goal in this Article is to theorize the boundaries between a general standard space and the safe-harbor and sure-shipwreck building blocks that limit it. The key takeaway is that persons subject to a safe harbor converge on the line drawn by the safe harbor both from the noncompliance side of the line and from the compliance space within the safe harbor. In contrast, sure shipwrecks encourage persons who would otherwise find themselves within the sure shipwreck to bunch instead immediately on the compliant side of the sure shipwreck line. Sure shipwrecks do not necessarily influence the behavior of persons initially on the compliant side of the line.

This Part II.A presents a drunk driving example and a lobbyist-legislator gift example to illustrate this point about asymmetric convergence. A key assumption underlying this initial analysis is that the probability of liability for the behavior that lies outside the safe harbor and/or sure shipwreck is not affected by the appearance of the safe harbor and/or sure shipwreck. This assumption of exogeneity is relaxed in Part III. Part III acknowledges that the probability of liability in the general standard space could increase or decrease as a result of the appearance of a safe harbor and/or sure shipwreck.

Consider a misdemeanor law, drafted as a standard, that prohibits driving if the driver is "intoxicated"⁴² or "under the influence of alcohol."⁴³ Drivers who estimate the likelihood of their liability under this standard will estimate a range of probabilities that increases with more drinking. Perhaps the range starts at 0 and increases to 100%. Perhaps the standard produces a 10% probability of liability if a

⁴¹ Cf. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEG. STUD. 1, 2-9 (1980) (arguing that the appropriate use of strict liability and negligence rules depends in part on what party has the capacity to avoid an accident).

⁴² E.g. Texas Penal Code Title 10 § 49.01(2).

⁴³ E.g. California Vehicle Code § 23152.

person drives after having one drink and a 90% probability of liability if a person drives after having four drinks.

Assume that a safe harbor rule appears and guarantees no liability under this law if a person drives after one drink. Some individuals who used to abstain from drinking before driving will change their behavior and have one drink before driving. This is because the reduction from a 10% probability of liability to a 0% probability of liability for one drink under the safe harbor makes the one-drink option more attractive than it was before the appearance of the safe harbor. In addition, some drivers who used to drink two drinks will change their behavior and only have one drink, also because the one-drink alternative with a 0% probability of liability is more attractive than the one-drink alternative with a 10% probability of liability. The safe harbor thus encourages behavior convergence from both sides of the line.

Alternatively or in addition, a rule might appear that automatically provides the result of a misdemeanor conviction if a person drives after four drinks. This is a sure shipwreck. Some persons who used to drink four drinks before driving will no longer do so, because the option of drinking four drinks with a 100% probability of liability is less attractive than the option of drinking four drinks with a 90% probability of liability.

But persons accustomed to drinking, say, three drinks before driving will have no incentive to drink more. This is because the sure shipwreck makes the four-drink option less attractive, not more attractive, for the driver. The sure shipwreck thus encourages the bunching of behavior only as a result of drivers' decisions to shift out of the noncompliance space and into the possibly compliant space.

As another example, consider a law, drafted as a standard, that prohibits a gift from a lobbyist to a legislator if the gift carries an "inference of intent to influence."⁴⁴ A "cup-of-coffee" safe harbor under this law might provide that gifts of food or drink worth \$10 or less will definitely not violate the underlying standard. The cup-of-coffee safe harbor leaves open for determination under the standard the question of whether food or drink transfers worth more than \$10 violate the law.

A "fancy dinner" sure shipwreck under the background standard might provide that gifts of food or drink worth more than \$100 definitely violate the law. Under this sure shipwreck, gifts of food or drink worth \$100 or less may or may not violate the law. Future decisionmakers will determine results for food or drink gifts worth \$100 or less by applying the background standard.

⁴⁴ Cf. New York State Public Integrity Reform Act ("PIRA"), Chapter 399 of the Laws of 2011.

Consider the impact of the \$10 cup-of-coffee safe-harbor rule on two lobbyists, A and B. A spent \$5 per legislator cup of coffee before the imposition of the safe harbor; B spent \$15. Before the safe harbor, the \$5 cup of coffee was the optimal point for lobbyist A and the \$15 cup was the optimal point for lobbyist B. The safe harbor provides an incentive for both lobbyists to choose \$10 cups of coffee instead.

Imagine that A chose a \$5 cup of coffee before the appearance of the safe harbor because, although a \$10 cup would produce slightly more value for A without considering possible penalties, A was concerned that a \$10 cup would produce the noncompliance result of inference of intent to influence. After a \$10 safe harbor is put into place, A faces the same possible penalty for a \$5 or \$10 cup -- \$0. As a result, the slightly higher value of a \$10 cup of coffee encourages A to switch to the \$10 cup.

Note that not every \$5-per-cup lobbyist will switch to \$10 cups. Some prefer – aside from any possible penalty – cheap coffee at run-down diners. It is those lobbyists that prefer \$10 cups to \$5 cups in the absence of any penalty considerations who drive this “going up to the line” tendency when a safe harbor is imposed. The analysis is marginal.

Lobbyist B illustrates the convergence tendency from the other side of the safe harbor line. B paid \$15 per cup of coffee before the imposition of the safe harbor. In other words, the difference between the value of the coffee for B and the probability-adjusted fine for noncompliance was at a maximum at \$15. The appearance of the safe harbor changes B’s calculus. Because the possibility of a fine for noncompliance for a \$10 cup of coffee is now zero, B must now compare her previous optimal value for coffee with a legislator – equal to the difference between the value of \$15 coffee and the probability-adjusted fine for noncompliance at \$15 – to the value of \$10 coffee, unadjusted for any fine, since a fine will definitely not be imposed at \$10. Lobbyist B will switch if the benefit of definitely avoiding the possibility of liability exceeds the loss in value from having a \$10 cup of coffee rather than a \$15 cup of coffee.

Next consider the results of the imposition of a fancy-dinner sure shipwreck providing that gifts of food or drink costing over \$100 will be penalized. Take two more lobbyists, C and D. C spent \$90 on dinner before the sure shipwreck; D spent \$110. Before the sure shipwreck, the \$90 dinner was the optimal point for lobbyist C and the \$110 dinner was the optimal point for lobbyist D. The sure shipwreck encourages lobbyist D, but not lobbyist C, to choose a \$100 dinner instead.

Lobbyist C will not face an incentive to increase the price of the \$90 meal he

provides to a legislator merely because of the appearance of the sure shipwreck.⁴⁵ This follows from the assumption that the sure shipwreck does not change the attractiveness of different compliance choices outside its bounds. If the same legal standard applies to the \$90 meal before and after the appearance of the safe harbor, Lobbyist C will continue to conclude that purchasing the \$90 meal is the optimal course of action. The sure shipwreck only makes choices costing over \$100 less attractive.

In contrast, consider lobbyist D. Assume that, prior to the imposition of the \$100 sure shipwreck, D spent \$110 on dinner and that the probability of violating the standard with a \$110 dinner was less than 100%. After the sure shipwreck, the probability of the imposition of a fine for a \$110 dinner is equal to 100%. This changes D's calculus. D faces a greater incentive to choose a \$100 meal, because the probability of the imposition of a fine for a \$100 dinner is less than 100%.

Finally, consider lobbyist E, who typically spends \$500 on dinner with a legislator. Lobbyist E, let us assume, was certain in the absence of any sure shipwreck that \$500 dinners violated the inference of intent to influence standard. E accepted that penalties would apply; and even considering the penalties that would apply, E concluded that \$500 dinners produced the maximum value for E. The appearance of a sure shipwreck for dinners costing more than \$100 will not change E's behavior. Lobbyist E illustrates that persons at noncompliance extremes that produce the same penalties with or without a sure shipwreck face no incentive to change their behavior as a result of the sure shipwreck.⁴⁶

B. The Discontinuity or "Notch" Feature of Safe Harbors and Sure Shipwrecks

The results of behavior convergence for safe harbors and behavior bunching for sure shipwrecks follow from a key premise about the structure of the relevant legal regime. This premise is that a discontinuity exists at the boundary of the safe harbor

⁴⁵ Note however that Lobbyist C's behavior could change as a result of second-order effects. For example, the bunching of other lobbyists' per-plate spending at \$100 may facilitate a market coordination effect, which could induce Lobbyist C to also spend \$100. *See infra* Part III.B.

⁴⁶ Lobbyist E's incentives also depend on whether there is a maximum penalty or an increasing penalty for increasing noncompliant behavior. An increasing penalty presents a greater likelihood that Lobbyist E will be appropriately deterred from noncompliant behavior. Similarly, a sure shipwreck that increases the probability of the imposition of an increasing penalty is more likely to prompt lobbyist E to move out of the noncompliant sure shipwreck space and into the adjacent standard space. *See generally* A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in I HANDBOOK OF LAW AND ECONOMICS 403, 408 (A. Mitchell Polinsky & Steven Shavell, eds., 2007) (explaining that fines should equal harm caused to produce appropriate cost internalization and deterrence); *see also* Mark Gergen, *Uncertainty and Tax Enforcement: A Case for Modest Fault-Based Penalties*, 64 TAX L. REV. 453 (2011).

or sure shipwreck. The discontinuity means that the chance of a “good” (or “bad”) result will all of a sudden jump, and become greater in a non-smooth fashion, if a person subject to the rule is just inside the boundary of the safe harbor (or sure shipwreck) rather than just outside that boundary.

