

O

verruling Dr. Miles:
The Supreme Trade Commission
in action

BY RICHARD M. BRUNELL*

INTRODUCTION

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹ a sharply divided Supreme Court abolished the *per se* rule against resale price maintenance (RPM), overruling the venerable case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*² *Leegin* is important not merely for its impact on resale price maintenance, but also for what it says about the Supreme Court's role in making national antitrust policy and whether traditional jurisprudential limitations on the Court's power, such as *stare decisis* and the intent of Congress, matter. It is a commonplace that the federal courts have significant discretion in applying the Sherman Act's vague mandate prohibiting "[e]very

* Director of Legal Advocacy and Senior Fellow, American Antitrust Institute, Washington, D.C.

AUTHOR'S NOTE: *The American Antitrust Institute filed an amicus curiae brief which I drafted, urging the Court in Leegin not to overrule Dr. Miles. I am grateful to Bert Foer, Harry First, Steve Calkins, Warren Grimes, and Rudy Peritz for their helpful comments on an earlier draft.*

¹ 127 S. Ct. 2705 (2007).

² 220 U.S. 373 (1911).

contract, combination . . . , or conspiracy, in restraint of trade"³ Indeed, the Act has famously been likened to "a charter of freedom [with] a generality and adaptability comparable to that found to be desirable in constitutional provisions."⁴ However, the courts' policymaking discretion has frequently been tempered by jurisprudential concerns associated with the fact that, at bottom, courts applying the Sherman Act are engaged in statutory construction. In *Leegin*, the battle between policy and jurisprudential concerns was joined, and policy triumphed.

I will argue in part III that abandoning the *per se* rule is bad policy and that the Court's policy analysis was woefully inadequate primarily because the Court failed to consider all the relevant costs and benefits of moving from the *per se* rule to the rule of reason. But even those who oppose the *per se* rule on policy grounds ought to be troubled by the Court's jurisprudential analysis, which I argue in part II marks a new height in antitrust judicial activism. A growing chorus of scholars of various ideological stripes has criticized the extent to which the Court acts as a free agent in interpreting the Sherman Act.⁵ *Leegin* promises to provide new fodder for their critique. I begin in

³ 15 U.S.C. § 1 (2006).

⁴ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

⁵ Professor Arthur is the leading critic of the conception of the Sherman Act as a standardless delegation of authority to the Court to make national competition policy. See Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 270 (1986) (contending that Congress did not authorize the federal judiciary to make the basic policy choices in antitrust). More recent critiques include: Daniel A. Farber & Brett H. McDonnell, "Is There a Text in This Class?" *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619 (2005) (arguing that the reigning approach to interpreting the antitrust laws as a delegation of lawmaking power to the courts is indefensible from textualist and historical perspectives); Andrew S. Oldham, *Sherman's March (In)to the Sea*, 74 TENN. L. REV. 319, 324 (2007) (arguing that "the common law monstrosity that federal courts have created atop the Sherman Act's unadorned text is unconstitutional" under separation of powers doctrine); David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725 (2001) (questioning the legitimacy of the shift away from reliance on legislative history or other sources of congressional intent in antitrust cases).

part I with some background on the *per se* rule against resale price maintenance and the Court's decision.

I. BACKGROUND

A. *Short history of the per se rule against resale price maintenance*

The *per se* rule against resale price maintenance originated in 1911 with *Dr. Miles*, which held that an agreement between a manufacturer and its distributors to set the minimum price the distributors must charge for the manufacturer's goods was invalid.⁶ Eight years later, the Court established what is now known as the "*Colgate doctrine*," namely that a manufacturer could refuse to deal with distributors that did not adhere to suggested retail prices.⁷ Congress enacted the Miller-Tydings Act in 1937, amending section 1 of the Sherman Act to allow resale price maintenance agreements that were lawful under state fair trade laws,⁸ and in 1952 passed the McGuire Act, expressly extending this exception to allow manufacturers to enforce minimum resale prices against retailers that had not signed any resale price maintenance agreement, where permitted by state law.⁹ The Warren Court sharply limited the *Colgate doctrine* in *Parke, Davis*,¹⁰ limited the consignment exception to *Dr. Miles* in *Simpson*,¹¹ and extended the *per se* rule to nonprice vertical restraints in *Schwinn*,¹² and to maximum resale price maintenance in *Albrecht*.¹³ In 1975, Congress enacted the Consumer Goods Pricing

⁶ *Dr. Miles*, 220 U.S. at 409.

⁷ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁸ 50 Stat. 693 (1937). The Miller-Tydings Act is the only substantive amendment to section 1 of the Sherman Act in its entire history.

⁹ 66 Stat. 631 (1952). The McGuire Act was passed in response to the Court's narrow reading of the Miller-Tydings Act in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

¹⁰ *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

¹¹ *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

¹² *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹³ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

Act¹⁴ repealing the Miller-Tydings and McGuire Acts and making *Dr. Miles* the uniform governing law nationwide.

Thereafter, the Court's hostility towards vertical restraints waned and the scope of the *per se* rule was narrowed. But even as the Court adopted the rule of reason for nonprice restraints in *Sylvania*,¹⁵ overturning *Schwinn*, reinvigorated the *Colgate* doctrine and made proof of agreement more difficult in *Monsanto*,¹⁶ narrowed the definition of a vertical "price" agreement in *Business Electronics*,¹⁷ and adopted the rule of reason for maximum resale price maintenance in *Khan*,¹⁸ the Court adhered to the core of *Dr. Miles*, significantly in respect of the will of Congress as expressed in the Consumer Goods Pricing Act of 1975. After the Reagan Administration's Justice Department sought to overturn *Dr. Miles* in *Monsanto*,¹⁹ Congress passed appropriations measures in 1983,

¹⁴ Pub. L. No. 94-145, 89 Stat. 801 (1975).

¹⁵ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹⁶ *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

¹⁷ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

¹⁸ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹⁹ The Court expressly declined the Department's invitation to overrule *Dr. Miles*. *Monsanto*, 465 U.S. at 762 n.7. In *Leegin*, the Court took comfort from the fact that, "[u]nlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, . . . the Court [in *Monsanto*] 'declin[e]d to reach the question' whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise . . ." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722 (2007), quoting *Monsanto*, 465 U.S. at 762 n.7. In context, however, *Monsanto's* rebuff to the Reagan Administration's high-profile efforts to overturn *Dr. Miles* (which not only provoked a sharp congressional response, but resulted in extensive amicus briefing in the Supreme Court), must be read as an affirmation of the *per se* rule. See *Monsanto*, 465 U.S. at 760 (concerted action to set prices has "been *per se* illegal since the early years of national antitrust enforcement"). The Court did not distance itself from Justice Brennan's concurrence, and it is known to overturn precedent even when not requested by the parties. See, e.g., *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1979 (2007) (Stevens, J., dissenting) (noting that Court had retired *Conley v. Gibson* formulation even though neither the petitioners nor any of the six amici supporting the petitioners requested it); see also ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES,

1985, 1986, and 1987 preventing the Department from using appropriated funds for this purpose.²⁰ Such measures were dropped when the (first) Bush Administration came to office and promised to enforce *Dr. Miles*.²¹ Between 1990 and 2000, the Federal Trade Commission and Department of Justice brought more than a dozen resale price maintenance cases;²² the states also brought a

CONCEPTS AND PROBLEMS IN COMPETITION POLICY 372 (2002) (noting that Justice Powell's papers indicate that "he was inclined to overrule *Dr. Miles* in *Monsanto*, but ultimately felt constrained from doing so because (1) the issue was not preserved by the parties, and (2) there was apparent Congressional support for *Dr. Miles*. Only the first of these reasons is reflected in the final opinion . . . but it appears that the second was the more influential.").

²⁰ See Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983); Pub. L. No. 99-180, § 605, 99 Stat. 1136, 1169 (1985); Pub. L. No. 99-500, § 605, 100 Stat. 1783, 1783-73 (1986); Pub. L. No. 100-202, § 605, 101 Stat. 1329, 1329-38 (1987).

²¹ James F. Rill, Ass't Attorney General, Speech Before the New England Antitrust Conference, Antitrust Enforcement: An Agenda for the 1990s, in 57 Antitrust & Trade Reg. Rep. (BNA) 671 (Nov. 9, 1989) (stating that the Antitrust Division would not advocate change to the *per se* rule and would "not hesitate to bring a resale price maintenance case, contingent only on evidence sufficient to establish a genuine resale price conspiracy and facts showing a significant regional impact"). Still, in 1991 both houses of Congress passed different versions of bills that would have reversed *Monsanto* and *Business Electronics*, as well as codified the *per se* rule against resale price maintenance, but the House rejected the conference report, which did not include the House version's exemption for small businesses. See 138 CONG. REC. H 5657-63 (daily ed. June 30, 1992).

²² FTC cases include: In re Nintendo of America Inc., 114 F.T.C. 702 (1991), In re Kreepy Krauly USA, Inc., 114 F.T.C. 777 (1991), In re The Keds Corp., 117 F.T.C. 389 (1994), In re Reebok Int'l, Ltd., 120 F.T.C. 20 (1995), Fed. Trade Comm'n v. Onkyo U.S.A. Corp., 1995-2 Trade Cas. (CCH) ¶ 71,111 (D.D.C. 1995), In re New Balance Athletic Shoe, Inc., 122 F.T.C. 137 (1996), In re American Cyanamid Co., 123 F.T.C. 1257 (1997), In re Nine West Group, Inc., No. C-3937, 2000 WL 250227 (F.T.C.), and In re Sony Music Entertainment, Inc., No. C-3971, 2000 WL 1257799 (F.T.C.) (minimum advertised price agreement). DOJ cases include: United States v. Canstar Sports USA, Inc., 1993-2 Trade Cas. (CCH) ¶ 70,372 (D. Vt. 1993), United States v. California SunCare, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,843 (C.D. Cal. 1994), United States v. Playmobil USA, Inc., 1995-1 Trade Cas. (CCH) ¶ 71,000 (D.D.C. 1995), United States v. Anchorshade, Inc., 1996-2 Trade Cas. (CCH) ¶ 71,640 (S.D. Fla. 1996), and United States v. Brush Fibers, Inc., 1997-2 Trade Cas. (CCH) ¶ 71,915 (E.D. Pa. 1996).

number of cases, although most were in connection with the federal cases.²³

No great hue and cry was demanding that *Dr. Miles* be reversed when the Roberts Court granted certiorari in *Leegin* to reconsider the *per se* rule. Although the professional bar viewed *Dr. Miles* as an anomaly, the bipartisan Antitrust Modernization Commission had declined to study the topic, its working group noting "a relatively low level of controversy on the subject."²⁴ Professor Hovenkamp had suggested that *Dr. Miles* had already been "largely defanged" by *Monsanto* and *Business Electronics*.²⁵ The defense bar was pitching *Colgate* policies as an effective means to curb discounting.²⁶ Yet, the Court having taken the case, many pundits assumed *Dr. Miles* was dead; after all, this is a Supreme Court that has not decided a substantive antitrust matter favorably to plaintiffs since 1992,²⁷ with most of the cases decided by 9-0 or 8-0 votes. What was surprising to some Court watchers was the fact that the decision to overturn *Dr. Miles* provoked such a strong dissent from Justice Breyer, joined by Stevens, Ginsburg and Souter, in defense of the *per se* rule on both policy and jurisprudential grounds.²⁸

²³ For a listing of the cases, see Brief for the States of New York et al. as Amici Curiae Supporting Respondent, *Leegin*, 2007 WL 62185, at 1.

²⁴ Memorandum From the Antitrust Modernization Commission Single-Firm Conduct Working Group 16 (Dec. 21, 2004), <http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf>.

²⁵ Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L. J. 125 (2000) ("While [the *per se*] rule [against minimum resale price maintenance] remains nominally intact, it has been largely defanged by a strict agreement requirement and a narrow construction of the term 'price.'"). *But see Interview With Former Assistant Attorney General James F. Rill*, 63 Antitrust & Trade Reg. Rep. (BNA) 254 (Aug. 27, 1992) ("People forget that Monsanto lost its case and Sharp settled.").

²⁶ See, e.g., Brian R. Henry & Eugene F. Zelek, Jr., *Establishing and Maintaining an Effective Minimum Resale Price Policy: A Colgate How-To*, ANTITRUST, Summer 2003, at 8, 8 ("While a resale price policy is not a panacea, it can be a powerful and effective tool to curb discounting. Provided that such a policy is carefully designed, implemented, and applied, the legal risk is sufficiently low so as to be acceptable to many companies.").

²⁷ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

²⁸ See, e.g., Linda Greenhouse, *Justices Hear Arguments About Pacts on Pricing*, N.Y. TIMES, Mar. 27, 2007, at C1 (observing that oral argument "laid to rest

B. *A thumbnail of the Court's decision*

Justice Kennedy, writing for the majority, posed the question as "whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of § 1."²⁹ Having rhetorically placed the burden on the proponents of the *per se* rule to defend the unusual, the outcome followed naturally. The logic of overturning *Dr. Miles* was simple enough. First, "[r]esort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.'"³⁰ Second, "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."³¹ Third, the empirical evidence, while "limited . . . does not suggest efficient uses of the agreements are infrequent or hypothetical."³² Consequently, "were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints."³³ Finally, "*Stare decisis* . . . does not compel our continued adherence to the *per se* rule against vertical price restraints."³⁴

The structure of the Court's decision reflects its focus on policy. After determining that *Dr. Miles* is bad antitrust policy, the Court concluded that considerations of *stare decisis* "do not require a different result."³⁵ As discussed in the next section, the Court treated

any expectation that the rule against 'resale price maintenance' would go quietly," and that rule got a spirited defense from Justices Breyer, Stevens, Ginsburg, and Souter).