Discontinuities in legal regimes have been previously studied in at least three respects. First, paradigm bright-line rules have been studied. Second, “notches” have been examined. Third, the question of whether a discontinuity exists at the boundary of an uncertain space -- which is the core animating idea of this paper -- is also engaged in contemporaneous work.

A paradigm bright-line rule that gives a compliant result on one side of a line and a noncompliant result on the other side of a line provides a clear and important example of a discontinuity. Others have observed that such a bright-line rule produces the effect of convergence.⁴⁷ To illustrate the convergence effect of a bright-line rule, consider a continuation of the lobbying expense legal regime. Assume a bright-line rule that permits gifts of \$100 or less, and prohibits gifts in excess of \$100.⁴⁸ This rule encourages both Lobbyist C (who previously bought \$90 dinners) and Lobbyist D (who previously bought \$110 dinners) to buy \$100 dinners instead. This result contrasts with the sure shipwreck, which provided no incentive for the \$90 dinner lobbyists to increase their spending, under the assumption that the sure shipwreck did not affect the probability of liability for dinners costing up to \$100. In other words, a “going up to the line” incentive exists for bright-line rules (as well as safe harbors) but not for sure shipwrecks.⁴⁹

The existence of “notches,” or “discontinuous jumps” “in the choice set of individuals and firms” has also been examined. An example is a tax, such as an excise tax on cigarettes, that is higher in one state than in another. Such a notch is

⁴⁷ See Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. L. ECON. & ORG. 279, 285 (1986) (“The standard deviation can be interpreted as a measure of the amount of uncertainty in the legal system. . . . [T]he effect of a shift in the mean is much greater when the standard deviation is small than when it is large.”); David A. Weisbach, *An Efficiency Analysis of Line Drawing in Tax Law*, 29 J. LEG. STUD. 71 (2002) (analyzing the deadweight loss produced by the shifting of behavior to the more favorable side of a line). If practitioners more or less agree on a market dividing line between compliant and noncompliant conduct under an uncertain legal regime, this may also cause behavior to gather at this de facto or market line. See Alex Raskolnikov, *Rational Decisions Under Legal Uncertainty* (working paper, 2015) (arguing that the behavior of persons subject to an uncertain legal regime will gather, depending in part on such persons’ costs, in the vicinity of the mean of the density distribution of views of the dividing line between the compliant and the noncompliant).

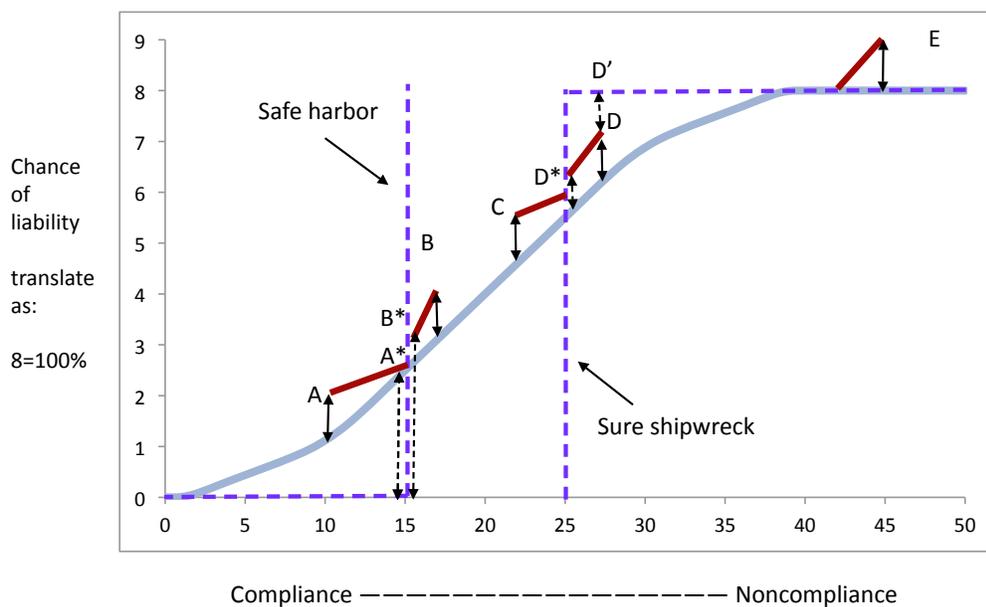
⁴⁸ This rule draws the same lines as the fancy-dinner sure shipwreck discussed above, but does so in a bright-line fashion.

⁴⁹ Second-order effects, such as market coordination, may cause a sure shipwreck to behave more like a bright-line rule. See *infra* Part III.B.

predicted to produce a bunching effect, in the form of “a mass of purchases just on the low-tax side of the border.”⁵⁰ A similar analysis motivates the description here of the behavioral incentives presented by sure shipwrecks.

The motivating assumption and intuition for the core analysis in this Article is that discontinuities, or notches, exist at the boundaries of uncertain legal spaces, where safe harbors and sure shipwrecks cordon off compliant and noncompliant behavior.⁵¹ However, the discontinuities they produce are smaller than those produced by a bright line rule. For example, a sure shipwreck might produce a 100% chance of liability, while the chance of liability immediately outside the sure shipwreck boundary might equal 90%. This discontinuity is smaller than that produced by a bright-line rule that provides 100% chance of liability on one side of a line and 0% chance of liability on the other side of the line. Figure 1 provides a visual example of such safe harbor and sure shipwreck discontinuities.

FIGURE 1: DISCONTINUOUS CHANCE OF LIABILITY AT SAFE HARBOR AND SURE SHIPWRECK BOUNDARIES



⁵⁰ Joel Slemrod, *Buenas Notches: Lines and Notches in Tax System Design*, 11 *EJOURNAL OF TAX RESEARCH* 259, 264 (2013) (noting that the consumer’s decision depends in part on “whether the transportation costs exceed the savings from the tax differential”).

⁵¹ It is also possible to reason that, in general, discontinuities do not exist at the boundaries of uncertain legal spaces. Contemporaneous work describes this possibility, see Alex Raskolnikov, *Rational Decisions Under Legal Uncertainty* (working paper, 2015) (considering the result when boundaries of uncertain space shift), and Part III examines it in more depth.

One reason these results are interesting is that they are counterintuitive. The asymmetry of the results is one counterintuition. Another counterintuitive element is the result of convergence of behavior on the line drawn by a safe harbor. One may think that a regulation that cordons off certain behavior and labels it compliant is only discussing, or affecting, the cordoned off, compliant behavior. This analysis reveals to the contrary that a safe harbor also affects behavior outside the safe harbor.

One famous example that illustrates this point is the *Bush v. Gore* litigation that decided the 2000 presidential election. It turned in part on an election law safe harbor that provides that Congress will accept a state's list of electors if the state turns that list in by an appointed date in early December. The law is silent about the result if elector names are provided after the safe harbor date, and there is little reason to think that Congress would have refused to accept a late list from Florida which reflected a more complete recount in that election. Yet the Supreme Court majority put great weight on an assumption that the Florida legislature meant to take advantage of the safe harbor and therefore that the Florida legislature had properly declined to extend the recount effort. Whether or not that assumption was correct or wise is certainly open to debate. Here, I mean only to suggest that the very plausibility of the idea that the Florida legislature desired the protection of the safe harbor is evidence that safe harbors can have influence beyond the boundaries of the compliant behavior they describe.⁵²

⁵² *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 78 (2000) (labeling a "safe harbor" the statute that guaranteed the acceptance of Florida's elector list by December 12, 2000) (citing 3 U.S.C. § 5). *See also* *Bush v. Gore*, 531 U.S. 98, 149 (2000) (Breyer, J., dissenting) (emphasizing that the "safe harbor" statute is not a "mandate"). In reversing the Florida Supreme Court's Presidential election recount order, the Court majority put significant weight on the assumption that the Florida legislature meant to take advantage the safe harbor. *See* *Bush v. Gore*, 531 U.S. 98, 110 (2000) (articulating assumption based on statement by Florida Supreme Court). *But see* *Bush v. Gore*, 531 U.S. 98, 143 (2000) (Ginsburg, J., dissenting) ("[The] safe harbor lacks the significance the Court assigns it.").

Table 1 summarizes the core analysis of Parts II.A and II.B. It compares the incentives of persons subject to a legal regime when a safe harbor, sure shipwreck or bright-line rule appears against a background legal standard.

TABLE 1: SAFE HARBOR, SURE SHIPWRECK, BRIGHT-LINE RULE INCENTIVES

	Safe harbor	Sure shipwreck	Bright-line rule
Incentive to decrease compliance for persons initially on compliant side of line	Yes “Going up to the line” incentive	No Assuming unchanged probability of liability in adjacent space	Yes “Going up to the line” incentive
Incentive to increase compliance for persons initially on noncompliant side of line	Yes Incentive to comply if initially outside safe harbor because safe harbor offers lower chance of liability	Yes Incentive to comply because sure shipwreck characterizes earlier behavior as noncompliant	Yes Incentive to comply because bright-line rule characterizes earlier behavior as noncompliant

C. Probability of Liability Could Be Greater than 0% for Safe Harbor, Less than 100% for Sure Shipwreck

The discussion in Part II.A presents two safe harbor and sure shipwreck examples based on legal regimes that apply to drunk driving and lobbying expenditures. In both examples, the hypothetical safe harbors reduced the probability of liability to 0%, and the hypothetical sure shipwrecks increased the probability of liability to 100%. However, there is nothing magic about the 0%, or 100%, liability probability.

It is the reduction in the probability of liability when a safe harbor appears that produces a discontinuity and drives convergence from both sides of a safe harbor. And it is the increase in the probability of liability when a sure shipwreck appears that produces a discontinuity and drives bunching from the noncompliant side of a sure-shipwreck boundary. In fact, the actual probability of liability for most safe harbors, and especially for sure shipwrecks, does differ from 0%, or 100%, respectively.

A person that fits within a safe harbor may nevertheless face liability because of the application of an anti-abuse rule. An anti-abuse rule applies explicitly, for

example, in the case of the Rule 10b-1 insider trading safe harbor.⁵³ Imperfect enforcement may also incorrectly categorize safe harbor behavior as illegal, which imposes costs on the person subject to the safe harbor even if liability does not result in the final analysis.

For sure shipwrecks, a variety of imperfections in an enforcement regime will generally produce a less-than-100% probability of liability. These imperfections include imperfect detection, enforcement discretion, and difficulty of proof. Many drivers who drive after four drinks make it home without getting stopped, let alone convicted.⁵⁴

For both safe harbors and sure shipwrecks, the essential feature is that the probability of liability is less (for safe harbors) or more (for sure shipwrecks) than it would be without the safe harbor or sure shipwreck. If driving after one drink has a probability of liability of 1% before a safe harbor and 0.05% after the safe harbor, the one-drink option will be more attractive, on the margin, both to persons who otherwise would abstain and to persons who otherwise would have two drinks. If driving after four drinks has a probability of liability of 1% before a sure shipwreck and 2% after a sure shipwreck, then on the margin the sure shipwreck will encourage drivers who otherwise would drink four drinks to drink less.

D. Who Are the “Persons Subject to” a Safe Harbor or Sure Shipwreck?

When a safe harbor or sure shipwreck appears, only some of the persons subject to the regime will change their behavior in response. The strength of the core thesis of the Article – which predicts convergence at safe-harbor boundaries and bunching immediately on the compliance side of sure-shipwreck boundaries -- depends in a particular case on the number and identity of persons who change their behavior. To determine whether to change behavior, a person would consider the value of the compliance option right at the safe-harbor or sure-shipwreck boundary compared to the compliance option the person had chosen before the appearance of the safe harbor or sure shipwreck.

A utility curve would capture how a person values different compliance and noncompliance options.⁵⁵ For example, a person whose utility increases for more

⁵³ See 17 CFR § 240.10b5-1(c)(1)(ii) (providing that “affirmative defense” applicable only if used “in good faith and not as part of a plan or scheme to evade the prohibitions of this section”).

⁵⁴ See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in I HANDBOOK OF LAW AND ECONOMICS 403, 423-24 (A. Mitchell Polinsky & Steven Shavell, eds., 2007) (noting general problem of low probability of detection and citing evidence about the low probability of enforcement of drunk driving law).

⁵⁵ See Benjamin E. Hermalin, Avery W. Katz, and Richard Craswell, *Contract Law*, in I HANDBOOK OF LAW AND ECONOMICS 3, 22 (A. Mitchell Polinsky & Steven Shavell, eds., 2007)

noncompliant choices is a person who might “go up to the line” drawn by a safe harbor. Also, a person relatively close to a safe-harbor or sure-shipwreck boundary probably faces less reduction in utility as a result of adopting more compliant behavior so as to fit within a safe harbor or avoid fitting within a sure shipwreck.⁵⁶

Consider again the one-drink safe harbor that protects against an under-the-influence driving offense. Drivers who prefer one drink but drink less because of concerns about drunk driving liability in the absence of the safe harbor make up the relevant population for purposes of the going-up-to-the-line incentive to drink one drink rather than zero before driving. There is no practical going-up-to-the-line incentive for an individual who abstains for medical or religious reasons, because such an individual does not place a higher value on having one drink compared to having zero drinks.

To further illustrate this point about the distribution of persons subject to a safe harbor or sure shipwreck, consider another safe harbor, which exempts an individual taxpayer from the disadvantageous passive activity loss tax rules if the taxpayer spends 500 hours a year on a business activity.⁵⁷ A taxpayer who chooses 495 hours as the optimal amount of time to spend on a business activity in the absence of the safe harbor will likely increase her hours to 500 to take advantage of the safe harbor. This is because she needs to make only minor changes to her schedule to fit within it, and she likely assigns similar values to working 495 hours per year on the business activity and working 500 hours per year on the business activity. Taxpayers who before the safe harbor spend less time – say 450 hours, or 400, or 350 – will be increasingly less likely to change their behavior to fit within the safe harbor.

Consider finally a new example of a sure shipwreck. This hypothetical sure shipwreck requires the provision of health insurance to janitors who work 40 hours a week or more (and leaves open the question of whether such taxes must be paid for janitors working less than 40 hours per week). This might well cause employers to reduce janitors’ hours to less than 40 hours per week, because employers might value the services of two part-time janitors at not much less than the services of one full-time janitor. In contrast, a sure shipwreck that requires the provision of health insurance to medical residents who work 40 hours a week or more (and leaves open

(describing individual utility curves and the social welfare function that results from aggregating such individual curves).

⁵⁶ See David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1661 (1999) (noting that if similar behavior is treated differently, a large incentive for taxpayers to change their behavior to the favorable side of a rule will result).

⁵⁷ See Temp. Treas. Reg. § 1.469-5T(a) (providing 500-hour safe harbor and also “regular, continuous, and substantial” material participation standard).

whether medical residents who work less are treated as students or employees)⁵⁸ will not encourage many hospitals to reduce residents' hours so as to fall outside the sure shipwreck. This is because most residents work far in excess of 40 hours per week, and because the long work weeks of medical residents are built into the economics and culture of health care. The hospitals highly value the residents' 80-hour weeks, in other words, and 40-hour weeks are not an acceptable substitute.

The risk aversion, uncertainty aversion, and satisficing tendencies of a person subject to a safe harbor regime may also encourage the person to change behavior so as to fit within the space of a safe harbor. These considerations are discussed in Part III.C below, where I explain that convergence around a safe harbor results even if a person subject to the safe harbor sees identical probabilities of liability inside and immediately outside the safe harbor. In contrast, risk aversion, uncertainty aversion, and satisficing do not cause a person to change behavior so as to fit within the space described by a sure shipwreck. This is because these behavioral incentives encourage persons to seek out more definitely good results, not more definitely bad results.⁵⁹

III. WHEN LIABILITY PROBABILITIES CHANGE IN GENERAL STANDARD SPACE

A. *Liability Probabilities May Increase, Decrease or Stay the Same*

1. Endogeneity. The discussion above assumes that the appearance of a safe harbor or certain shipwreck only affects the probability of liability within the boundaries of a safe harbor or sure shipwreck. Part II observes that a safe harbor reduces the chance of liability within the safe harbor. It also observes that a sure shipwreck increases the chance of liability within the sure shipwreck.

Part II also assumes that the probability of liability outside these boundaries is exogenous to the safe harbor or certain shipwreck. This is a strong assumption. It generates the discontinuity in liability at the border of a safe harbor or sure shipwreck that helps produce the convergence and bunching results articulated above. At the same time, it supports the conclusion that the discontinuity for safe harbors and sure shipwrecks is not as great as for bright-line rules.

In contrast, this Part III acknowledges that when a safe harbor or sure shipwreck appears, it could produce a change in the probability of liability outside its boundaries. This could result in no discontinuity at the boundary of the safe harbor

⁵⁸ *Cf.* Mayo Found. v. United States, 562 U.S. 44 (2011) (deferring to a Treasury Regulation that treats an individual who works 40 hours or more per week as an employee, not a student; regulation applies a standard on other facts) (citing Treas. Reg. § 31.3121(b)(10)-2(d)(3)).

⁵⁹ *See infra* Part III.C.

or sure shipwreck.⁶⁰ It could also result in a greater discontinuity, one that more closely resembles the discontinuity of a bright-line rule, at the boundary of the safe harbor or sure shipwreck space.