²⁹ *Leegin*, 127 S. Ct. at 2710.

³⁰ *Id.* at 2713 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

³¹ *Id.* at 2714.

³² *Id.* at 2717.

³³ *Id.* at 2720.

³⁴ *Id.* at 2721.

³⁵ *Id.* at 2723.

the jurisprudential considerations as an obstacle to be avoided, rather than a significant value that must be weighed in the balance.

II. JURISPRUDENTIAL CONSIDERATIONS

A. *Stare decisis*

The Court gave little weight to *stare decisis*, which is perhaps surprising given the new Justices' professed support for the doctrine and other tenets of judicial restraint,³⁶ and the fact that, as the Court acknowledged, "*Dr. Miles* is almost a century old."³⁷ The Court acknowledged that "[e]ven if *Dr. Miles* established an erroneous rule, '*stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.'"³⁸ And the Court recognized

³⁶ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141-44, 158 (2005) (Judge Roberts testifying about the importance of *stare decisis* and his appreciation of the limited role of a judge); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318 (2006) (Judge Alito testifying that *stare decisis* is "a fundamental part of our legal system"). The Roberts Court has been sharply criticized for not respecting precedents in controversial constitutional cases, see, e.g., Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (reporting criticism), but in contrast to *Dr. Miles*, those precedents were not expressly overruled. See, e.g., *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2670 n.8, 2674 (2007) (Chief Justice Roberts and Justice Alito declining to revisit *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), although the concurring and dissenting Justices shared the view that it had been effectively overruled); *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2571-72 (2007) (Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, expressly declining to overrule *Flast v. Cohen*, 392 U.S. 83 (1968)).

³⁷ *Leegin*, 127 S. Ct. at 2720. Justice Breyer noted that *Dr. Miles* had been cited dozens of times in the Court and hundreds of times in the lower courts, and that he was "not aware of any case in which this Court has overturned so well-established a statutory precedent." *Id.* at 2731 (Breyer, J., dissenting).

³⁸ *Id.* at 2720 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). The quote is originally from Justice Brandeis's dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, which adds, "This is commonly true even where the

that "concerns about maintaining settled law are strong when the question is one of statutory interpretation."³⁹ But, the Court concluded, "*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act."⁴⁰ Indeed, the Court said, "In the antitrust context the fact that a decision has been 'called into serious question' justifies our reevaluation of it."⁴¹ In contrast, Justice Breyer maintained, "Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof."⁴²

error is a matter of serious concern, provided correction can be had by legislation." 285 U.S. 393, 406 (1932).

³⁹ *Leegin*, 127 S. Ct. at 2720.

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.* at 2721 (quoting *Khan*, 522 U.S. at 21). It was apparently sufficient that many notable economists and the current federal enforcers favored overruling *Dr. Miles*. See *id.* The Court did not acknowledge that two out of the five Federal Trade Commissioners had dissented from the FTC's joining the Solicitor General's brief calling for the reversal of *Dr. Miles*. See An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour 2 (Feb. 26, 2007), <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf>. Moreover, recent administrations prior to the current one (Republican and Democrat alike) supported *Dr. Miles* and had invoked the *per se* rule in their enforcement agendas and guidelines. See, e.g., *Interview With Former Assistant Attorney General James F. Rill*, *supra* note 25, at 254 (favoring "a *per se* illegality principle applied to resale price maintenance"); *Roundtable Conference With Enforcement Officials*, 64 ANTITRUST L. J. 749, 757 (1996) (FTC Chairman Pitofsky stating that resale price maintenance was an enforcement priority); cases cited *supra* note 22 brought by federal agencies between 1990-2000; Dept. of Justice and Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.2 (April 6, 1995), available at <http://www.ftc.gov/bc/0558.pdf> ("[DOJ and FTC] will enforce the *per se* rule against resale price maintenance in the intellectual property context"). Cf. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006) (in reversing presumption that patent provides market power in tying cases, Court found it significant that Intellectual Property Guidelines did not follow presumption). Of course, *Dr. Miles* had been called into more serious question 25 years ago when the Reagan Administration actively sought to overturn it in *Monsanto*.

⁴² *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting).

Where did the Court get this idea that the strong version of *stare decisis* normally applicable to statutes⁴³ does not apply to the Sherman Act? After all, in *Illinois Brick* the Court declined to overrule *Hanover Shoe* in part because "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."⁴⁴ And the Court applied "the strong presumption of continued validity that adheres in the judicial interpretation of a statute" in declining to overrule the *Keogh* doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*⁴⁵ Furthermore, in *Flood v. Kuhn*, the Court refused to overturn prior decisions exempting baseball from the Sherman Act, stating, "It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce."⁴⁶

The *Leegin* Court rejected the traditional strong form of *stare decisis* for statutory precedents on the basis that the Sherman Act is not like most other statutes; it has been treated "as a common-law statute," to

⁴³ The Court has explained, "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). *See also* *Neal v. United States*, 516 U.S. 284, 296 (1996) ("Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."). Justice Kennedy had previously explained in a statutory case that the Court "will not depart from the doctrine of *stare decisis* without some compelling justification." *Hilton v. S. Carolina Public Ry. Com'n*, 502 U.S. 197, 202 (1991).

⁴⁴ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Indeed *Illinois Brick* is a leading cite for what Professor Eskridge calls the "super-strong" presumption of the correctness of statutory precedents. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1368 n.34 (1988). According to Professor Eskridge, the Court applies a three-tiered hierarchy of *stare decisis*: statutory precedents enjoy the strongest presumption of correctness, common law precedents enjoy a strong presumption of correctness, and constitutional precedents enjoy a relaxed or weaker form of the presumption. *See id.* at 1362.

⁴⁵ 476 U.S. 409, 424 (1986).

⁴⁶ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

be adapted by the courts to "meet the dynamics of present economic conditions."⁴⁷ The idea is that if courts are largely responsible for making the law, like common law courts, they should be free to change it as they deem necessary. This is the approach Justice O'Connor had articulated in *Khan*, but is a departure from the Court's decisions in *Square D*, *Illinois Brick*, and *Flood*.⁴⁸ And while some scholars find this "common law" rationale for weaker *stare decisis* convincing,⁴⁹ others have argued that precedents under common law statutes warrant *heightened* deference precisely because "the lawmaking role of the court is at its pinnacle."⁵⁰ In *Maricopa*, the Supreme Court sided with the latter view:

Our adherence to the *per se* rule [for maximum horizontal price fixing] is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. Given its generality, our enforcement of the Sherman Act has required the Court to

⁴⁷ *Leegin*, 127 S. Ct. at 2720.

⁴⁸ Arguably, one might distinguish these cases as not involving the definition of an unreasonable restraint of trade under section 1. Cf. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643-644 (1981) ("The intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action created in § 7 of the original Act. . . ."). However, each of the cases involved a precedent interpreting a rather capacious concept, such as "trade or commerce" (*Flood*), "injured in his business or property" (*Illinois Brick*), and the judicially-created *Keogh* doctrine (*Square D*). Moreover, prior to *Khan*, the Sherman Act cases in which the Court did overturn prior precedents did not invoke the "common law" nature of the Sherman Act as a rationale for applying a weaker form of *stare decisis*. See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977) (citing *Illinois Brick* presumption, but finding *stare decisis* not compelling where *Schwinn* precedent was only 10 years old and "itself was an abrupt and largely unexplained departure" from *White Motor* which had been decided only four years earlier); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760 (1984) (repudiating intra-enterprise conspiracy doctrine where Court had never considered the doctrine in any depth and nearly all cases that referenced it did so in *dicta*).

⁴⁹ See Eskridge, *supra* note 44, at 1377-78, 1385.

⁵⁰ Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 223 (1989).

provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law.⁵¹

In any event, precedents under "common law" statutes are entitled to more weight than the minimal deference the Court afforded *Dr. Miles*. Justice Breyer, quoting Karl Llewellyn, noted that "the common-law judge's 'conscious reshaping' of prior law 'must so move as to hold the degree of movement down to the degree to which need truly presses.'"⁵² And, as discussed in the next section, even when the Court makes federal common law, it is particularly sensitive to congressional action.⁵³

⁵¹ *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354 (1982) (citation omitted). See also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 n.10 (1972) ("Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach."). A different view may be drawn from Justice Scalia's assertion in *Business Electronics* (quoted by the *Leegin* majority) that "[i]t would make no sense to create out of a single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988). But besides the fact that Scalia was talking about the extent to which the Court was bound to pre-Sherman Act common law, not its own prior decisions, *stare decisis* can apply to a precedent adopting a rule of reason analysis as well as one adopting a *per se* rule. Cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 389 (1967) (Stewart, J., dissenting) (criticizing majority's lack of justification for adopting *per se* rule and overruling *White Motor*). There is nothing special about the decision to classify types of conduct as either *per se* illegal or subject to the rule of reason that is not suited for Congress to make. See, e.g., 15 U.S.C. § 4302 (2006) (making joint venture and standard-setting conduct subject to rule of reason).

⁵² *Leegin*, 127 S. Ct. at 2737 (Breyer, J., dissenting) (quoting KARL LLEWELLYN, *THE BRAMBLE BUSH* 156 (1960)) (emphasis added). See also Eskridge, *supra* note 44, at 1362 ("Common law precedents enjoy a strong presumption of correctness.").

⁵³ See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise in lawmaking by federal courts disappears.").

B. Congressional intent

Perhaps the most compelling argument for retaining the *per se* rule was that Congress had effectively ratified the rule when it passed the Consumer Goods Pricing Act of 1975.⁵⁴ Justice Breyer in dissent maintained that by repealing the fair trade amendments, Congress thereby “consciously extended *Dr. Miles’ per se* rule.”⁵⁵ He noted:

[A]t that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here presented. And they explained to Congress why Congress should reject them. Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful.⁵⁶

Breyer cited the congressional testimony of Assistant Attorney General Thomas E. Kauper,⁵⁷ FTC Chairman Lewis A. Engman,⁵⁸ and Deputy Assistant Attorney General Keith I. Clearwaters,⁵⁹ and the report of the Senate Judiciary Committee.⁶⁰ He might also have cited

⁵⁴ See Herbert Hovenkamp, *Chicago and its Alternatives*, 1986 DUKE L.J. 1014, 1020 n.34 (“I am persuaded . . . that Congress has sanctioned the *per se* rule for resale price maintenance, and that we should feel obliged to comply with it until Congress tells us otherwise.”).

⁵⁵ *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting); see *supra* text accompanying notes 8–9 (describing fair trade amendments).

⁵⁶ *Id.* at 2731–32 (citations omitted).

⁵⁷ *Fair Trade Laws: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 94th Cong. 176–77 (1975) (testifying that arguments in favor of resale price maintenance—including enhancing the marketability of the manufacturer’s product, preventing loss leaders, and maintaining good will—were not convincing).

⁵⁸ *Id.* at 170–72 (testifying that “fair trade laws are little more than anticompetitive price fixing, unadorned with any redeeming features”).

⁵⁹ *Fair Trade: Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 94th Cong. 113–14 (1975) [hereinafter *House Hearings*] (testifying that resale price maintenance “may shore up inefficient wholesalers and retailers” and “block entry into the market by new small business enterprises” and describing fair trade as “legalized price fixing”).

⁶⁰ S. REP. NO. 94-466, at 1 (1975) (“The purpose of the proposed legislation is to repeal Federal antitrust exemptions which permit States to

the report of the House Judiciary Committee,⁶¹ the statements of the chief sponsors of the legislation,⁶² as well as the signing statement of President Ford.⁶³

What did the Court have to say about this legislative history demonstrating a clear congressional intent to outlaw resale price maintenance agreements by restoring *Dr. Miles* as the governing law nationwide? And what of the footnote in *Sylvania* distinguishing price and nonprice vertical restraints in part on the ground that "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States"?⁶⁴ The Court responded:

The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of § 1 of the Sherman Act. And, as has been discussed, Congress intended § 1 to give courts the ability "to develop governing principles of law" in the common-law tradition. Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible

enact fair trade laws. . . . These laws are in fact legalized price-fixing. . . . Without these exemptions the agreements they authorize would violate the antitrust laws."); *id.* at 2 (repeal "will prohibit manufacturers from enforcing resale prices.").

⁶¹ H.R. REP. NO. 94-341, at 2 (1975) ("An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is . . . *per se* illegal under section 1 of the Sherman Act. . .").

⁶² *See. e.g.*, 121 CONG. REC. 38,049-50 (1975) (Sen. Brooke, chief Senate sponsor: "Fair trade is legalized price fixing. . . . Without [Miller-Tydings and McGuire Acts], these interstate price-fixing conspiracies would be in violation of . . . the Sherman Antitrust Act. . ."); *id.* at 23,659 (Rep. Jordan, chief House sponsor: without the exemptions, resale price maintenance agreements "would be *per se* violations of the antitrust laws").

⁶³ President Ford stated that the law "will make it illegal for manufacturers to fix the prices of consumer products sold by retailers." Statement by President Gerald R. Ford Upon Signing the Consumer Goods Pricing Act of 1975 (Dec. 12, 1975), available at <http://www.presidency.ucsb.edu/ws/print.php?pid=5432>.

⁶⁴ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977).

option. *We respect its decision* by analyzing vertical price restraints, like all restraints, in conformance with traditional § 1 principles, including the principle that our antitrust doctrines "evol[v]e with new circumstances and new wisdom."⁶⁵

The Court's attempt to use the "common law" nature of the Sherman Act to bootstrap its disregard of congressional intent into an argument that it is actually deferring to Congress is clever,⁶⁶ but stands the normal law-making relationship between the Court and Congress on its head by making the Court's law-making power paramount, subject only to an express legislative enactment to the contrary. Under the Court's reasoning, the Court could have deemed resale price maintenance agreements *per se legal* if "new wisdom" supported such a rule and still would have respected Congress's decision not to codify the treatment of resale price maintenance. This is not the common law tradition. "Even in admiralty, . . . where the federal judiciary's lawmaking power may well be at its strongest," the Court has declared "it is our duty to respect the will of Congress."⁶⁷ One would have thought that the will of Congress with respect to

⁶⁵ *Leegin*, 127 S. Ct. at 2724 (emphasis added) (alteration in original) (citations omitted).

⁶⁶ The Court cited *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643 (1981), for the Court's power "to develop governing principles of law," which is curious because the holding in that case was predicated on a relatively restrictive role for the Court. There, the Court refused to use its common law authority to create a right of contribution under the Sherman Act, as it had in admiralty, because that authority was limited. The Court quoted Senator Morgan in the Sherman Act debates stating, "It is very true that we use common-law terms here and common-law definitions in order to define an offense which is in itself comparatively new, *but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States.*" *Id.* at 644 (quoting 21 CONG. REC. 3149 (1890)). The Court noted that the resolution of the complex, conflicting policy arguments about the desirability of contribution "is a matter for Congress, not the courts, to resolve." *Id.* at 646. While it is true that the Court distinguished its lawmaking powers in defining violations and the ability to fashion remedies, even with respect to the former it suggested its discretion was limited by the fact that "Congress assumed the courts would refer to the existing law of monopolies and restraints of trade." *Id.* at 643 n.15.

⁶⁷ *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 96 (1981).

resale price maintenance agreements would be better reflected in the relatively recent legislative history of the repeal of the statutes that had legalized such agreements, rather than in some vague intent about the common-law tradition expressed in 1890.

In no realistic sense can it be said that Congress "chose a more flexible option" when it did not codify *Dr. Miles*. Plainly, Congress did not codify the *per se* rule in 1975 because *Dr. Miles* was part of the fabric of the Sherman Act, and it never occurred to the legislators that the Court might rip it asunder some 30 years later without congressional sanction.⁶⁸ Indeed, if Congress had any assumptions in 1975 about the prospect of the Court modifying the *per se* rule, such assumptions would have been informed by *Flood* and *Topco*, decided three years earlier, with the former applying a very strict version of *stare decisis* to the Sherman Act,⁶⁹ and the latter indicating that modifications of *per se* rules should come from Congress.⁷⁰ And,

⁶⁸ Cf. 138 CONG. REC. H 5657, 5658, 5660 (daily ed. June 30, 1992) (House members opposing conference report on bill that would have, *inter alia*, codified *per se* rule, stating that opponents did not favor vertical price fixing, but that bill was not needed because vertical price fixing has been illegal since 1911: "We don't need a new statute to tell us what is already the law.").

⁶⁹ See *supra* note 46 and accompanying text.

⁷⁰ The Court also argued that the rule of reason was "not inconsistent" with the Consumer Goods Pricing Act because the Act was intended to repeal exemptions "designed to save inefficient small retailers from their inability to compete," a rationale "foreign to the Sherman Act." *Leegin*, 127 S. Ct. at 2724. "To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anticompetitive conduct, the rule of reason promotes the same objective," the Court said. *Id.* This is an odd argument because it recognizes that the Consumer Goods Pricing Act was fully consonant with "modern" antitrust objectives, yet rejects Congress's judgment as to how those objectives should be achieved. Moreover, while it is true that "the traditional justification for [the fair trade] exemptions [was] preservation of the small 'Mom and Pop' retail outlet against price competition of the discount chains," H.R. REP. NO. 94-341, at 1 (1975), "[o]pponents [of repeal] were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit." S. REP. NO. 94-466, at 3 (1975). Congress determined that the way to protect competition and consumer welfare was to restore the *per se* rule, without exception.

certainly, Congress is not immune to "new wisdom," as demonstrated by its reversal of course on resale price maintenance between the McGuire Act of 1952 and the Consumer Goods Pricing Act of 1975.

The Court saw the relationship between *stare decisis* and congressional action quite differently in *Square D*.⁷¹ There, the Court declined to overrule *Keogh v. Chicago & Northwestern Railway Co.*,⁷² which barred treble damage actions to remedy price fixing conspiracies in connection with filed rates. As in *Leegin*, the United States as amicus curiae urged that "Keogh's judicially-crafted immunity"⁷³ be overruled because the rationales of the decision had been undermined by subsequent developments and rendered the "decision obsolete and its continued application anomalous."⁷⁴ Judge Friendly, writing for the Second Circuit also thought that the reasoning of *Keogh* was "outdated" and that "[t]he case for reaching a conclusion today contrary to that reached by Justice Brandeis is particularly strong in the light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates."⁷⁵ The Supreme Court essentially agreed, but nonetheless declined to overrule *Keogh*, stating:

Even if it is true that these developments cast Justice Brandeis' reasons in a different light, however, it is also true that the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6 1/2 decades. *The emergence of subsequent procedural and judicial developments does not minimize Keogh's role as an essential element of the settled legal context in which Congress has repeatedly acted in this area.*⁷⁶

⁷¹ *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

⁷² 260 U.S. 156 (1922).

⁷³ Brief for the United States as Amicus Curiae Supporting Petitioners, *Square D*, 1985 WL 670055, at 16 n.21.

⁷⁴ *Id.* at 7. And, as in *Leegin*, the United States argued that congressional action in the area did not indicate that Congress "intended to fix by legislative fiat the balance this Court struck in 1922" particularly in light of the "long tradition of dialogue between the judicial and legislative branches that has served to perfect and preserve the vitality of the antitrust laws." *Id.* at 16 & n.21.

⁷⁵ *Square D*, 760 F.2d 1347, 1349, 1354 (2d Cir. 1985).

⁷⁶ *Square D*, 476 U.S. at 423 (emphasis added).

The Court concluded, "If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."⁷⁷

The significance of Congress's action on resale price maintenance can be framed, under traditional *stare decisis* doctrine, in terms of public reliance.⁷⁸ As Justice Breyer noted, "enacting major legislation premised upon the existence of [the *Dr. Miles*] rule constitutes important public reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments."⁷⁹ Indeed, reliance by Congress distinguishes *Leegin* from all of the other Sherman Act cases in which the Court overruled one of its precedents. As noted above, in *Sylvania*, the Court expressly recognized Congress's support for *per se* analysis of resale price maintenance and observed that "[n]o similar expression of congressional intent exists for nonprice restrictions."⁸⁰ And in *Khan*, as Justice Breyer noted, "Congress had nowhere expressed support for *Albrecht's* rule."⁸¹ When the Court repudiated the intra-enterprise conspiracy doctrine in *Copperweld*,⁸² there

⁷⁷ *Id.* at 424 ("We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention."). Cf. H.R. REP. NO. 102-237, at 4 (1991) ("With the possible exception of merger policy, there is probably no area of antitrust where Congress has displayed such an explicit and abiding intent to set policy for the courts and enforcement agencies as in the area of resale price maintenance. . . .").

⁷⁸ See Eskridge, *supra* note 44, at 1387 (public or private reliance is a "classic *stare decisis* concern"); *Hilton v. S. C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.").

⁷⁹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2732 (2007) (Breyer, J., dissenting).

⁸⁰ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977).

⁸¹ *Leegin*, 127 S. Ct. at 2736 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 19 (1997)); see Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *Khan*, 1997 WL 163852, at 16 n.7 (noting that the "congressional approval of *per se* analysis inferred by the Court [in *Sylvania*] from repeal of the federal antitrust exemptions for state 'fair trade' laws would

was no suggestion that Congress (or anyone else) had acted in reliance on the doctrine, nor any hint that Congress approved of it. And more recently, when the Court reversed the presumption of market power in patent tying antitrust cases in *Illinois Tool Works*,⁸³ it did so largely because Congress had made such a change in patent misuse law. Thus, the Court was acting in furtherance of congressional will, not against it.⁸⁴

Congressional reliance has been an important factor in *stare decisis* analysis even in true common law contexts such as admiralty.⁸⁵ Thus, for example, in *Edmonds v. Compagnie Generale Transatlantique*,⁸⁶ the Court declined to change the judicially created admiralty rule that a shipowner can be made to pay all the damages not due to the plaintiff's own negligence, because Congress had legislated in the area in reliance on the rule. "Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them."⁸⁷ The Court in *Leegin* did not specifically address the public reliance point,⁸⁸

not extend to maximum price restraints, because the sort of 'fair-trade pricing' . . . covered by those laws . . . typically involved only the setting of minimum prices.").

⁸² *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

⁸³ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

⁸⁴ *See id.* at 42 ("While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the *per se* rule announced in *International Salt*.").

⁸⁵ Similarly, while a federal agency ordinarily has significant discretion to change its position, *see, e.g.*, *Eskridge*, *supra* note 44, at 1377, its ability to do so is limited when Congress has legislated in reliance on the agency's original position. *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156–57 (2000) (FDA's assertion of authority to regulate tobacco rejected where Congress passed tobacco legislation based on FDA's prior long-standing position that it lacked such authority).

⁸⁶ 443 U.S. 256 (1979).

⁸⁷ *Edmonds*, 443 U.S. at 273; *accord* *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 165 (2003).

⁸⁸ The Court did address the issue of private reliance, recognizing that "reliance on a judicial opinion is a significant reason to adhere to it . . . especially in cases involving property and contract rights. . . ." *Leegin*, 127 S. Ct. at 2724 (internal quotation marks omitted). The Court concluded, "The

but implicitly adopted a contrary rule to the effect that Congress *may not* rely on the Court's Sherman Act precedents, no matter how firmly entrenched, because Congress has authorized the Court to make the law in the "common law tradition." As a result, Congress is more likely to adopt rigid measures to enshrine existing case law, undermining the very flexibility that the common law tradition is said to foster. To be sure, the fact that Congress did not codify *Dr. Miles* means that the Court was not *foreclosed* from reconsidering the *per se* rule, but the advocates for *Dr. Miles* had never contended as much. Rather, they had contended that congressional approval bolstered the case for *stare decisis* such that only the most compelling reasons could justify reversal.

III. POLICY CONSIDERATIONS

Is the *per se* rule against resale price maintenance sound policy? Justice Breyer thought the question a difficult one. The majority of the Court, most economists, and the established bar did not because of the widespread consensus that resale price maintenance can have both procompetitive and anticompetitive uses. As the Court correctly noted, "Even those more skeptical of resale price maintenance acknowledge that it can have procompetitive effects."⁸⁹ The Court concluded that the *per se* rule was not appropriate for resale price maintenance agreements because, "[n]otwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to

reliance interests here, however, like the reliance interests in *Khan*, cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers to set minimum resale prices in other ways." *Id.* at 2724–25. But, as Justice Breyer noted, in *Khan* "[t]he Court specifically noted the lack of any significant reliance upon *Albrecht*." *Id.* at 2736; *see* *State Oil Co. v. Khan*, 522 U.S. 3, 18 (1997) ("*Albrecht* has little or no relevance to ongoing enforcement of the Sherman Act."). The Court's argument against private reliance is essentially that overruling *Dr. Miles* will have little practical impact, an issue that is addressed *infra*.

⁸⁹ *Leegin*, 127 S. Ct. at 2715. The Court quoted from the Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae Supporting Neither Party, which stated, "given [the] diversity of effects [of RPM], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted." 2007 WL 173679, at 3. However, Scherer and Comanor went on to suggest a "quick look" approach, rather than a rule of reason analysis. *See id.* at 8–10.

restrict competition and decrease output."⁹⁰ If indeed that is the correct test for applying the *per se* rule, then it may be difficult to quarrel with the majority's conclusion. But why is that the proper standard? Justice Breyer acknowledged that resale price maintenance can have procompetitive effects ("the proponents of a *per se* rule have always conceded as much"),⁹¹ but "before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms and benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?"⁹²

Modern decision theory dictates that the proper focus is not simply on the frequency with which a practice is anticompetitive or procompetitive, but also on the magnitude of the harms or benefits and, given error costs, whether an alternative rule would generally improve consumer welfare and the administration of the antitrust laws.⁹³ As Professors Areeda and Hovenkamp have said, "It is thus not enough to suggest that a class of restraints is sometimes or even often beneficial or harmful. The critical questions are always ones of frequency and magnitude relative to the business and legal alternatives."⁹⁴ One might read *Sylvania* to adopt a standard along these lines when the Court explained:

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive conse-

⁹⁰ *Leegin*, 127 U.S. at 2717 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)) (second alteration in original).

⁹¹ *Id.* at 2732 (Breyer, J., dissenting).

⁹² *Id.* at 2729.

⁹³ According to decision theory, or error-cost analysis, the proper rule of decision minimizes the sum of the costs of (1) false positives, (2) false negatives, and (3) decisionmaking. See Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391, 394-95 (2000) ("[A] rule that 'X' is *per se* illegal is justified if the cost of wrongly judging 'X' illegal is outweighed by the administrative cost of an alternative rule plus any increased risk that the alternative rule will wrongly find 'X' to be legal when in fact it is harmful.").

⁹⁴ 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1628b, at 292 (2d ed. 2004). See also Arndt Christiansen & Wolfgang Kerber, *Competition Policy With Optimally Differentiated Rules Instead of "Per se Rules vs. Rule of Reason"*, 2 J. COMP. L. & ECON. 215, 238 (2006) (explaining "error cost approach"

quences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases *are not sufficiently common or important* to justify the time and expense necessary to identify them.⁹⁵

The *Leegin* Court all but ignored the tradeoffs that should be considered under decision theory. While giving some credence to the anticompetitive effects of resale price maintenance, the Court downplayed the administrative and uncertainty costs of a rule of reason and completely ignored the false negatives that would result from the rule. At the same time, the Court was content to conclude that the empirical evidence on the procompetitive uses of resale price maintenance, while concededly thin, did not suggest that the uses "are infrequent or hypothetical," but made no judgment about the extent of the false positives under the *per se* rule and, more significantly, the cost of such false positives in light of the available less restrictive alternatives.