Factors that influence the discontinuity at the boundary of a safe harbor or sure shipwreck include: the framing given by the policy maker; the uniqueness of the facts within the safe harbor or sure shipwreck; the use of lists; the comparison between the safe harbor or sure shipwreck and previous beliefs about the content of the law; and whether the person interpreting the safe harbor or sure shipwreck considers the subtleties of the regime. Finally, it is important that many legal spaces include both safe harbors and sure shipwrecks. Where both safe harbors and sure shipwrecks exist in the same legal space, it is not logically possible for safe harbors and sure shipwrecks to behave as bright-line rules do.

2. Framing. To illustrate the importance of a policy maker's framing, consider a new example of a safe harbor. Assume that an administrative agency interprets a statutory requirement of "reasonable rates" for the delivery of packages to prisons⁶¹ with a safe harbor allowing delivery companies to charge the same rates as the postal service, such as \$20 for three-day delivery of a medium-size box. Does the appearance of the \$20 safe harbor change the possibility of liability when a company charges \$25 for three-day delivery of a medium-sized box? If so, does it increase or decrease the possibility of liability for a \$25 delivery? The answer depends in part on how the agency frames the safe harbor.

Say the guidance is accompanied by the agency's statement that the safe harbor is a preliminary guideline. Assume further that the agency invites delivery services to suggest additional rules protecting higher rates based on evidence of higher cost structures. With this message, a delivery company that charged \$25 could reasonably conclude that the appearance of the safe harbor decreased its chance of liability. Similarly, if a sure shipwreck is understood to open the way for liability for similar cases, it could increase the perception of the likelihood of liability outside the boundaries of the sure shipwreck.⁶²

⁶⁰ See *supra* TAN 51.

⁶¹ The business of prison package delivery faces layers of regulation. See Alan Feuer, *The Cellblocks' Amazon.com*, N.Y. Times, Nov. 3, 2013, p. MB1 (reporting on specialized prison delivery firm Sendapackage.com). Rules regulating charges for prison phone calls refer to industry-provided index benchmarks. Rates for Inmate Calling Services, Federal Communications Commission Rule, 78 Fed Reg. 67956 (Nov. 13, 2013) (explaining that permitted rates are based on industry data relating to costs).

⁶² See Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 693, 700-01 (1978) (suggesting that a law "directed at hard-core pornography" might "dete[r] ... publishing ... *Lady Chatterly's Lover*" and arguing that "[a]ny regulation will deter someone somewhere from engaging in conduct that the regulation does not purport to control.").

But the agency might alternatively state that after exhaustive research it has concluded that prison delivery companies “can make a fair profit” at the stated safe harbor rate. This framing suggests that the agency believes that its safe harbor covers just about all of the landscape. As a result, a delivery company that charged \$25 would reasonably conclude that the appearance of the safe harbor increased its chance of liability.

3. Uniqueness of Facts; Case Law vs. Statutes and Regulations. The exceptional nature of a conclusion on certain facts also can affect how the conclusion influences the probability of liability on other facts. If a court decided that a railroad retained an abandoned right-of-way, rather than suffering the reversion of the right-of-way to the government, the court might explain that the decision arose from the unique or “*sui generis*” nature of railroad-government relations.⁶³ The case might produce a safe harbor for railroads holding similar property interests. But it should not affect the likelihood of liability for non-railroad persons who abandon right-of-ways, because the court has taken care to confine the case to its facts.⁶⁴

If the safe harbor or sure shipwreck takes the form of a list or “catalog”, this form also influences the probability of liability in the general standard space. A statute might prohibit leaving a “dog, cat or another pet” in an unattended car.⁶⁵ The statute, which explicitly anticipates application to other situations, will likely increase the probability of liability for leaving a pet rabbit in a car. Or case law, addressing the same issue, might conclude that the owner of a dog or a cat is liable under common law for animal endangerment as a result of leaving the animal in an unattended car. If the case decision is carefully tailored to the situation presented, it is likely easier to confine to the dog-and-cat facts.

The railroad and dog-and-cat examples both raise the possibility that a court decision, rather than a government legislature or agency action, might provide a safe

⁶³ Cf. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1269 (2014) (Sotomayor, J., dissenting).

⁶⁴ It is possible that non-railroad persons will mistake such a unique holding as one that should apply more generally to allow the retention of property rights in abandoned easements. However, this would misunderstand the law. See Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2229, 2232, 2237-38 (2013) (exploring the possibility that “[w]hen the law quietly permits Actor 1 to act in a way that is usually forbidden, Actor 2 may be misled into taking the liberties with the law that he (mistakenly) perceives Actor 1 as taking” and suggesting that the presence of a licensed ticket seller on the sidewalk outside a theater may lead to the incorrect conclusion that ticket scalping is legal).

⁶⁵ This example is offered and developed in Parchomovsky & Stein, *supra* note 3, TAN 23-24 (forthcoming 2015) (giving the example of a sure shipwreck prohibiting leaving a “dog, cat, or another pet” in an unattended car and anticipating that courts will consider whether rabbits count as pets in future adjudications).

harbor or sure shipwreck. It is worth pausing here to consider an important difference between judicial decision making, on the one hand; and legislative and regulatory decision making, on the other. The commonly accepted framework of case law development is the decision of specific cases. Future situations may be analogized to case law of course, and those that seem more compliant than the facts in a favorably decided case can functionally fit within a safe harbor. Yet the project of case law is meant to focus on the particular facts of a narrow situation in each case.⁶⁶

In contrast, the project of regulation and legislation is broader. It is expected that a statute or regulation will apply to some range of situations. Examples may be given in the text of a statute or its legislative history; or in illustrations in the text or introduction to a regulation. But because of the context, they are more likely to be considered as illustrative or inclusive examples rather than exclusive examples. All things equal, the specific case-by-case framework of judge-made law makes it less likely to produce a discontinuous safe harbor or sure shipwreck relative to the more generally framed tools of legislation and regulation.⁶⁷

4. Comparison to Priors. The presence or absence of a gap between pre-existing beliefs about the content of the law and the result given in a safe harbor or certain shipwreck also influences whether the probability of liability changes in the adjacent standard space. If pet owners always assumed that it was illegal to leave a dog in an unattended car, then a case so holding likely will not change their understanding of the law applicable to leaving pet rabbits in cars. If they previously thought that leaving a dog in an unattended car was perfectly legal, the news that it is illegal will likely increase pet owners' concern that leaving a rabbit unattended in a car is also illegal.⁶⁸

The understanding of a safe harbor or sure shipwreck by persons subject to it, or by their advisors, also affects the perceived probability of liability in the general standard space. Perhaps persons subject to legal regimes expect bright-line rules, and fail to absorb the subtle structure of a safe harbor or sure shipwreck. Perhaps a lobbyist faced with a \$10 cup-of-coffee safe harbor will not consider the subtlety of the general standard space, and will not recognize that an \$11 cup of coffee might well comport with the underlying standard. Similarly, the lobbyist presented with a \$100 fancy-dinner sure shipwreck may simply see the sure shipwreck through the lens of his expectation that law takes the form of bright-line rules, and conclude that \$100 dinners are not compliant but that \$99 dinners are.

⁶⁶ OWH, more cites

⁶⁷ more cites to come.

⁶⁸ Emily Cauble also analyzes the interaction between the appearance of a safe harbor and parties' preexisting expectations about results. See Cauble, *supra* note 3.

5. Space of uncertainty inconsistent with bright-line rules. All this is to say that a safe harbor or sure shipwreck may cause a shift in liability in the general standard space in either direction. A shift in liability in the general standard space may reduce the discontinuity at the boundary of the safe harbor or sure shipwreck. This results if a safe harbor causes the chance of liability to decrease in the adjacent general standard space, or if a sure shipwreck causes the chance of liability to increase in the adjacent general standard space.

Conversely, a shift in liability in the general standard space may increase the discontinuity at the boundary of the safe harbor or sure shipwreck, making it look more like a bright-line rule. This results if a safe harbor causes the chance of liability to increase in the adjacent general standard space, or if a sure shipwreck causes the chance of liability to decrease in the adjacent general standard space.

But note that many, probably most, legal regimes limit the capacity of safe harbors and sure shipwrecks to behave like true bright-line rules where the chance of liability is 0% on one side of the line and 100% on the other side of the line. This is because legal regimes often have both safe harbors and sure shipwrecks. For example, case law that sometimes finds for the plaintiff and sometimes for the defendant tends to produce both safe harbors and sure shipwrecks. Also, a regulatory structure that gives good and bad examples, or produces adjudications that sometimes favor the government and sometimes not, contains both safe harbors and sure shipwrecks.⁶⁹ When both a safe harbor and a sure shipwreck occupy a legal regime, a space of uncertainty occupied by the general standard space necessarily exists between the safe harbor and sure shipwreck. As a result, persons subject to the regime should be less likely to interpret either a safe harbor or a sure shipwreck as a bright-line rule.