A. *The anticompetitive effects of resale price maintenance*

The Court recognized that resale price maintenance "does have economic dangers."⁹⁶ What are those dangers? The advocates of the *per se* rule point to higher consumer prices as the principal danger. The function of resale price maintenance is to raise resale prices to consumers, and there is little dispute that resale price maintenance

in law and economics and observing that, to justify abandoning prohibition of resale price maintenance, "it is not sufficient to show that there are cases in which resale price maintenance can lead to positive welfare effects").

⁹⁵ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (emphasis added).

⁹⁶ *Leegin*, 127 S. Ct. at 2719; *see id.* at 2717 ("[T]he potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."); *id.* at 2716 ("[U]nlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation."). The Court's characterization of the level of danger is not so different from Justice Breyer's, *see id.* at 2727 ("agreements setting minimum resale prices may have serious anticompetitive consequences") (Breyer, J., dissenting) and *id.* at 2729 ("resale price maintenance can cause harms with some regularity") (Breyer J., dissenting), although, as we shall see, the particulars of the Court's analysis tend to minimize the risks.

generally has that effect.⁹⁷ This would seem enough to make resale price maintenance competitively suspect,⁹⁸ and was the main reason Congress repealed the fair trade laws.⁹⁹ Studies of the fair trade era showed that prices of items subjected to fair trade in fair trade states were significantly higher than those in states where resale price maintenance was illegal, and that fair trade cost consumers *billions* of dollars a year.¹⁰⁰ More recently, music companies' efforts to restrain resale prices of CDs was estimated by the FTC to have cost consumers as much as \$480 million.¹⁰¹

The Court, however, was not impressed with the argument that resale price maintenance raises prices to consumers, "absent a further showing of anticompetitive conduct."¹⁰² The Court suggested that

⁹⁷ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1604b, at 40 (resale price maintenance "tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point."). Even the majority seemed to acknowledge this, see *Leegin*, 127 S. Ct. at 2718 ("price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold") (quoting THOMAS R. OVERSTREET, JR., *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* 160 (FTC Bureau of Economics Staff Report 1983)) (alteration in original), although the Court went on to say that resale price maintenance "may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful." *Id.*

⁹⁸ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) ("[p]rice is the 'central nervous system of the economy'") (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

⁹⁹ The Consumer Goods Pricing Act of 1975 itself is entitled, "An Act To amend the Sherman Antitrust Act to provide lower prices for consumers." 89 Stat. 801 (1975).

¹⁰⁰ See H. REP. NO. 94-341, at 3 (1975). See also F.M. Scherer, *Comment on Cooper et al.'s "Vertical Restrictions and Antitrust Policy"*, *COMP. POLICY INT'L*, Autumn 2005, at 65, 71-74 (reviewing studies showing substantial consumer savings from termination of resale price maintenance in light bulb, retail drug, blue jeans, and other sectors).

¹⁰¹ See Press Release, Fed. Trade Comm'n, *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market* (May 10, 2000), <http://www.ftc.gov/opa/2000/05/cdpres.htm>.

¹⁰² *Leegin*, 127 S. Ct. at 2718.

since the higher prices may be accompanied by more dealer services, it is not necessarily the case that higher prices indicate a reduction of consumer welfare.¹⁰³ Was Congress therefore mistaken when it saw higher prices in fair trade states as being harmful to consumers? In the absence of other information, is it unreasonable to *presume* that higher prices resulting from resale price maintenance are indicative of consumer harm? According to the Court, focusing on higher prices overlooks that a manufacturer ordinarily benefits from *low* resale prices. "As a general matter, therefore," the Court said, "a single manufacturer will desire to set minimum resale prices only if the 'increase in demand resulting from the enhanced service . . . will more than offset a negative impact on demand of a higher retail price.'"¹⁰⁴ However, an alignment between manufacturers' and consumers' interests cannot be generalized.¹⁰⁵

Any congruence of manufacturer and consumer interests evaporates if the manufacturer adopts resale price maintenance at the behest of its retailers. Indeed, the Court noted, "If there is evidence that retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or

¹⁰³ See *id.* ("price surveys 'do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories'") (quoting OVERSTREET, *supra* note 97, at 106) (alteration in original).

¹⁰⁴ *Id.* at 2719 (quoting Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. IND. ORG. 57, 67 (1998)) (alteration in original).

¹⁰⁵ See *Toys "R" Us, Inc. v. Fed. Trade Comm'n*, 221 F.3d 928, 938 (7th Cir. 2000) (noting that rationale for permitting restricted distribution policies "depends on the alignment of interests between consumers and manufacturers. Destroy that alignment and you destroy the power of the argument.") (internal quotes omitted). Justice Breyer offered this qualified version of the point that manufacturers benefit from low resale prices: "[I]f the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances [such as] new entry, 'free riding,' or variations on those themes." *Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting).

supports a dominant, inefficient retailer."¹⁰⁶ The Court acknowledged that the risk of resale price maintenance being used to facilitate dealer collusion is a "legitimate concern."¹⁰⁷ Moreover, the Court recognized that, even without dealer collusion, a "manufacturer might consider that it has little choice but to accommodate [a powerful] retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network."¹⁰⁸ But while recognizing the anticompetitive retailer-power explanation for resale price maintenance, the Court seemed oblivious to the changes in the economy that have heightened the risk of retailer-induced resale price maintenance. For example, the Court emphasized that a single retailer cannot "abuse" resale price maintenance without "market power," and quoted the old saw from *Business Electronics* that "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers."¹⁰⁹ However, common sense says otherwise. Retail buyer power is common¹¹⁰ and is increasing along

¹⁰⁶ *Id.* at 2719 (citing Brief for William S. Comanor & Frederic M. Scherer as Amici Curiae Supporting Neither Party, 2007 WL 173679, at 7–8, which states, "there are no arguments in economic analysis supporting restraints arising from distributor actions or pressures. In such circumstances, RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values. . . .").

¹⁰⁷ *Id.* at 2717.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2720 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 n.2 (1988)) (alteration in original).

¹¹⁰ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1604d3, at 48, 49 ("Multibrand dealers' ability to substitute other brands gives the dealers considerable leverage."); William S. Comanor, *The Two Economics of Vertical Restraints*, 21 SW. U. L. REV. 1265, 1277 (1992) (monopsony power arises from pervasive economies of scope in distribution sector); John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 638–44 (2005) (buyer power can exist even when buyer does not have dominant market position); *Toys "R" Us*, 221 F.3d at 930 (large toy manufacturers acceded to demands of Toys "R" Us to restrict distribution to lower-margin warehouse clubs because manufacturers felt they could not find other retailers to replace it, despite the fact that its national market share was only 20%).

with retail concentration.¹¹¹ As Justice Breyer pointed out, increased concentration in retailing “may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.”¹¹²

The Court also conceded the danger that resale price maintenance might be used to facilitate a manufacturer cartel¹¹³ but, significantly, failed to recognize that resale price maintenance may also facilitate oligopolistic pricing that may not itself be illegal.¹¹⁴ Moreover, the Court did not acknowledge Justice Breyer’s point that “[i]ncreased

¹¹¹ See, e.g., Kris Hudson, *States Target Big-Box Stores—Maine is First to Require that Wal-Mart, Rivals Undergo Impact Studies*, WALL ST. J., June 29, 2007, at A8 (reporting that in 2006, the ten largest U.S. retailers accounted for 25% of the nation’s retail purchases, excluding cars, up from 18% in 1996); Deloitte, 2007 Global Powers of Retailing, STORES, Jan. 2007, at 2–G8, available at <http://www.nxtbook.com/nxtbooks/nrfe/stores-globalretail07/index.php> (combined sales of ten largest retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers); ORG. FOR ECON. CO-OPERATION AND DEV., BUYING POWER OF MULTIPRODUCT RETAILERS 7 (1999), <http://www.oecd.org/dataoecd/1/18/2379299.pdf> (“last twenty years have seen momentous changes in retail distribution including significant increases in concentration”).

¹¹² *Leegin*, 127 S. Ct. at 2733 (Breyer, J., dissenting).

¹¹³ See *id.* at 2716. See also Brief of Amici Curiae Economists in Support of Petitioner, *Leegin*, 2007 WL 173681, at 13 (objection “had some traction historically”); OVERSTREET, *supra* note 97, at 22 (“The economics literature contains several examples of possible collusion among manufacturers which may have been facilitated by RPM.”). For a modern example, see Press Release, Dep’t of Justice, Massachusetts Tampico Fiber Distributor Charged in Price Fixing Conspiracy (Aug. 29, 1996), http://www.usdoj.gov/atr/public/press_releases/1996/0862.htm (“textbook example of a cartel among producers enhanced and strengthened by a resale price agreement”) (internal quotes omitted).

¹¹⁴ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1606d-f, at 86–92 (resale price maintenance reinforces manufacturer coordination, whether express or tacit, by reducing utility of wholesale price cuts and increasing visibility of prices; “danger is more than theoretical”). Justice Breyer recognized that facilitation of tacit collusion was the main anticompetitive risk at the producer level. See *Leegin*, 127 S. Ct. at 2727 (Breyer, J., dissenting).

concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful."¹¹⁵ Further, the Court failed to recognize manufacturers' incentive independently to adopt resale price maintenance in order to protect their own wholesale margins. Retail discounting is often harmful to the manufacturer because it puts pressure on the manufacturer to reduce its wholesale prices.¹¹⁶ As a Wal-Mart executive stated when Wal-Mart was the new discounter on the block, "I don't have any question but that competitive pricing at the retail level creates more pressure on manufacturers' factory prices than is present when they're able to set retail prices as well. . . ."¹¹⁷

In addition to raising prices, resale price maintenance opponents point to the fact that resale price maintenance has a tendency to reduce innovation and efficiency in retailing. As Justice Breyer noted, resale price maintenance agreements "can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing. . . ."¹¹⁸ The majority recognized this effect when it noted,

¹¹⁵ *Leegin*, 127 S. Ct. at 2734 (Breyer, J., dissenting).

¹¹⁶ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1606c, at 85-86 (noting "instances in which intense price competition at the dealer level has led to price cuts at the manufacturing level"); Robert L. Steiner, *How Manufacturers Deal With the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L. J. 407, 441-42 (1997) (explaining that resale price maintenance may be used to tame the exercise of countervailing retail power); David Gilo, *Retail Competition Percolating Through to Suppliers and the Use of Vertical Integration, Tying, and Vertical Restraints To Stop it*, 20 YALE J. REG. 25 (2003) (explaining how resale price maintenance may be used by a manufacturer to offset its incentive to offer selective price cuts to distributors); see, e.g., *In re Sony Music Entertainment, Inc.*, No. C-3971, 2000 WL 1257799 (F.T.C.) (music companies' restriction on resale prices designed to shore up wholesale prices).

¹¹⁷ S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small-Town America (II)*, 15 ANTITRUST L. & ECON. REV. No. 2, at 11, 16 (1983).

¹¹⁸ *Leegin*, 127 S. Ct. at 2727 (Breyer, J., dissenting). See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1632c4, at 320 ("When resale prices are not fixed, price competition among dealers favors the expansion of those with efficient scale and methods, thus lowering the cost of distribution.").

"Retailers with better distribution systems and lower cost-structures would be prevented from charging lower prices by the [RPM] agreement."¹¹⁹ But while the majority was referring to resale price maintenance that is used to organize a retailer cartel,¹²⁰ the effect is inherent in resale price maintenance regardless of the purpose for which it is employed.

B. The procompetitive effects of resale price maintenance

Declaring that the "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance,"¹²¹ the Court identified three procompetitive justifications.¹²² The principal theory discussed by the Court and relied upon by resale price maintenance advocates is the "free rider" theory, under which resale price maintenance can benefit consumers because the higher prices may induce retailers to provide pre-sale services that promote interbrand competition and otherwise would not be provided. Prominently featured in *Sylvania*, this theory (dating back at least to Telser in 1960) was well known to Congress in 1975, but nonetheless was rejected as a basis for permitting resale price maintenance.¹²³ As

¹¹⁹ *Leegin*, 127 S. Ct. at 2717.

¹²⁰ *See id.* (also noting that "dominant retailer . . . might request resale price maintenance to forestall innovation in distribution that decreases costs").

¹²¹ *Id.* at 2714.

¹²² Justice Breyer said that the majority had listed just two theories, free rider and new entry. He did not accept the majority's contractual-fidelity theory, discussed *infra*. Notably, the Court did not include preservation of "brand image" as a procompetitive justification, notwithstanding that it is often cited by manufacturers, including *Leegin* itself. *See id.* at 2711 (*Leegin* "expressed concern that discounting harmed Brighton's brand image and reputation"). *See also* Henry & Zelek, *supra* note 26, at 8 ("Significant discounting of a product can adversely affect the manufacturer, its resellers and the product itself by eroding brand image. . . .").

¹²³ *See, e.g.*, S. REP. NO. 94-466, at 3 (1975) (noting that manufacturer could solve services problem "by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize

Justice Breyer noted, free riding is common in our economy; the real issue is "how often the 'free riding' problem is serious enough significantly to deter dealer investment."¹²⁴ Professors Comanor and Scherer in their amicus brief to the Court indicated that "there is skepticism in the economic literature about how often" resale price maintenance "is needed to prevent free-riding and ensure that desired services are provided."¹²⁵ Klein and Murphy have noted that the standard free rider theory for resale price maintenance is "fundamentally flawed" because it is based on "the unrealistic assumption that the sole avenue of nonprice competition available to retailers is the supply of the particular services desired by the manufacturer."¹²⁶ They have shown that, "[e]ven if the manufacturer fixes the retail price and does not permit price competition, retailers still have an incentive to free ride by supplying nonprice services that

service."); *House Hearings*, *supra* note 59, at 32 (statement of Thomas A. Rothwell, Executive Director and General Counsel of Marketing Policy Institute, quoting Robert Bork's efficiency explanation for RPM).

¹²⁴ *Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting).

¹²⁵ Brief for William S. Comanor & Frederic M. Scherer as Amici Curiae Supporting Neither Party, *Leegin*, 2007 WL 173679, at 6. See also F. M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 552 (3rd ed. 1990) ("relatively few products qualify . . . under Telser's free-rider theory"); 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1601e, at 13 ("[U]nrestrained intrabrand competition does not lead to substantially detrimental free riding when dealers provide no significant services (such as drugstores selling toothpaste), the services they do provide cannot be utilized by customers who patronize other dealers (luxurious ambience), the services are paid for separately (post-sale repair), the services provided are not brand specific and are fully supported by a wide range of products (high-quality department store), the services can be provided efficiently by the manufacturer (advertising), or a sufficient number of consumers patronize the dealers from whom they receive the service."); *id.* ¶ 1611f, at 134 ("[F]or most products, low-service discounting dealers do not impair the viability of full-service dealers; both exist side by side.").

¹²⁶ Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. L. & ECON. 265, 266 (1988). Klein and Murphy were part of the group of amici economists supporting the reversal of *Dr. Miles*. See Brief of Amici Curiae Economists in Support of Petitioner, *supra* note 113, at App. 2a.

are not desired by the manufacturer but are of value to consumers,¹²⁷ such as free gifts, free delivery, discounts on bundled products, rewards programs, and so forth. “No matter how large a margin is created by resale price maintenance, there appears to be no incentive for competitive free-riding retailers to supply the desired . . . services.”¹²⁸

The “quality certification” version of the free rider theory cited by the Court¹²⁹ is even more problematic because the discounters are not even expected to offer the services of the prestige retailers, and thus have higher margins with which to continue to “free ride” by offering nonprice inducements to attract customers from prestige retailers.¹³⁰ Furthermore, even if resale price maintenance is used to prevent free riding and increase output, there is no a priori reason to believe that consumers as a whole benefit, because most consumers may prefer the lower-priced product without the services.¹³¹ As Justice Breyer noted, insofar as resale price maintenance agreements encourage dealers to compete on service instead of price, they threaten “wastefully to attract *too many* resources into that portion of the industry.”¹³²

¹²⁷ Klein & Murphy, *supra* note 126, at 266.

¹²⁸ *Id.*

¹²⁹ Under this version, discount retailers free ride on the reputation of prestige retailers for carrying only high-quality products. See *Leegin*, 127 S. Ct. at 2715–16 (“[C]onsumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise.”).

¹³⁰ See Edward Iacobucci, *The Case for Prohibiting Resale Price Maintenance*, WORLD COMP. L. & ECON. REV., Dec. 1995, at 71, 80–82. See also 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1613d-g, 156–65 (maintaining that quality certification theory is “relatively weak” largely because elite dealers’ services are unlikely to be driven from the market since they are not brand specific and the ambience of elite dealers is not subject to free riding; “distribution restraints in this context reflect the power of elite dealers rather than the manufacturer’s desire”).

¹³¹ See Brief for Comanor & Scherer, *supra* note 125, at 4–5; see also Brief of Amici Curiae Economists, *supra* note 113, at 10 (noting that Scherer & Ross have shown “that RPM may reduce both consumer and social welfare under a plausible hypothesis regarding the impact on demand for the product”).

¹³² *Leegin*, 127 S. Ct. at 2727 (Breyer, J., dissenting) (emphasis added).

The Court maintained that resale price maintenance "can also increase interbrand competition by encouraging retailer services that would not be provided even absent free riding" because it "may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform."¹³³ The Court was referring to Klein and Murphy's "contractual fidelity" theory, which is not so much about the difficulty of contractual specification, but rather about giving dealers excess profits to provide an incentive "for faithful performance of all the dealers' express or implied obligations."¹³⁴ Under this theory, the threat of termination or other contractual sanction may be an inadequate incentive against shirking by retailers if they are making only normal profits.¹³⁵

Putting aside the issue of why competition among retailers in the absence of free riding would not be sufficient to ensure adequate dealer services,¹³⁶ this theory suffers from several flaws.

¹³³ *Id.* at 2716 (majority opinion).

¹³⁴ 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1614e, at 172. *See also* Mathewson & Winter, *supra* note 104, at 74 ("The role of resale price maintenance in the Klein-Murphy explanation is to protect retailer quasi-rents against erosion by retail price competition, to ensure that contract termination has sufficient value as a threat.").

¹³⁵ Klein & Murphy, *supra* note 126, at 268-69 (many dealers "make insufficient manufacturer-specific investments to insure dealer performance solely through the threat of losing the return on these specific investments").

¹³⁶ Justice Breyer did not credit this theory because, he said, "I do not understand how, in the absence of free-riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not 'expand' its 'market share' as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand." *Leegin*, 127 S. Ct. at 2733 (Breyer, J., dissenting). In fact, the contractual fidelity theory does rely on free riding, either between dealers as under the traditional theory, or between the manufacturer and the retailer. *See* Klein & Murphy, *supra* note 126, at 281 (noting that dealer may free ride on manufacturer's reputation). The theory responds to the criticism of the traditional free rider theory that resale price maintenance is unnecessary if (and ineffective unless) manufacturers can contractually require retailers to provide services. Klein and Murphy suggest

First, as with the standard free rider theory, this theory is undermined by nonprice competition, which should have a tendency to eliminate the excess dealer profits on which the theory is predicated.¹³⁷ Second, as with any resale price maintenance scheme designed to raise dealer margins, the result is likely to harm consumers of multibrand retailers insofar as those retailers steer consumers to high-margin, price-maintained products regardless of their competitive merits.¹³⁸ Third, if the goal is merely to increase the rents earned by dealers, then there are less restrictive alternatives, such as lump-sum payments.¹³⁹ Finally, it is not obvious that this theory has any empirical significance; how many manufacturers in the real world look to provide supranormal profits to their distributors so that the threat of termination in the case of noncompliance is meaningful?

The third procompetitive justification discussed by the Court is the "new entrant" justification.¹⁴⁰ Quoting *Sylvania*, the Court suggested that resale price maintenance can facilitate new entry by

that contractual specification may not be enough to motivate dealers or may not be practical. For a further discussion of the specification point, see *infra* note 164.

¹³⁷ See Ittai Paldor, *Rethinking RPM: Did the Courts Have it Right All Along?* 199–202 (June 25, 2007) (unpublished S.J.D. thesis, University of Toronto), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=994750.

¹³⁸ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1614a-d, at 165–71 (rejecting dealer goodwill as justification for RPM because providing multibrand retailers with higher margin to push particular brand leads to deception of consumers and reflects retailer power); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 6.3c2, at 343 (2006) (noting multibrand retailers' incentives to steer consumers away from brands that offer lower margins even if those brands are competitively superior).

¹³⁹ See Paldor, *supra* note 137, at 204–08; Iacobucci, *supra* note 130, at 88.

¹⁴⁰ The majority mentioned a fourth theory by way of citing Raymond Deneckere et al., *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q. J. ECON. 885 (1996), which the Court described as "noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand[]." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2716 (2007). Under

“induc[ing] competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.”¹⁴¹ This theory has been questioned by scholars because other tools (such as restricted distribution) are usually more effective in ensuring that “Johnny-come-lately” stores will not siphon off the rewards that pioneering dealers need for their “missionary work.”¹⁴² In any event, this rationale, if convincing, could easily be accommodated by a limited exception to the *per se* rule, as Justice Breyer suggested,¹⁴³

this theory, RPM assures dealers that if demand turns out to be low they will not be forced to liquidate their inventory at fire-sale prices, which induces the dealers to stock sufficient inventory to cover a high demand. This theory does not necessarily benefit consumers, as the authors note, because it deprives consumers of the surplus that would be obtained in the low demand state absent resale price maintenance, which may exceed the surplus with resale price maintenance. See Deneckere et al., *supra*, at 887 (“[I]n contrast to other efficiency-based theories of RPM . . . in which manufacturer and consumer interests roughly coincide, we show that manufacturer benefits can often come principally from consumer surplus.”). Moreover, it assumes that the alternative of paying dealers for unsold inventory in the event of low demand is more costly than enforcing resale price maintenance, which is questionable. See Paldor, *supra* note 137, at 211–21 (critiquing demand uncertainty hypothesis).

¹⁴¹ *Leegin*, 127 S. Ct. at 2716 (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977)). Interestingly, this theory is not typically one of the procompetitive justifications offered by economists. See, e.g., Brief of Amici Curiae Economists, *supra* note 113 (citing free-rider, contractual fidelity, and demand-uncertainty theories).

¹⁴² Steiner, *supra* note 116, at 430. See also Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 817, 849 (1992) (maintaining that less restrictive alternatives are available for new entrants to gain dealer loyalty); 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1617a3, at 195–96 (while new-entry rationale makes sense as a justification for exclusive territories, it “seems presumptively inapplicable to resale price maintenance”).

¹⁴³ See *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting, stating that if he were starting from scratch, he “might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable and temporary condition of ‘new entry’”) (citing Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1495 (1983)).

although such an exception was expressly rejected by Congress in 1975.¹⁴⁴

C. Empirical evidence

What of the empirical evidence? The Court concluded that, "although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical" and thus "the [*per se*] rule would proscribe a significant amount of procompetitive conduct . . ."¹⁴⁵ The dissent disagreed. Justice Breyer could "find no economic consensus" on how often resale price maintenance will be beneficial in practice.¹⁴⁶ The majority cited two "recent" empirical studies of litigated cases.¹⁴⁷ One by Pauline Ippolito, published in 1991, reviewed all cases (public and private) reported between 1976 and 1982 that included resale price maintenance claims.¹⁴⁸ The other by Thomas Overstreet, issued by the FTC in 1983, reviewed the 68 resale price maintenance cases brought by the FTC that were resolved between 1965 and 1982.¹⁴⁹

¹⁴⁴ See H. REP. NO. 94-341, at 5 (1975).

¹⁴⁵ *Leegin*, 127 S. Ct. at 2717-18.

¹⁴⁶ *Id.* at 2729 (Breyer, J., dissenting).

¹⁴⁷ *Id.* at 2715, 2717 (majority opinion).

¹⁴⁸ See Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J. L. & ECON. 263, 266 (1991) [hereinafter Ippolito, *RPM*]. Ippolito's work was originally published as a staff report of the Federal Trade Commission Bureau of Economics. See PAULINE M. IPPOLITO, *RESALE PRICE MAINTENANCE: ECONOMIC EVIDENCE FROM LITIGATION* (FTC Bureau of Economics Staff Report 1988) [hereinafter IPPOLITO, *STAFF REPORT*]. Her sample consisted of 73 cases brought by federal or state enforcement agencies and 130 private cases, about 30% of which involved maximum resale price maintenance claims. See Ippolito, *RPM*, *supra*, at 268-69. Information about the cases came from judicial opinions and consents reported in the CCH Trade Cases Reporter. See *id.* at 266.

¹⁴⁹ See OVERSTREET, *supra* note 97, at 63. Many of the FTC cases reviewed by Overstreet are also in the Ippolito sample. Compare *id.* at 92-100 with IPPOLITO, *STAFF REPORT*, *supra* note 148, at Table A1.

Ippolito concluded that the cases were generally not consistent with dealer or manufacturer cartel theories,¹⁵⁰ but Justice Breyer noted that “this study equates failure of plaintiffs to *allege* collusion with the *absence* of collusion—an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take.”¹⁵¹ Ippolito also concluded that the “special services,” or free rider theory, “has the *potential* to be a major explanation for RPM-type practices”¹⁵² based on the fact that 50 percent of the private cases and 42 percent of the government cases involved what she categorized as “complex products,” i.e. “products for which quality and use information were nontrivial issues prior to purchase and where the information was not specific to the retailers’ goods.”¹⁵³ This

¹⁵⁰ See Ippolito, *RPM*, *supra* note 148, at 281 (noting that only 13% of the sample included allegations of horizontal price fixing). *But see* IPPOLITO, STAFF REPORT, *supra* note 148, at 53 (45% of resale price maintenance cases brought by DOJ involved allegations of horizontal price fixing).

¹⁵¹ *Leegin*, 127 S. Ct. at 2732 (Breyer, J., dissenting) (citing HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 11.3c, at 464 & n.19 (3d ed. 2005) (making similar criticism). Ippolito’s assumption was that “if the plaintiff had any evidence that the practice at issue in the litigation was used to support collusion, we would expect to see horizontal price-fixing allegations in these cases, in addition to the RPM allegation.” Ippolito, *RPM*, *supra* note 148, at 281. This raises the question of the validity of drawing any inferences about the actual *practice* of resale price maintenance from private cases with resale price maintenance *allegations*, when resale price maintenance may not have been present at all in many of the cases. More than half of the private cases were brought by terminated distributors asserting a variety of antitrust and non-antitrust claims, *see id.* at 267–70, and fewer than 30% of the cases where decisions were available resulted in a favorable judgment for plaintiffs. *See id.* at 272–73; *see also id.* at 268–69 (defendants generally “denied that RPM was at issue”); *id.* at 276 (noting “fundamental weaknesses in the cases”); *id.* at 292 (“practices at issue in the cases are only weakly related to the classic definition of RPM”); IPPOLITO, STAFF REPORT, *supra* note 148, at 54 & n.62 (characterizing 36 out of 82 private minimum resale price maintenance cases in sample as involving “frivolous” allegations of resale price maintenance, but noting that percentage of remaining cases that involved allegations of collusion was still only about 15%).