B. Convergence If Sure Shipwreck Becomes Bright-Line Rule

There is an important possibility related to a sure shipwreck that deserves consideration. This is the possibility that a sure shipwreck will operate as a bright-line rule. It is important because, if the sure shipwreck operates as a bright-line rule, it will prompt convergence from both directions, which includes an incentive for persons who inhabit the space of uncertainty to “go up to the line,” meaning that

⁶⁹ Many schemes that only explicitly list a safe harbor (or sure shipwreck) also implicitly include a sure shipwreck (or safe harbor). One example is the safe harbor in *Bush v. Gore*, which provided that Congress would accept a list of electors from a state if submitted by December 12, 2000. See *supra* note 12 and accompanying text. Since the Constitution requires the newly elected President to take office on January 20, see U.S. CONST. ART. XX, January 20, 2001 provided a sure shipwreck for the submission of electoral votes on the facts of *Bush v. Gore*.

they would face an incentive to become more noncompliant. We would expect such a bright-line rule or convergence result if there were a decrease in the probability of liability in the standard space next to a sure shipwreck, which would make the sure shipwreck more like a bright-line rule.⁷⁰

Nothing in the mere appearance of a sure shipwreck suggests that the probability of liability in the adjacent standard space would decrease. Indeed, some commentators argue that it would systematically increase.⁷¹ But the analysis here reveals that the probability of liability in the adjacent standard space is at once endogenous and contingent on several factors. This raises the possibility that a sure shipwreck could cause the probability of liability in the adjacent space to decrease.

Two possible scenarios are as follows. I will use the example of Lobbyist C, who paid \$90 per legislator dinner before the appearance of a \$100 fancy-dinner sure shipwreck, to illustrate. One possibility is that Lobbyist C expects rules to come in bright-line form, and therefore would interpret that \$100 fancy-dinner rule to only prohibit dinners costing more than \$100, while explicitly permitting dinners costing \$100 or less.

Another possibility is that Lobbyist C will experience a market coordination response due to the behavior of other lobbyists.⁷² At least some other lobbyists are predicted to bunch their behavior at the \$100 fancy-dinner price point. This kind of market coordination could result in the development of the norm of buying a \$100 dinner among a critical mass of lobbyists. This norm could acquire salience in the lobbyist and legislator communities, and Lobbyist C could face pressure to conform to it.

In addition, if a strong market norm develops at the \$100 price point, it could become difficult for a regulator to assert that a \$100 fancy dinner violates the underlying inference-of-intent-to-influence standard. There exists the possibility of a delicate and nonverbal form of communication between regulator and regulatees, under which a regulator's silence as to a widespread practice is taken to mean that the regulator does not object and will not enforce. Thus it is possible that a market rule, with an undesired going-up-to-the-line incentive, might become the unintended result of a sure shipwreck which meant only to push regulated parties out of a forbidden zone.⁷³

⁷⁰ This is consistent with the observation that a bright-line rule encourages behavior convergence. See *supra* note 47.

⁷¹ Raskolnikov

⁷² Market coordination/game theory cites

⁷³ This consideration of the possibility that a sure shipwreck might act as a bright-line rule has implication for the regulation of bad behavior. See generally Alex Raskolnikov, *Irredeemably*

Yet note that, as mentioned just above, if a legal regime includes both safe harbors and sure shipwrecks for a certain indicator of compliance, then the legal regime requires a space of uncertainty between definitely-bad and definitely-good behavior. And if a space of uncertainty exists, then sure shipwrecks should not behave exactly like bright-line rules. They might encourage some convergence from the non-compliant side of the line, but it would be less than would be observed for a bright-line rule.

C. Robust Convergence Result for Safe Harbors

Part II presents the core thesis that a safe harbor encourages persons subject to the legal regime to converge on the line drawn by the safe harbor from both the compliant side of the line and the noncompliant side of the line. Part II relied on a discontinuity in the likelihood of liability between the safe harbor and the area immediately outside the safe harbor. Such a discontinuity produces convergence because the abrupt jump to a lower chance of liability at the safe harbor boundary encourages persons subject to the rule to both “go up to the line” from the compliance side and to change behavior so as to fit within the safe harbor from the noncompliance side.

A discontinuity at the safe harbor boundary results where the probability of liability outside the boundaries of the safe harbor either increases or remains the same. But what if the probability of liability outside the safe harbor *decreases* as a result of the appearance of the safe harbor. In the extreme case, what if the probability of liability outside the safe harbor decreases so much that the probability of liability is equally low adjacent to the safe harbor and within the boundaries of the safe harbor?⁷⁴ In this case, there is no discontinuity. And so it cannot be said that a preference for a lower probability of liability encourages persons subject to the legal regime to move inside the safe harbor.

Inefficient Acts: A Threat to Markets, Firms, and the Fisc, 102 GEO. L. J. 1133 (2014). If sure shipwrecks only affect behavior on the noncompliant side of the line, they may be ideal instruments to use when the main policy goal is to encourage less of a certain behavior, such as illegal fishing, or drunk driving, or tax avoidance. (Safe harbors may also be useful in encouraging noncompliant types to increase compliance to the safe harbor level, but safe harbors also have the going-up-to-the-line incentive, which works against the goal of discouraging a behavior.) But if a sure shipwreck has some possibility of morphing into a market rule and therefore including a going-up-to-the-line incentive, its use for the regulation of bad behavior becomes more complicated, and more contingent on the way in which the project of enforcement proceeds in the space of uncertainty adjacent to the sure shipwreck.

⁷⁴ Contemporaneous research suggests that this is generally the case. Raskolnikov.

Yet even where the chance of liability is equal within and outside a safe harbor, so that there is no discontinuity, behavior convergence at the safe harbor boundary should result. It should result because of behavioral factors: risk aversion, uncertainty aversion and/or satisficing.

To illustrate the robust convergence result for safe harbor regimes without a boundary discontinuity, consider a new hypothetical safe harbor. It appears against a background standard requiring a student to “regularly attend” school or be required to attend summer school. A safe harbor rule might provide that a student absent for 15 days or less will meet the “regular attendance” standard, so long as the student does not frequently come late to school or leave early. Assume further that the 15-day safe harbor decreases the likelihood that 16 days of absence will also comply with the underlying standard.

For example, it could be that prior to the safe harbor, students believed that only five days of absence would be allowed under the regular attendance standard. When they learn that 15 days of absence is acceptable, the probability of liability at 16 days of absence decreases. Perhaps it even decreases to the same level as the 15-day safe harbor. Perhaps 15 or 16 days of absence carry the same degree of likelihood that the student will be required to attend summer school. Let us say that either 15 or 16 days of absence produce a 5% chance of liability.⁷⁵

Even though they face a 5% chance of liability at either 15 or 16 days of absence, students will on the margin choose 15 days of absence over 16 days of absence. This is because risk and uncertainty aversion and satisficing will influence student behavior. These behavioral economics factors support the result that a safe harbor produces convergence even if the expected-value fine is the same for behavior immediately on either side of the line drawn by the safe harbor.

Risk aversion means the tendency to avoid situations where a greater variance of outcomes is possible, and uncertainty aversion means the tendency to avoid situations where the probabilities of outcomes are not known.⁷⁶ Satisficing refers to persons’ tendency to use rules of thumb, or heuristics, to guide decision making.⁷⁷ It

⁷⁵ The probability is slightly positive even for the 15-day safe harbor to account for the possibility that frequent tardies or early departures will cause a student to fail the regular attendance standard.

⁷⁶ FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* Part III Ch VIII (1921) (using “risk” to mean a measurable or mathematical uncertainty like that faced in a game of chance and “uncertainty” to mean an unmeasurable uncertainty). *See also* KENNETH J. ARROW, *ASPECTS OF THE THEORY OF RISK-BEARING* (1965) (providing risk aversion model); Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 *STAN. L. REV.* 241, 259- 61 (2013) (citing Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms*, 75 *Q. J. OF ECON.* 643 (1961)).

⁷⁷ *See* Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 *AM. ECON.*

describes a solution to the problem of resource constraints, which limit individuals' ability to fully analyze every decision.

Consider a student trying to decide whether to spend an extra quiet weekday on the ski slopes rather than recording a 16th day of absence at school. Her best estimate of the probability of summer school may not increase with the extra day of absence. But the 16-day probability arises not from a clearly drafted safe harbor, but rather from the student's expected-value weighted estimate of different probabilities of liability. Moreover, the student is not sure about any of the probability inputs used in her estimate.

Risk and uncertainty aversion encourage the student to choose 15 days of absence. This is because a risk-adjusted and/or estimated 5% liability probability is less attractive than a for-sure 5% probability of liability.⁷⁸ Also, satisficing will encourage the student to choose 15 days of absence. Generally, it will require fewer resources to analyze behavior covered by a safe harbor, both because the rule tends to be more specific and transparent; and because it allows a person to focus only on the terms of the safe harbor, without engaging with all the factors that are relevant under the general standard.

The uncertainty aversion and satisficing tendencies of third parties also can encourage the use of safe harbors even if behavior immediately outside a safe harbor also has an equally low chance of liability. For example, recommending safe harbor use may serve advisors' individual reputational interests.⁷⁹ The use of safe harbors may also serve risk management or other interests of contract counterparties.⁸⁰

REV. 493, 498 (1979) (connecting the resource constraints that limit the ability to fully analyze every decision with the use of rules of thumb to guide decisionmaking).