¹⁵² Ippolito, *RPM*, *supra* note 148, at 285 (emphasis added).

¹⁵³ *Id.* at 283; *see id.* at 284 (categorizing as complex such products as printing, funeral insurance, and television sets).

can hardly be described as "evidence" that free riding was involved in any of these cases; at most it suggests that free riding could not be ruled out.

In his study, Overstreet concluded that resale price maintenance⁶⁶ was not likely motivated by collusive dealers who had successfully coerced their suppliers into using RPM to facilitate a widespread dealers' cartel" based on the fact that in 47 cases where data were available, over 80 percent involved products with more than 200 dealers.¹⁵⁴ But large numbers do not necessarily indicate low concentration or the absence of a dominant dealer, and the study does not consider whether resale price maintenance may have been limited to local markets in which dealer concentration was high.¹⁵⁵ Moreover, some of the most well-documented instances of resale price maintenance in history, such as those involving retail druggists, involved dealer cartels in highly unconcentrated markets.¹⁵⁶ Overstreet did not look for indications of procompetitive explanations of resale price maintenance,¹⁵⁷ and recognized that the

¹⁵⁴ OVERSTREET, *supra* note 97, at 80 ("Widespread dealer collusion involving more than 100 (or 200) decision makers seems unlikely to be effective or persistent in the absence of restrictions on entry such as licensing requirements or some mechanism for overt coordination such as an active trade association."). Overstreet also concluded that manufacturer collusion was an unlikely explanation for most of the cases, since "a good deal of the RPM reflected in FTC cases has occurred among small firms selling in markets that are structurally competitive." *Id.* at 78; *see id.* at 73 (finding only 24.4% of cases had four-firm concentration in excess of 50%, measured using 5 digit S.I.C. product classes).

¹⁵⁵ *See id.* at 80 ("Whether local dealer collusion (or monopsony) could explain particular instances of RPM cannot presently be determined from the general information in the case files.").

¹⁵⁶ *See* Thomas R. Overstreet Jr. & Alan A. Fisher, *Resale Price Maintenance and Distributional Efficiency: Some Lessons from the Past*, 3 CONTEMP. POL'Y ISSUES 43, 49-50 (1985) (noting that, contrary to predictions of economic analysis, retail druggists cartel "achieved virtually universal compliance with a price-fixing policy—despite very large numbers and an extremely unconcentrated market").

¹⁵⁷ *See* OVERSTREET, *supra* note 97, at 66-68. The Court quoted Overstreet's conclusion that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare," *Leegin*, 127 S. Ct. at 2715 (alteration in original), but this conclusion seems to be based on his determination that his study and the

information he used for his study was generally "inadequate to determine rigorously whether the associated economic conditions correspond best with procompetitive or anticompetitive hypotheses about the use of RPM."¹⁵⁸ Neither Ippolito nor Overstreet considered whether dealer pressure without collusion might have accounted for any of the instances of resale price maintenance. In sum, neither of these antiquated "new" studies does much to fill "the dearth of empirical evidence" on the effects of resale price maintenance noted by Ippolito.¹⁵⁹ However, many commentators agree with Overstreet's later observation that "the historical experience, or practice of RPM [is] largely a sorry record of abuses, in sharp contrast to the contention of RPM's missionaries."¹⁶⁰

D. Costs of the per se rule

Perhaps the most glaring flaw in the majority's analysis is its failure to consider whether any of the procompetitive effects of resale

prior studies that he reviewed did not show that dealer and manufacturer collusion always or almost always explained resale price maintenance, rather than any studies affirmatively demonstrating efficient uses of resale price maintenance. See OVERSTREET, *supra* note 97, at 165–67.

¹⁵⁸ OVERSTREET, *supra* note 97, at 66. Indeed, Overstreet noted that the case records "generally contain only limited information concerning the scope of particular RPM programs and the extent to which they were enforced," *id.*, and most files had "no description of the RPM practices of competitors." *Id.* at 67.

¹⁵⁹ Ippolito, *RPM*, *supra* note 148, at 293 ("The current dearth of empirical evidence on the use of vertical restraints and of RPM in particular seriously limits the development of economic understanding of these practices.").

¹⁶⁰ Overstreet & Fisher, *supra* note 156, at 45; see also OVERSTREET, *supra* note 97, at 15 n.1 (explaining that "the literature contains numerous examples where analysts have attributed the existence of RPM to pressure from organized dealer trade groups, rather than to manufacturers' attempts to deal with 'free-rider' problems," citing Palamountain, Bowman, Yamey, and Hollander); HOVENKAMP, *supra* note 151, at 451 ("A wealth of history shows that dealers have attempted to use RPM imposed by suppliers to facilitate horizontal dealer collusion."); 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1620c4, at 217 ("[T]he Court's perception [in *Dr. Miles*] that dealer power may be the predominant explanation for much resale price maintenance may have been accurate."); *id.* ¶ 1604a, at 35 ("[M]anufacturers have often restrained intrabrand competition—especially through resale price maintenance—not to achieve more effective distribution but rather to appease dealer interests in excess profits or the quiet life.").

price maintenance can be achieved by less restrictive means that do not prevent efficient retailers from passing on their lower costs to consumers. If so, then the costs of the *per se* rule would be minimal. Amici economists recognized that manufacturers may curtail free riding by other means, and that where such means are available, "resale price maintenance" may not offer an incremental benefit to interbrand competition that would offset the diminution of intrabrand competition."¹⁶¹ The most obvious way to ensure desired retailer services is to pay retailers for performing those services, using promotional allowances or other marketing techniques.¹⁶² There is no empirical evidence whatsoever that such techniques are more costly or less effective than resale price maintenance in obtaining dealer services,¹⁶³ which is perhaps why the Court ignored the point.¹⁶⁴ To be sure, promotional allowances for services may ultimately also raise consumer prices to account for the cost of the services, but unlike resale price maintenance, such payments do not prevent discounting that reflects more efficient retailers' lower costs of doing business. As New York's Solicitor General pointed out at oral argument, "It's a

¹⁶¹ Brief of Amici Curiae Economists, *supra* note 113, at 9.

¹⁶² See, e.g., *Toys "R" Us, Inc. v. Fed. Trade Comm'n*, 221 F.3d 928, 933, 938 (7th Cir. 2000) (rejecting free rider argument because services performed by retailer, such as advertising, warehousing and full-line stocking, were compensated by manufacturer).

¹⁶³ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1632b at 318 ("there are few documented instances of significantly impaired distribution" as a result of ban on resale price maintenance).

¹⁶⁴ The Robinson-Patman Act is no impediment to reimbursing retailers for services that benefit the supplier. See Richard M. Steuer, *Dysfunctional Discounts*, ANTITRUST, Spring 2005, at 75, 79. Amici economists maintained that paying dealers for services may not be as efficient as resale price maintenance "*under some circumstances*" because "it may be difficult to specify completely all of the services that the retailer must perform and the level at which it must perform them," or because it is "possible that the retailer, rather than the manufacturer, knows which retail-level services will be the most effective in maximizing the competitiveness of the product, or that the most effective services will be discovered only through experience with the market and will be more apparent to the retailer than to the manufacturer." Brief of Amici Curiae Economists, *supra* note 113, at 9 (emphasis added). However, no evidence was offered as to the empirical significance of these possibilities. It is not apparent why a retailer

question really of what kind of currency a manufacturer can use to buy those retailer services."¹⁶⁵

The Court missed this simple truth, as is evident in its critique of the argument that resale price maintenance should be considered anticompetitive merely because it raises prices:

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.¹⁶⁶

But the difference between resale price maintenance and these other, quality-enhancing activities that also raise prices is that, even assuming that resale price maintenance in theory can be used to increase demand, it comes with an anticompetitive weight attached: it always prevents more efficient retailers from cutting prices based on their lower costs. And, of course, these other activities raise demand directly, and only indirectly raise prices, while resale price maintenance raises prices directly and only indirectly may lead to the hoped-for benefits.

E. Costs of the rule of reason

The majority acknowledged that "the *per se* rule can give clear guidance for certain conduct"¹⁶⁷ and "may decrease administrative

would choose to provide services that the manufacturer has not even asked for when other retailers are not also required to provide such services, unless the services themselves are profitable for a retailer, which means that resale price maintenance is not necessary in the first place.

¹⁶⁵ Transcript of Oral Argument at 48, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), 2007 WL 967030 (Mar. 26, 2007) (Barbara Underwood).

¹⁶⁶ *Leegin*, 127 S. Ct. at 2719.

¹⁶⁷ *Id.* at 2713.

costs,"¹⁶⁸ but minimized the significance of the issue by asserting that "[a]ny possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule."¹⁶⁹ No one had argued they did. Justice Breyer contended that the administrative costs of a rule of reason would be significant, and militated strongly in favor of retaining the *per se* rule. And the cost of the rule of reason is not simply uncertainty and adjudication costs, but the false negatives that result from significantly raising the costs of bringing a successful resale price maintenance suit.

Although the Court said that the lower "courts would have to be diligent in eliminating . . . anticompetitive uses [of resale price maintenance] from the market,"¹⁷⁰ and instructed them to "establish the litigation structure to ensure the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses,"¹⁷¹ Justice Breyer pointed out that will not be an easy exercise. The Court suggested three relevant considerations for the rule of reason—number of manufacturers using the restraint, source of the restraint, and market power—but the Court's obtuse three paragraphs of instruction offer little guidance and likely will exonerate many anticompetitive uses of resale price maintenance.¹⁷² The Court said the "number of manufacturers that make use of the practice in a given

¹⁶⁸ *Id.* at 2718.

¹⁶⁹ *Id.* The Court pointed out that *per se* rules "can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage." *Id.* And, gilding the lily, added, "They also may increase litigation costs by promoting frivolous suits against legitimate practices." *Id.* Of course, if the practice is deemed *per se* illegal, then it is not legitimate under the law and suits challenging it can hardly be considered frivolous. The nature of *per se* rules is that they are overinclusive and lead to false positives. The Court seemed to think that the rule of reason leads to more accurate results, but that is not necessarily the case, as noted in the text.

¹⁷⁰ *Id.* at 2719.

¹⁷¹ *Id.* at 2720.

¹⁷² Perhaps the Court cannot be blamed for the confusion, since none of the amici seeking to overturn *Dr. Miles*, including the United States, offered any suggestions for how a rule of reason might work in practice, and the petitioner offered only a market-power screen. Likely, they anticipated that the Court would simply refer to the toothless rule of reason under *Sylvania*.

industry can provide important instruction,¹⁷³ for widespread coverage of resale price maintenance may facilitate a manufacturer's cartel¹⁷⁴ or deprive consumers of meaningful choice.¹⁷⁵ But the Court did not acknowledge the difficulties of determining the extent of coverage when local variation and "informal" resale price maintenance are considered, as they should be.¹⁷⁶ Nor did the Court offer guidance on the extent of market coverage that should be considered problematic. In a concentrated market, coverage need not be extensive to trigger concern about manufacturer coordination.¹⁷⁷ Moreover, the Court did not

¹⁷³ *Id.* at 2719.

¹⁷⁴ As noted above, the Court did not acknowledge that resale price maintenance can facilitate oligopoly pricing. *See supra* note 114 and accompanying text. If cartel facilitation were the only issue, however, then it would be difficult to quarrel with the argument of resale price maintenance proponents that it needs no independent legal sanction.

¹⁷⁵ *See Leegin*, 127 S. Ct. at 2719 (quoting SCHERER & ROSS, *supra* note 125, at 558, to the effect that widespread coverage of resale price maintenance "depriv[es] consumers of a meaningful choice between high-service and low-price outlets"). *See also* Brief for Comanor & Scherer, *supra* note 125, at 9 (noting that with widespread market coverage "consumer choice is restricted to goods bearing high distribution margins" and dealer promotional efforts will "largely cancel each other out in the aggregate, leading to a high-price, high-margin, high promotional cost equilibrium with relatively little if any expansion of demand").

¹⁷⁶ Areeda and Hovenkamp argue persuasively that "[i]n measuring market coverage, vertically integrated firms should be counted among those using the vertical restraint, along with firms controlling resale prices informally." 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1606g6, at 96. But they note the difficulties of determining market coverage "because a suit involving one or a few manufacturers will seldom offer reliable information about other manufacturers' vertical restraints, especially their informal ones." *Id.*, ¶ 1632d2, at 322. Market coverage must be assessed at the local level if consumers' ability to avoid price-maintained products is taken seriously.

¹⁷⁷ *See id.* ¶ 1606g5, at 96 (danger of use of resale price maintenance to facilitate manufacturer coordination in concentrated market "does not disappear" at market coverage between 10 and 50 percent); Brief for Comanor & Scherer, *supra* note 125, at 10 (suggesting presumption of illegality in concentrated markets where resale price maintenance is implemented by seller with at least 10 percent market share; "[f]ocusing on oligopolistic sellers' market structure is appropriate because under oligopoly, imitation of one leading seller's marketing strategy by other sellers is more likely").

consider that resale price maintenance by a single manufacturer is anticompetitive if adopted in response to pressure from a powerful dealer or dealers.¹⁷⁸ To be sure, the Court allowed that the “source of the restraint may also be an important consideration,”¹⁷⁹ so perhaps the Court meant to suggest that widespread coverage or dealer pressure were alternative ways for a plaintiff to make out a case. But Justice Breyer pointed out that “it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement.”¹⁸⁰ The Court indicated that market power is important,¹⁸¹ but the absence of traditionally-defined market power¹⁸² on the part of

¹⁷⁸ Cf. *Leegin*, 127 S. Ct. at 2719 (“retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance”) (emphasis added).