⁷⁸ However, a risk-adjusted and/or estimated 99% liability probability is *more* attractive than a for-sure 99% probability of liability. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 454 (1981) (presenting evidence of loss aversion or "risk seeking" when persons are faced with the choice of (a) a sure loss versus (b) a chance of losing a larger amount, even where (a) and (b) have equal expected value). This is why equivalent probabilities of liability on either side of a sure shipwreck boundary do not cause persons subject to the rule to choose to move inside the boundaries of the sure shipwreck.

⁷⁹ For example, advisors appear to recommend Delaware incorporation because of satisficing or "familiarity" as well as because of the substantive features of Delaware law. See Brian J. Broughman, Jesse Fried & Darien M. Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, working paper dated January 1, 2014, available at ssrn.com, abstract id=2117967.

⁸⁰ See, e.g., *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Serv.*, 489 F.3d 1267 (2007) (explaining that dialysis clinics, rather than directly regulated nephrologists, adjusted contracts to comply with safe-harbor compensation levels).

IV. WHEN AND HOW TO USE SAFE HARBORS AND SURE SHIPWRECKS

This Article so far has attempted to carefully define safe harbors and sure shipwrecks. It has argued that safe harbors encourage behavior convergence; while sure shipwrecks encourage the bunching of behavior immediately on the compliance side of a sure shipwreck boundary, as a result of the incentive to move out of the sure shipwreck zone. These observations provide a basic theory of how safe harbors and sure shipwrecks work.

The observations in this Article also raise additional questions about when and how safe harbors and sure shipwrecks should be used. In this Part IV, my goal is to raise (but not fully analyze) some of these additional questions. I briefly outline safe harbors' and sure shipwrecks' overinclusion and underinclusion features, their combination of ex ante and ex post qualities, the vulnerability of safe harbors to interest group influence, and the question of whether only sure shipwrecks should be used to regulate bad behavior. Future work might explore some or all of these points.

A. Overinclusion and Underinclusion

Like bright-line rules, safe harbors and sure shipwrecks present problems of overinclusion and underinclusion.⁸¹ These problems relate to the quality or congruence of the safe harbor or sure shipwreck. In other words, just like other regimes, safe harbors and sure shipwrecks can reflect better and worse judgments about what behavior ought and ought not be punished according to the underlying policy and wisdom of the relevant law.

Consider the tax law safe harbor that provides that an individual who spends 500 hours a year on a business activity avoids the adverse "passive activity loss" rules. This is a good safe harbor if, among other considerations, (1) we agree that spending a quarter of one's presumed 2000 hours of annual working time on a business venture is a sufficient commitment given the purposes of the passive activity loss rule⁸² and (2) acceptably low deadweight loss costs result when the safe harbor encourages taxpayers to increase their time spent to 500 hours for targeted business activities.

⁸¹ See Sunstein, *supra* note 1, at 992-993. The idea that an ex ante rule and an ex post standard could have exactly the same legal content, or and thus exactly the same congruence, underlies some prior literature. See Kaplow *supra* note 1, at 586-90. Assuming identical legal content in rules and standards focuses attention on comparing ex ante and ex post costs. However, the assumption that rules and standards will have the same content is too strong for purposes of this Article.

⁸² Cf. Temp. Treas. Reg. § 1.469-5T(a) (providing a 100-hour rule for some real estate businesses).

Another tax law safe harbor provides that a person who retains between 100% and 125% of an asset's value in a derivative transaction avoids an adverse "constructive sale" result. This is a bad safe harbor if we acknowledge the fact of material differences in asset volatility. It is overinclusive, because it allows a person to use a derivative transaction to accomplish an economic sale of a high-volatility asset without facing an adverse constructive sale result.⁸³ It is also underinclusive, because a derivative transaction involving a low-volatility asset might very well avoid the result of economic equivalence with a sale even if the taxpayer retained between 100% and 125% of the asset's value.

Overinclusion means that, relative to the intended or ideal policy that underlies a background legal standard, a rule protects some behavior that ought to produce a noncompliance result or punishes some behavior that ought to produce a compliance result. Underinclusion means the failure of a rule to protect some behavior that is compliant or the failure of a rule to punish some behavior that is noncompliant. Prior literature has suggested that safe harbors and sure shipwrecks produce less serious overinclusion or underinclusion problems compared to bright-line rules.⁸⁴

In contrast to the suggestions in prior literature, the problem of overinclusion is *as a matter of logic* equally acute for safe harbors and sure shipwrecks as for bright-line rules. That is, the problem is identical assuming that the line is drawn in the same place. For example, the same overinclusion mistakes will be made whether a bright-line rule or a safe harbor provides that an individual who spends 500 hours a year on an activity will avoid the adverse result of the passive activity loss tax rules. If an individual who spends 550 hours really should suffer the consequences provided by the passive activity loss rules, then both a bright-line rule and a safe harbor will erroneously exempt him from those rules.

The problem of overinclusion may be less acute *as a practical matter* in safe harbors and sure shipwrecks, compared to bright-line rules, if it is true that a policy maker tends to draft safe harbors and sure shipwrecks more narrowly compared to bright-line rules. When a policy maker gives a bright-line rule, the policy maker must embrace both the result that behavior on one side of the line is compliant and the result that behavior on the other side of the line is not compliant. In contrast, safe harbors and sure shipwrecks invite policy makers to make decisions

⁸³ See *supra* notes 21-22 and accompanying text (explaining the constructive sale background standard and safe harbor). See also Thomas Brennan, *Law and Finance: The Case of Constructive Sales*, 5 ANN. REV. FIN. ECON. 259 (2013) (modeling the failure of the existing safe harbor rule to account for volatility).

⁸⁴ See, e.g., Swire, *supra* note 2, at 373 (suggesting that safe harbors present less acute "overinclusion and underinclusion" problems compared to bright-line rules).

incrementally,⁸⁵ and to decide only that a narrow set of facts produces compliance (for safe harbors) or noncompliance (for sure shipwrecks).

For example, the European Union prohibits “illegal, unreported and unregulated” (IUU) fishing.⁸⁶ Its regulatory scheme includes port inspections and other enforcement mechanisms, together with a capacity to blacklist specific vessels and/or all vessels flagged in certain countries from sourcing European fish imports.⁸⁷ The country blacklist serves as a sure shipwreck, not a bright-line rule, since fishing vessels flagged in a country that is not on the blacklist could still face sanctions for IUU fishing under other portions of the regulatory scheme. Because of the possibility of other sanctions, the EU is probably relatively less likely to blacklist a country. In other words, the EU is relatively less likely to make an overinclusion mistake. It has issued “yellow cards” to countries with specific suggestions for improvement, rather than putting the countries on the sure-shipwreck blacklist.⁸⁸

The analysis of underinclusion in safe harbors and sure shipwrecks compared to bright-line rules is more subtle. Both safe harbors and sure shipwrecks are intentionally underinclusive. Indeed, this is the key point that separates safe harbors and sure shipwrecks from bright-line rules. Safe harbors and sure shipwrecks acknowledge that they are not solving the questions presented by fact patterns outside their boundaries; they leave that to future decisionmakers, who apply the background standard.

Take the lobbyist gift regime, with the \$10 cup-of-coffee safe harbor and the \$100 fancy-dinner sure shipwreck. The intentional underinclusiveness of this legal regime means that a \$20 sandwich at a thinktank conference can comply with the inference of intent to influence standard despite the \$10 cup-of-coffee safe harbor. It also means that an \$80 dinner at the best restaurant in a legislator’s small town can violate it despite the \$100 sure shipwreck.

The intentional underinclusiveness of safe harbors and sure shipwrecks might

⁸⁵ See *supra* Part III.A

⁸⁶ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999.

⁸⁷ Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing

⁸⁸ European Commission, Fisheries, Questions and Answers on the EU’s fight against illegal, unreported and unregulated (IUU) fishing, December 12, 2014, available at http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=19549&subweb=343&lang=en.

suggest that underinclusion is only a feature, and not a problem, for these rule-standard hybrids. It is true that underinclusion is generally not a problem for sure shipwrecks, as discussed further below. But for safe harbors, underinclusion is a problem. This is because safe harbors affect the behavior of persons outside the boundary of the safe harbor. The guaranteed result of lower liability provided by a safe harbor makes the behavior outside the safe harbor less attractive.

For example, the \$20 conference sandwich is less attractive relative to a \$10 coffee after the safe harbor appears. So some persons who otherwise might accept the \$20 sandwich will refuse it. The incentive is gentler compared to the convergence incentive for a bright-line rule, but it exists. This presents the problem of underinclusion if the \$20 conference sandwich was perfectly fine under the background “inference of intent to influence” standard and policy.

The problem of underinclusion means that safe harbors can cause problems when used to describe “easy cases.”⁸⁹ Consider the Department of Education regulations that give colleges a safe harbor for compliance with Title IX. The safe harbor provides that a college does not violate Title IX if the ratio of male intercollegiate athletic participants in athletics to total participants is less than or equal to the ratio of male students to total students.⁹⁰ Some colleges respond by cutting men’s teams. When members of a cut wrestling team object to the safe harbor regulation, they make an underinclusion argument, meaning that they argue that numerical proportionality is not the only way to satisfy Title IX’s policy goal of equity in collegiate athletics.⁹¹

⁸⁹ See Morrison, *supra* note 3 (arguing that safe harbors should address “easy cases” against the background of a standard).

⁹⁰ 34 C.F.R. 106.41 and OCR Policy Interpretation, 44 Fed. Reg. 71,415. The regulations provide a “Three-Part Test” including a safe harbor rule, which applies if intercollegiate athletic opportunities are “substantially proportionate” to male and female enrollments; and two parts that are adjacent standards and allow the possibility of Title IX compliance if the institution has a sufficient practice of program expansion or if the institution has “fully and effectively accommodated” the interests of male and female students in sports participation. See Catherine F. Pieronek, *The 2010 “Dear Colleague” Letter on Title IX Compliance for College Athletic Programs: Pointing the Way to Proportionality . . . Again*, 38 J. Coll. & Univ. L. 277, 299-306 (2012) (describing “clarification” guidance issued in 1996, 2003, 2005 and 2010).

⁹¹ In one case, the D.C. Circuit refused standing to a coalition of wrestlers and wrestling coaches who had sued the Department of Education on the theory that the safe harbor did not cause the college to take any action. See *National Wrestling Coaches Ass’n v. Dep’t of Education*, 366 F.3d 930, 938 (D.C. Cir. 2004). Other Title IX cases have extended standing to plaintiff organizations representing cut men’s teams. See, e.g., *Equity in Athletics, Inc. v. Dep’t of Education*, 639 F.3d 91, 101 n.7 (4th Cir. 2011) (granting standing because plaintiffs sued the university as well as the Department of Education and because of a lack of evidence that the college would have “eliminated specific teams” in the absence of the Department of Education guidance). See also *Bennett v. Donovan*, 703 F.3d 582, 588 (D.C. Cir. 2013) (analyzing standing by considering whether, “with respect to the action in a particular case” a

Another easy-case safe harbor guaranteed Medicare reimbursement for dialysis facilities if the referring physician's compensation did not exceed midpoints derived from survey evidence. Dialysis centers responded to the safe harbor by reducing nephrologists' compensation to safe harbor rates. When nephrologists challenged the safe harbor, they made an underinclusion argument, which contended that their previous compensation satisfied the underlying law.⁹²

Underinclusion is less of a problem for sure shipwrecks. An underinclusion problem would result if a sure shipwreck failed to list bad behavior as noncompliant, *and* the sure shipwreck reduced the chance that that bad behavior would produce liability. Underinclusion is not a problem for sure shipwrecks under the assumption that a sure shipwreck does not affect the behavior of persons outside the boundary of the sure shipwreck. Unless a sure shipwreck produces a decrease in the probability of liability outside the bounds of the sure shipwreck (and thus resembles a bright-line rule)⁹³ a sure shipwreck encourages bunching only as a result from migration from the noncompliance side of the line.

As an example of underinclusion and sure shipwrecks, consider a tax shelter blacklist. Imagine that there are 14 tax shelters routinely marketed to large corporations, and that the tax shelter blacklist lists 12 of them as tax avoidance transactions. The omission of the two tax shelters not on the list causes an underinclusion problem only if the publication of the blacklist reduces the chance that the missing two shelters will produce tax avoidance liability.

B. Ex Ante and Ex Post

Safe harbors and sure shipwrecks have a temporal dimension. A safe harbor or sure shipwreck provides an ex ante answer for some factual situations covered by the legal standard. The remainder of the legal standard is left open for future development. The ex post space exists because later decisionmakers have the responsibility to determine the results of cases not covered by the safe harbor or sure

third-party action is “independent of government policy”) (emphasis in original).

⁹² The D.C. Circuit held that the nephrologists lacked standing for lack of a clear causal link between the safe harbor and dialysis center compensation decisions. *See Renal Physicians Ass'n v. U.S. Dep't of Health & Human Serv.*, 489 F.3d 1267, 1277 (2007) (“We have no way of knowing why the dialysis facility ... reduced Dr. Anzalone's hourly wage. . . .”). It held the causation and redress prongs missing. Standing does not present a similar causation question in the case of a bright-line rule or sure shipwreck. *See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Education*, 366 F.3d 930, 941 (D.C. Cir. 2004) (noting cases in which parties alleging injury caused by a sure shipwreck-type rule had standing).

⁹³ *See supra* Part III.B.

shipwreck.⁹⁴

The costs of an ex ante rule compared to the costs of an ex post standard properly influence a choice to pursue a safe-harbor or sure-shipwreck path. As prior literature has observed, if the content of an ex ante rule and an ex post standard are the same, then a rule is efficient when the rulemaking, compliance and enforcement costs of an ex ante rule are less than the costs of ex post decision making. A determination that the costs of an ex ante rule are lower for only some factual situations supports a decision to establish a safe harbor and/or sure shipwreck.⁹⁵

Relevant costs for the ex ante / ex post contrast include rulemaking, compliance and enforcement costs. These factors translate to several reasons why a decision maker might choose to replace only part of a legal standard with a safe harbor or sure shipwreck.⁹⁶ For example, if persons subject to a legal regime are more numerous and/or homogenous, there is a better chance that an ex ante rule will make sense. If a court or agency faces an area featuring unsure and rapidly developing technology, then an ex ante rule makes less sense, all else equal.⁹⁷

The institutional capacity of an agency, court, or other decisionmaker also affects the decision whether to adopt a safe harbor or sure shipwreck. Sometimes, an agency may only have the capacity to immediately solve part of the problem before it.⁹⁸ This can result from resource constraints that include the challenge of

⁹⁴ Rules-versus-standards choices also allocate decision making among different decision makers, for example between legislators and judges, or between current and future iterations of an administrative agency. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 158-162, 231-233 (1991).

⁹⁵ See Kaplow, *supra* note 1, at 621 (contrasting ex ante costs of promulgating rules with ex post costs of applying standards). The distributive question of whether to weight costs differently depending on who bears them lies beyond the scope of this article. Cf. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEG. STUD. 667 (1994).

⁹⁶ See Kaplow, *supra* note 1, at 621-624 (listing and analyzing different ex ante and ex post costs).

⁹⁷ Other solutions to developing technology also exist, including automatically dynamic rulemaking approaches. See, e.g., Lynn Blais & Wendy Wagner, *Emerging Science*, 86 TEX. L. R. 1701, 1731-37 (considering adjustment mechanisms including “contemporaneous revision planning,” “revision rulemaking” and periodic review). Cf. *Industrial Union Dept. v. Amer. Petroleum Inst.*, 448 U.S. 607 (1980) (invalidating OSHA benzene exposure regulation interpreting a “safe and healthful” standard and reasoning that OSHA had insufficient evidence to show that an emission level of 1 ppm or less was required to accomplish the goal of a safe and healthful workplace).

⁹⁸ See Parchomovsky & Stein, *supra* note 3 (arguing that catalogs, or open-ended lists of situations that give sure legal results, have an advantage over rules and standards because they “can be expeditiously and cheaply adapted to accommodate changes while reducing information costs for actors”).

too little information, or because of information overload,⁹⁹ because of the “ossification” that can follow from agency risk aversion and the threat of judicial review¹⁰⁰ and/or because of political considerations outside the agency.¹⁰¹ Courts may face similar information constraints, and also must operate within the limitation that requires judges to decide cases presented, not hypothetical cases.

The qualities of regulated parties and/or the institutional capacity of an agency or court can change over time, and safe harbors and sure shipwrecks accommodate this within the ex post standard space. In other words, safe harbors and sure shipwrecks can help decision makers use the dimension of time¹⁰² to break rulemaking tasks into smaller, more manageable parts.¹⁰³ But using time in this way may also expose

⁹⁹ See, e.g., Douglas A. Kysar & James Salzman, *Making Sense of Information for Environmental Policy*, 86 *TEX. L. REV.* 1347, 1347-48 (2008) (considering the problem of information for regulators).

¹⁰⁰ Compare Thomas McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L. J.* 557 (1992) with Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 *OHIO ST. L. J.* 251 (2009).

¹⁰¹ See, e.g., Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001) (exploring increased impact of presidential priorities on some rulemaking projects under the Bush 1 and Clinton administrations); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 *HARV. L. REV.* 1755 (2013) (noting agencies’ use of timing strategies to reduce the chance of close Presidential review). See also Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 *DUKE L. J.* 1671 (2012) (describing Congressional challenges to some administrative policies).