¹⁷⁹ *Id.* According to the Court, “If there is evidence that retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. . . . If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct.” *Id.*

¹⁸⁰ *Id.* at 2730 (Breyer, J., dissenting).

¹⁸¹ See Marie L. Fiala & Scott A. Westrich, *Leegin Creative Leather Products: What Does the New Rule of Reason Standard Mean for Resale Price Maintenance Claims?*, ANTITRUST SOURCE, Aug. 2007, at 4, <http://www.abanet.org/antitrust/at-source/07/08/Aug07-Westrich8-6f.pdf> (“Although the Court in *Leegin* did not expressly sanction the adoption of a market power screen at the pleading stage, there is some support in the opinion for such an approach.”). The Court said that under the rule of reason in general, “[w]hether the businesses involved have market power is a . . . significant consideration.” *Leegin*, 127 S. Ct. at 2712. And specifically with respect to resale price maintenance, the Court said: “[T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power.” *Id.* at 2720. This latter point makes no sense because a firm cannot be “dominant” without market power. A more serious question would be whether market power short of “dominance” can lead to the anticompetitive concerns identified by the Court.

¹⁸² Market share is normally the indicator of market power, but manufacturers with relatively small market shares but powerful brands may have significant market power. See SULLIVAN & GRIMES, *supra* note 138, § 7.3a1, at 384–88. Likewise, multibrand retailers with relatively modest market shares may have significant buyer power. See *supra* note 110.

the manufacturer does not mean that resale price maintenance is harmless.¹⁸³ In all events, as Justice Breyer noted, the "Court's invitation to consider the existence of 'market power' . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets."¹⁸⁴

Finally, the Court declined to offer guidance on how courts are to consider the procompetitive side of the rule of reason equation. While the Court identified certain procompetitive theories, it did not suggest how a manufacturer might prove them,¹⁸⁵ perhaps because as Justice Breyer observed, "it is difficult to determine just when, and where, the 'free riding' problem is serious enough to warrant legal

¹⁸³ The Court said that "if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets," *Leegin*, 127 S. Ct. at 2720, but the use of resale price maintenance to obtain exclusive dealing has never been one of the main concerns about resale price maintenance. See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1632c, at 319–21. The lack of market power has been thought to be important to resale price maintenance because, in the absence of brand market power at the local level, it is not obvious what retailers (or a single manufacturer) would have to gain from resale price maintenance. Higher retail prices would lead consumers to switch to competing brands (as long as they are unencumbered by resale price maintenance). Indeed, it is commonly understood by economists that neither retailers nor manufacturers will engage in resale price maintenance without some interbrand market power. See Ward S. Bowman, Jr., *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 849 (1955) ("Price maintenance appears to be incompatible with an assumption of pure competition among both sellers and resellers."); 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1632e2, at 324–25 ("most products subject to RPM are sufficiently differentiated to enjoy greater pricing discretion than is possible for perfectly competitive products"). Accordingly, the presence of resale price maintenance may itself be some evidence of market power.

¹⁸⁴ *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting); see Pitofsky, *supra* note 143, at 1489 (noting that definition of relevant product and geographic markets is "a complicated and extremely elaborate economic inquiry in itself").

¹⁸⁵ Cf. 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1633d, at 337 ("[W]e can reasonably expect at least substantial evidence that the manufacturer has a legitimate business problem, that resolution of that problem would confer a nontrivial benefit, that the restraint can be reasonably effective for the claimed purpose, and that that less restrictive alternatives would be significantly more costly or significantly less effective.").

protection."¹⁸⁶ Nor did the Court indicate whether less restrictive alternatives should be considered, or how any procompetitive justification should be balanced against anticompetitive effects.

The upshot of the Court's decision, besides leaving businesses and the lower courts largely at sea, is that the private bar and public enforcers will be reluctant to bring cases. As Professor Pitofsky has noted, "rule of reason cases often take years to litigate[,] are extremely expensive" and are "very difficult for a plaintiff (either the government or a private party) to win . . ."¹⁸⁷ Indeed, most commentators agree that the rule of reason, as applied by the lower courts to nonprice vertical restraints, has resulted in a rule of de facto *per se* legality.¹⁸⁸ Even if the lower courts are more diligent about resale price maintenance, the cost and uncertainty of undertaking a rule of reason case will no doubt mean that businesses will be more apt to engage in anticompetitive resale price maintenance, and many instances of anticompetitive resale price maintenance will go unremedied. Moreover, manufacturers that face pressure from retailers to adopt resale price maintenance will no longer be able to just say "no, it's illegal."¹⁸⁹

Another cost of *Leegin* is the uncertainty for businesses that results from the fact that many states ban resale price maintenance agreements, sometimes expressly,¹⁹⁰ and will not necessarily follow

¹⁸⁶ *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting).

¹⁸⁷ Pitofsky, *supra* note 143, at 1489.

¹⁸⁸ See, e.g., Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991). Plaintiffs cannot win nonprice restraints cases not because such restraints are never anti-competitive, but rather because the hurdles for recovery are so high. Not only must plaintiffs jump through the "agreement" hoops that the Court established for resale price maintenance, see, e.g., *Parkway Gallery Furn., Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), but lower courts have ordinarily required plaintiffs to make a threshold showing that the manufacturer has market power and "[m]ost cases have made clear that power will not be inferred unless the defendant's market share is significant." 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1645c, at 404-05.

¹⁸⁹ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1632b, at 319 ("There is little doubt that *per se* illegality strengthens the hands of manufacturers in resisting dealer demands for price protection.").

¹⁹⁰ See, e.g., N.Y. Gen. Bus. L. § 369-a (2007).

Leegin under their antitrust laws. This threatens to recreate the balkanized state of affairs that existed prior to the Consumer Goods Pricing Act of 1975, when fair trade was legal in some states and illegal in others. Indeed, given the anticonsumer effect of resale price maintenance, some states that follow the Sherman Act can be expected to adopt "*Leegin* repealers" (either by statute or judicial construction), perhaps replicating the confusion, uncertainty, and expense that has resulted from the divergent treatment of indirect purchaser damage actions under the Sherman Act and state law.¹⁹¹

F. The dichotomy between price and nonprice restraints

One of the rationales for the Court's decision was that there is "little economic justification for the current differential treatment of vertical price and nonprice restraints,"¹⁹² notwithstanding that the Court in *Sylvania* had said "[t]here are . . . significant differences that could easily justify different treatment."¹⁹³ In fact, different treatment is justified because, as Areeda and Hovenkamp explain, "Nonprice restraints fulfill a wider range of potentially legitimate objectives and threaten fewer harms to competitive interests" than resale price maintenance.¹⁹⁴ The Court in *Sylvania* had noted that unlike nonprice

¹⁹¹ See Donald I. Baker, *Hitting the Potholes on the Illinois Brick Road*, ANTITRUST, Fall 2002, at 14. State *Leegin* repealers (or congressional repeal) might also be used to narrow the scope of the *Colgate* doctrine.

¹⁹² *Leegin*, 127 S. Ct. at 2723.

¹⁹³ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977). The *Leegin* majority dismissed this "footnote" on the basis that "the central part of the opinion relied on authorities and arguments that find unequal treatment 'difficult to justify,'" quoting Justice White's concurring opinion. 127 S. Ct. at 2721. But the *Sylvania* majority expressly referred to Justice White's argument and rejected it. See *Sylvania*, 433 U.S. at 51 n.18.

¹⁹⁴ 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1630b, at 302; *id.* at 303 ("It is . . . entirely reasonable to regard resale price maintenance as a more pervasive threat to competition than nonprice restraints."). The fact that the Court saw fit to articulate guidelines for the rule of reason that are arguably more stringent than the rule of reason applicable to nonprice restraints underscores that different treatment is warranted.

vertical restraints, vertical price agreements “almost invariably” reduce interbrand competition.¹⁹⁵ Indeed, resale price maintenance agreements *are* more likely than nonprice restraints to restrict interbrand competition at both the retailer and manufacturer levels. At the retailer level, only resale price maintenance restricts dealers from competing on price *against other brands*.¹⁹⁶ And resale price maintenance, unlike nonprice restraints, prevents more efficient retailers from passing on the benefits of that efficiency to consumers.¹⁹⁷ Furthermore, by restricting an important competitive tool, resale price maintenance stultifies competition among multibrand retailers, which are generally not susceptible to territorial or customer restraints.¹⁹⁸ As a general matter, “[t]he form of restraint most likely to reflect dealer power is resale price maintenance.”¹⁹⁹ The Court in *Sylvania* also distinguished price and nonprice vertical restraints on the ground that price restraints, unlike nonprice restraints, can facilitate a manufacturers’ cartel.²⁰⁰

¹⁹⁵ *Sylvania*, 433 U.S. at 51 n.18 (quoting Justice Brennan’s concurring opinion in *White Motor Co. v. United States*, 372 U.S. 253, 268 (1963)).

¹⁹⁶ Even airtight territorial exclusives, while more restrictive of intrabrand competition, allow restricted dealers to compete fully in their territories against dealers of other brands. But resale price maintenance prevents restricted dealers “from engaging resellers of other brands in price competition.” 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1630b, at 303.

¹⁹⁷ See Arthur H. Travers, Jr. & Thomas D. Wright, Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795, 801 (1962) (noting that territorial and customer restraints do not have “settled propensity of resale price maintenance to prevent dealers or distributors from passing the benefits of efficient distribution on to consumers by adopting a high-volume, low-markup policy”) (cited with approval in *White Motor*, 372 U.S. at 268 n.7 (Brennan, J., concurring)).

¹⁹⁸ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1604g6, at 65.

¹⁹⁹ *Id.* See also *id.* ¶ 1630b, at 303 (“Historically . . . price rather than nonprice restraints have been the vehicle chosen by dealer organizations to limit competition among their members.”).

²⁰⁰ *Sylvania*, 433 U.S. at 51 n.18. See also *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725–26 (1988) (noting that authorities cited by *Sylvania* suggested resale price maintenance may assist cartelization, but “[s]imilar support for the cartel-facilitating effect of vertical nonprice restraints was and

Besides doing less harm, nonprice vertical restraints are more likely to have procompetitive benefits than vertical price restraints might have. Nonprice vertical restraints have a wider range of legitimate justifications, including ensuring efficient dealer scale, focusing dealer effort on developing classes of customers or territories, and promoting product quality and safety.²⁰¹ Moreover, to the extent that territorial or customer restraints entirely eliminate intrabrand competition, such restraints are more likely than resale price maintenance agreements to solve free rider problems.²⁰² In short, it makes sense to apply a more stringent standard to resale price maintenance than to nonprice vertical restraints.

The vast majority of advanced industrial countries generally ban minimum resale price maintenance and treat it more harshly than nonprice vertical restraints.²⁰³ For example, the European Union, which recently liberalized its treatment of most nonprice restraints,

remains lacking"); 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1606h, at 99 ("[M]ost nonprice restraints lack the characteristics that enable resale price maintenance to support price coordination among manufacturers."). *But see* Ittai Paldor, *The Vertical Restraints Paradox: Justifying the Different Legal Treatment of Price and Non-price Vertical Restraints* 14–15 (Jan. 29, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951609 (arguing that nonprice vertical restraints can facilitate upstream cartel).

²⁰¹ See 8 AREEDA & HOVENKAMP, *supra* note 94, ¶ 1647 (reviewing justifications for nonprice restraints); *Sylvania*, 433 U.S. at 55 n.23 (noting that nonprice restraints may be used by manufacturers to ensure compliance with product safety and warranty responsibilities).

²⁰² See SULLIVAN & GRIMES, *supra* note 138, § 6.3b, at 338; Paldor, *supra* note 200, at 36. As long as dealers still compete, as they do under resale price maintenance (but not under airtight territorial exclusivity), they have the incentive and ability to free ride on service-providing dealers by offering free shipping, discounts on bundled items, and so forth. Of course, as noted above, territorial exclusives are impractical for multibrand retailers. See *supra* text accompanying note 198.

²⁰³ See ORG. FOR ECON. CO-OPERATION AND DEV., *RESALE PRICE MAINTENANCE* 10 (1998) [hereinafter *OECD RPM REPORT*], <http://www.oecd.org/dataoecd/35/7/1920261.pdf> (reporting that resale price maintenance "is generally prohibited in almost all OECD countries, subject to a few exemptions, mostly for books, newspapers and medicaments").

continues to treat minimum resale price maintenance as a "hardcore" restraint, equivalent to *per se* illegal.²⁰⁴ Member States, many of which led the United States in abolishing fair trade, follow suit.²⁰⁵ Canada, which bars nonprice vertical restraints only when likely to substantially lessen competition,²⁰⁶ treats resale price maintenance as a criminal offense.²⁰⁷ The fact that the rest of the advanced industrialized world apparently recognizes the wisdom of the *Dr. Miles* rule,²⁰⁸ as do many scholars,²⁰⁹ underscores the lack of consensus in the Court's approach.

²⁰⁴ See Joseph F. Winterscheid & Margaret A. Ward, *Two Part Harmony: New Rules for Vertical Agreements Under European Union Competition Policy*, ANTITRUST, Summer 2000, at 52, 54; Comm. Reg. 2790/1999, Art. IV, 1999 O.J. (L336) 21, 23. Most vertical nonprice restraints, as well as maximum resale price maintenance, are presumptively lawful if undertaken by a supplier with a market share of less than 30%. See Winterscheid & Ward, *supra*, at 54.