¹⁰² Others have observed that administrative rulemaking has a temporal dimension. See, e.g. Yoon-Ho Alex Lee, *An Options Approach to Rulemaking*, 65 *ADMIN. L. REV.* 881 (2013) (arguing based on option theory that agencies should carefully consider “policy reversibility” and should face a more lenient standard of judicial review for rules that permit “ex post exemptions”); Yair Listokin, *Learning Through Policy Variation*, 118 *YALE L.J.* 480, 499-500, 522-23 (2008) (arguing that reversible policies should pursue a high-risk, or high-variance approach, while a policymaker might choose to delay the implementation of an irreversible policy).

¹⁰³ In other words, safe harbors and sure shipwrecks can combine features of “comprehensive rationality” and incremental “muddling through.” Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 *HARV. L. REV.* 393 (1981) (describing “comprehensive rationality” and “incrementalism”); Charles Lindblom, *The Science of Muddling Through*, 19 *PUB. ADMIN. REV.* 79 (1959). Various scholars recommend that agencies take a more comprehensive rationality view in specific subject areas. See, e.g., Daniel J. Gifford, *Labor Law and Its Reform*, 80 *IOWA L. REV.* 201, 203 (1994) (NLRB); Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 *MD. L. REV.* 511, 513-14 (2008) (gun control law); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 *CAL. L. REV.* 59, 119-20 (2010) (administrative agency coordination and climate change). See also David Super, *Against Flexibility*, 96 *CORNELL L. REV.* 1375, 1378-79 (2011) (stating a preference for earlier decisions on the theory that this reduces policymaker bias and citing the case of disaster relief regulation). But the practical reality of “muddling through” is widely acknowledged. See, e.g., Lynn M. LoPucki, *The Systems Approach to Law*, 82 *CORNELL L. REV.* 479, 521 (1997) (acknowledging descriptive importance of incremental account of rulemaking). Other scholars acknowledge the policy potential of incrementalism. See, e.g., Rachel Brewster, *Stepping*

decision makers to the pitfall of increasing interest group influence over less visible, incremental decisions.¹⁰⁴

C. Safe Harbors and the Problem of Capture

Because safe harbors produce a good result for persons subject to them, there is an increased risk of interest group influence for safe harbor rulemaking. Interest-group theory predicts regulatory rules benefiting small, well-organized interest groups even if such rules present detriments to larger, more diffuse groups.¹⁰⁵ It thus suggests the paradigm of an industry or other regulated-party group quietly and successfully pushing for a safe harbor while potential opponents remain paralyzed by collective action problems.¹⁰⁶

Of course, safe harbors sometimes face opposition from organized opposing groups, whether of industry competitors, public interest protectors, or otherwise. In addition, agencies can develop safe harbor rules despite the fact that no interest group requests them. Nevertheless, there remains a vulnerability: because safe harbors protect an identified group of regulated parties, it is likely that such protected parties will seek safe harbors; while, in general, others will have less reason to oppose the safe harbor compared to the protected parties' incentive to pursue it.

Stone or Stumbling Block: Incrementalism and National Climate Change Legislation, 28 YALE L. & POL'Y REV. 245, 311-12 (2010) (arguing that incrementalism can create feedback loops that feature in a productive interaction between national legislation and international negotiation); Daniel R. Cahoy, *An Incrementalist Approach to Patent Reform Policy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 587, 635-640 (2006) (advocating trial-and-error analysis in patent reform due to limited availability of empirical inputs); Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179, 1180-81 (2004) (suggesting greater reliance on back-end regulatory adjustment and recommending public access to process).

¹⁰⁴ See Saul Levmore, *Interest Groups and the Problem With Incrementalism*, 158 U. PA. L. REV. 815, 855 (2010) (outlining the possibility of an interest group's plan to accomplish a regulatory goal incrementally over time and thus fragment possible opposition).

¹⁰⁵ See, e.g. James Q. Wilson, *The Politics of Regulation*, in SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 135 (James W. McKie ed. 1978) (“[R]egulatory constraints often arise out of a political situation in which a small, relatively homogeneous group can make substantial gains by imposing unobtrusive costs on large number of others.”). See also, e.g. Diver, *supra* note 103, at 430-31 (noting that making rules “piecemeal” over time is a more legitimate approach in the presence of “decentralized decisionmaking” where interest parties have access to decisionmakers); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48 (1985) (suggesting a continuum where at one pole “interest group” controls and where at the other pole faction pressures are unimportant).

¹⁰⁶ See Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 144 (1963) (noting “political advantages of the small groups of large units”).

How serious is the problem of interest-group influence and safe harbors? The answer boils down to a familiar tension between public choice theory and accounts of agency independence and expertise. If public choice theory is correct that bureaucrats are very vulnerable to interest-group influence,¹⁰⁷ then we should expect safe harbors to bring out the most extreme forms of rent-seeking cronyism. This concern would be particularly strong if the safe harbors develop from informal and incremental guidance rather than full-fledged and fully public notice-and-comment rulemaking.¹⁰⁸

Yet public choice theory is not necessarily a true account of how government agencies work.¹⁰⁹ Perhaps bureaucrats face multiple motivations, including job security, institutional power, and good policy.¹¹⁰ Or perhaps administrators strive for good policy decisions subject to resource, institutional, exogenous political and other constraints.¹¹¹ To the extent the expertise story is right, or that another solution to the problem of capture or interest group influence is available,¹¹² agencies have interesting opportunities to use leverage over regulated parties who desire safe harbors.¹¹³ For example, an agency might force regulated parties to

¹⁰⁷ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 7 (1991) (explaining the idea that economic rent-seeking motivates bureaucrats' actions).

¹⁰⁸ See Levmore, *supra* note 104, at 855 (outlining the possibility of an interest group's plan to accomplish a regulatory goal incrementally over time and thus fragment possible opposition); see also SIDNEY A. SHAPIRO & ROBERT L. GLICKMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 158-68, 175 (2003) (stating support for exceptions and other "back-end adjustments" "only if the opportunities for participation afforded interested persons are essentially equivalent to those that govern adoption of regulatory standards in the first place.")

¹⁰⁹ Cf. STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 9 (2009) (arguing that relative political power cannot explain regulation).

¹¹⁰ Cf. RICHARD F. FENNO JR., *CONGRESSMEN IN COMMITTEES* (1973) (identifying goals of influence, re-election and policy for members of congressional committees).

¹¹¹ See Thomas McGarity, *Regulatory Analysis and Regulatory Reform*, 65 *TEX. L. REV.* 1243 (1987) (defining "technobureaucratic rationality").

¹¹² See, e.g., Ronen Avraham, *Private Regulation*, 34 *HARV. J. L. & PUB. POL'Y* 543, 591-93 (2011) (recommending that private regulators develop medical standards of care and face liability ... as determined from the ex ante perspective, for writing guidelines that are inefficiently risky"); Omri Ben-Shahar and Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 *MICH. L. REV.* 197, 197 (2012) (arguing that the insurance plus strict- or no-liability legal rules can substitute for government safety regulation).

¹¹³ For example, Bradley Karkkainen has analyzed California's Proposition 65 emissions standard, see Cal. Health & Safety Code §§ 25249.5-13, which invited regulatees to avoid an unattractive default regime by proposing and defending safe harbor emissions limits. He reports that it took "only a few months" for California regulators to establish safe harbor levels for hundreds of substances under this regime. Bradley Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 *TEX. L. REV.* 1409, 1430 (2008) ("[B]y shifting the default position to one of uncertainty and risk on the part of polluters, Proposition 65 profoundly changes the dynamics of information flow.").

internalize some rulemaking costs,¹¹⁴ for example by providing better and more usable information.¹¹⁵

CONCLUSION

Safe harbors and, as I call them, sure shipwrecks are rule-standard hybrids that appear throughout statutory, regulatory and case law. Safe harbors guarantee compliance, and also leave open the possibility of compliance for fact situations not described by the safe harbor. Sure shipwrecks describe behavior that violates the law as a matter of rule, and also leave open the possibility of a noncompliance result for fact situations outside the sure shipwreck.

This Article supplies a theory of safe harbors and sure shipwrecks that breaks new ground in the rules and standards literature. The analysis shows that safe harbors and sure shipwrecks produce asymmetric behavioral incentives for regulated parties. Safe harbors encourage parties on both sides of the line drawn by the safe harbor to change their behavior so that it converges on the line drawn by the safe harbor. This is because of the advantage of a lower chance of liability at the safe harbor boundary. Sure shipwrecks encourage bunching immediately on the compliant side of the line drawn by the sure shipwreck as a result of the incentive to move out of the sure shipwreck space.

Safe harbors and sure shipwrecks are natural tools for incremental policy making over time. But they have design flaws as well. For example, both safe harbors and sure shipwrecks can present overinclusion problems identical to those presented by bright-line rules. In addition, safe harbors confined to “easy cases” systematically present problems of underinclusion. The dimension of time and the question of interest group influence also influence safe-harbor and sure-shipwreck policy.

¹¹⁴ See A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 37 J. ECON. LIT. 45, 57-58 (2000) (explaining rationale for requiring internalization of public enforcement costs).

¹¹⁵ See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321 (2010) (suggesting “information filter” measures such as length-limited policy briefs).