²⁰⁵ See, e.g., II ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES France-42, Germany-33, United Kingdom-56 (2001); see also Paldor, *supra* note 137, at 51-52; SCHERER & ROSS, *supra* note 125, at 549-50.

²⁰⁶ See Competition Act, R.S.C., ch. C-34, § 77(3) (1985) (Can.).

²⁰⁷ See Competition Act, R.S.C., ch. C-34, § 61(9) (1985) (Can.); e.g., *Record Canadian Fine is Levied in Resale Price Maintenance Case*, 83 Antitrust & Trade Reg. Rep. (BNA) 410 (Oct. 25, 2002).

²⁰⁸ See OECD RPM REPORT, *supra* note 203, at 130 (EC official explaining anticompetitive effects of resale price maintenance and that "if one supposes that RPM can improve economic efficiency, this economic efficiency could be achieved by less costly means in terms of competition").

²⁰⁹ See, e.g., Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the Dr. Miles Rule*, ANTITRUST, Spring 2007, at 61; Jean Wegman Burns, *Vertical Restraints, Efficiency, and the Real World*, 62 *FORD. L. REV.* 597 (1993) (advocating retention of *Dr. Miles* rule); David F. Shores, *Vertical Price-Fixing and the Contract Conundrum: Beyond Monsanto*, 54 *FORD. L. REV.* 377 (1985) (same); see also Iacobucci, *supra* note 130, at 102 (advocating *per se* rule because "the number of cases where RPM is efficient will probably be rather small, while the cost involved from switching from RPM to alternatives is likely to be minimal [and] the cost of a rule-of-reason review is likely to be significant if it is to be done properly").

G. Tension with the Colgate doctrine

The Court thought that the *Colgate* doctrine, which permits manufacturers "unilaterally" to impose resale price maintenance by terminating retailers that do not follow its suggested prices, militated in favor of repealing *Dr. Miles*. After all, if the "economic effects of unilateral and concerted price setting are in general the same,"²¹⁰ what is the justification for making one *per se* legal and one *per se* illegal? It only pushes manufacturers that wish to set retail prices to adopt wasteful or seemingly irrational measures to get into the former category, according to the Court.²¹¹ Moreover, if resale price maintenance can readily be achieved via "*Colgate* policies" then it may be difficult to credit any private reliance interests in *Dr. Miles*, or expect that reversing *Dr. Miles* will appreciably increase the incidence of resale price maintenance.²¹² Finally, the *Colgate* doctrine has been widely criticized as distorting the concept of "agreement" under section 1, which not only sows confusion in the law, but results in immunizing all manner of vertical restraints without any analysis of actual competitive effects. Insofar as the expansion of the *Colgate* doctrine has been driven by the harshness of the *Dr. Miles* rule, as

²¹⁰ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722 (2007).

²¹¹ The Court, citing an amicus brief submitted by PING, Inc., a golf club manufacturer, stated, "Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger [of liability] can lead, and has led, rational manufacturers to take wasteful measures. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. The increased costs these burdensome measures generate flow to consumers in the form of higher prices." *Id.* at 2722-23 (citations omitted).

²¹² It has been argued that manufacturers can also easily circumvent *Dr. Miles* through minimum advertised price policies, which are generally analyzed under the rule of reason. However, such policies allow for significant "leakage" in discounting. Indeed, where minimum advertised pricing policies are tantamount to resale price maintenance, the FTC had said it would consider them to be *per se* illegal. See *In re Sony Music Entertainment, Inc.*, No. C-3971, 2000 WL 1257799 (FTC) (statement of Commissioners in connection with consent order).

some commentators have suggested, then repealing *Dr. Miles* will permit courts to focus on economic substance rather than *Colgate's* artificial and formalistic distinctions, or so the argument goes.²¹³

This line of argument is not easily dismissed, but ultimately is unpersuasive for several reasons. As an initial matter, the Court did nothing to modify the *Colgate* doctrine, and as long as it remains good law, it will continue to be invoked by defendants seeking immunity (rather than rule of reason of treatment) from resale price maintenance and other vertical restraint claims and continue to bedevil conspiracy jurisprudence.²¹⁴ Second, while it is difficult to determine the extent to which manufacturers have adopted *Colgate* policies to get around *Dr. Miles*, or have been deterred from doing so, it seems evident that many companies find *Colgate* policies too draconian and costly a weapon to use to combat discounting. A recent article by two experienced practitioners noted that "many well-known manufacturers have adopted [*Colgate*] policies successfully," but many manufacturers are undoubtedly reluctant to do so because "[u]nder *Colgate*, the cautious supplier has but one choice with respect to violators—immediate termination of product purchasing privileges with no warnings, no second chances, and no continued shipments in response to assurances of future compliance—regardless of the size of the violator and the volume of its purchases."²¹⁵ Moreover, the

²¹³ See GAVIL, KOVACIC & BAKER, *supra* note 19, at 363 (suggesting that "*Colgate's* fiction of 'no agreement' . . . might well be abandoned if *Dr. Miles* is ever overruled").

²¹⁴ See *Leegin*, 127 S. Ct. at 2734-35 (Breyer, J., dissenting) ("No one has shown how moving from the *Dr. Miles* regime to 'rule of reason' analysis would make the legal regime governing minimum resale price maintenance more 'administrable,' . . . particularly since *Colgate* would remain good law with respect to *unreasonable* price maintenance."); Fiala & Westrich, *supra* note 181, at 9 (noting that manufacturers may continue to rely on *Colgate* policies to minimize risks).

²¹⁵ Henry & Zelek, *supra* note 26, at 8, 10 ("[T]his requirement has resulted in much nail biting on the part of supplier executives over the prospective loss of substantial business."). Beyond the antitrust risks and the business considerations of having to terminate good customers, the authors point out that franchise, distributor, dealer-protection laws or other industry-specific laws may affect the ability of the supplier to refuse to supply a reseller. *See id.* at 11, 17 n.28.

apparent popularity of *Colgate* policies may simply reflect current lax enforcement attitudes and thus may be a transient phenomenon that could be reined in by a future administration.²¹⁶

Most significantly, however, the premise of this line of argument is that the justification for the *Colgate* doctrine is to "secure the procompetitive benefits associated with vertical price restraints through other methods."²¹⁷ This is revisionist history. While the bolstering of the *Colgate* doctrine in *Monsanto* may have been intended by the Court to achieve this result, the *Colgate* decision itself was based on "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."²¹⁸ In other words, *Colgate* was viewed as an exception to *Dr. Miles* "tolerated" by the need to protect a certain degree of manufacturer freedom.²¹⁹ In any

²¹⁶ See *id.* at 16 n.12 ("[A]nother risk factor is regulator efforts to narrow *Colgate* or make it go away."). Indeed, it is not obvious that the *Colgate* policies that have been peddled by the bar are protected by *Colgate* insofar as they do not require terminating a reseller, but merely a product line, and allow for reinstatement after a defined period. See *id.* at 10, 17 n.21.

²¹⁷ *Leegin*, 127 S. Ct. at 2722. See also *id.* ("If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question."); *id.* at 2721 ("Only eight years after *Dr. Miles*, . . . the Court reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them.") (emphasis added).

²¹⁸ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

²¹⁹ *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); see Edward H. Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 325 ("*Colgate* is caught between the important right to refuse to deal and the antipathy to price fixing"); Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 ANTITRUST L. J. 545, 552 (2000) ("Recognition of seller freedom may also be the best way to explain the *Colgate* limitation of *Dr. Miles*."). The irony of the Court's rejecting out of hand the restraints on alienation or "dealer freedom" rationale for *Dr. Miles*, while relying on *Colgate* to overturn it, was apparently lost on the Court. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 67-69 (1977) (White, J., dissenting) (noting that both *Dr. Miles* and *Colgate* reflect concern for the autonomy of independent businessmen).

event, the tension between *Colgate* and *Dr. Miles* has existed for nearly as long as *Dr. Miles* itself and cannot count as an *independent* justification for overturning *Dr. Miles* any more than for overturning *Colgate*. On the contrary, the case for the latter seems stronger, even for those on the fence about *Dr. Miles*.²²⁰ Notably, foreign jurisdictions do not allow manufacturers to get around resale price maintenance prohibitions by adopting *Colgate*-like policies.²²¹

IV. CONCLUSION

In his dissent, Justice Breyer emphasized that the majority was relying on policy arguments "well known in the antitrust literature for close to half a century."²²² In fact, the arguments go back to *Dr. Miles* itself. At bottom the controversy over the *per se* rule is about conflicting property rights (or "freedoms") of manufacturers and dealers.²²³ Justice Holmes and Justice Kennedy thought that the

²²⁰ The academic critique of the *Colgate* doctrine has been far more severe and universal than the criticism of *Dr. Miles*. See SULLIVAN & GRIMES, *supra* note 138, § 7.2c, at 382 n.50 (citing sources).

²²¹ For example, both Europe and Canada do not allow manufacturers to obtain resale price maintenance by threatening to refuse to deal with retailers that price below suggested retail prices or by other indirect means. See Guidelines on Vertical Restraints ¶ 47, 2000 O.J. (C 291) 1, 11 (European Commission) (resale price maintenance through indirect means prohibited, including "linking the prescribed resale prices to . . . threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations"); Competition Act, R.S.C., ch. C-34, § 61(1) (1985) (Can.) ("No person who is engaged in the business of producing or supplying a product . . . shall, directly or indirectly, (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or (b) refuse to supply a product or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.").

²²² *Leegin*, 127 S. Ct. at 2725–26 (Breyer, J., dissenting). See also *id.* at 2732 ("What is remarkable about the majority's arguments is that *nothing* in this respect [regarding consumer benefits] is *new*.").

²²³ See Leary, *supra* note 219, at 550–51 (contending that vertical restraints doctrine involves the accommodation of the manufacturer's and dealer's

public interest is best served by privileging the manufacturer's right to control the distribution of its products.²²⁴ Justice Hughes and Justice Breyer thought that preserving dealer freedom to set resale prices served the public interest best.²²⁵ But while Hughes and Holmes saw the issue in black and white terms, Kennedy and Breyer recognized the subtlety that preserving manufacturer freedom to set resale prices sometimes cuts against the interests of both consumers and manufacturers (e.g., when resale price maintenance is the result of dealer pressure), and preserving dealer freedom protects both the efficient dealer as well as the free rider. The difference between Kennedy and Breyer is that Breyer recognized the tradeoff entailed in choosing the rule of reason over the *per se* rule. Allowing the "independent" manufacturer to adopt resale price maintenance for "procompetitive" purposes provides benefits, but comes at the cost of inhibiting the growth of the efficient retailer, increasing the incidence of anticompetitive resale price maintenance, increasing business uncertainty, and raising the costs of administering the system.

freedoms to select the most effective means for distributing their products); Rudolph J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 525 (1989) (arguing that vertical restraints doctrine can be viewed as a series of attempts to resolve the question of identifying which entity holds the property right to set the terms of resale). Those who favor the rule of reason give less weight to dealer freedom because they tend to imagine "dealers" as distributing a single manufacturer's products and see vertical restraints as a form of partial vertical integration. Those who favor the *per se* rule tend to see distributors as multiproduct retailers that play a significant, independent role in the economy.

²²⁴ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 386 (1911) ("The Dr. Miles Medical Company knows better than we do what will enable it to do the best business.") (Holmes, J., dissenting); *Leegin*, 127 S. Ct. at 2718-19 ("A manufacturer has no incentive to overcompensate retailers with unjustified margins.").

²²⁵ See *Dr. Miles*, 220 U.S. at 385 ("The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."); *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting) (*Dr. Miles* "reflects a basic antitrust assumption (that consumers often prefer lower prices to more service) [and] embodies a basic antitrust objective (providing consumers with a free choice about such matters).").

What is the magnitude of these benefits and costs? Justice Breyer was uncertain, which for him was sufficient to leave well enough alone. But perhaps the more important question is, who should decide what is the best rule? The current majority of the Supreme Court? Congress? The appropriate treatment of resale price maintenance is a complicated policy issue. The economics are subtle. The empirical evidence is thin. The issue has been controversial for nearly a century. There is no academic consensus on the appropriate rule. Even had Congress not weighed in, the Court does not seem well suited to make this kind of policy decision.²²⁶ Indeed, given the uncertainties involved, one might have thought that the Court would reach out for jurisprudential markers (the intent of Congress, *stare decisis*) that would aid its decisionmaking. Instead, it reached out to avoid those markers. To be sure, the Supreme Court has made many controversial policy-laden decisions under the Sherman Act; that is inevitable given the vague terms of the statute. But doubtless Senator Sherman would be surprised to learn that the common law principles he expected the courts to apply include the disregard of long-standing precedent and clear expressions of congressional intent.²²⁷

Professor Arthur, a leading critic of the "constitutional" conception of the Sherman Act,²²⁸ observes that the Court has often displayed the personality of an economic regulatory commission,

²²⁶ As Justice Breyer noted, "both Congress and the FTC, unlike courts, are well-equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs." *Leegin*, 127 S. Ct. at 2737 (Breyer, J., dissenting); cf. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) ("The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.") (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

²²⁷ See 21 CONG. REC. 2455 (1890) (Senator Sherman stating that his bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government").

²²⁸ See *supra* note 5.

"[r]ambling through wilds of economic theory."²²⁹ "In this role, it seems to emulate the Federal Trade Commission, but without the benefit of any institutional economic expertise and without any political checks, such as the congressional oversight and budget hearings that restrain that agency."²³⁰ *Leegin* certainly fits that description, but this *über* trade commission has gone one step further: it makes national antitrust law according to its own vision of ideal policy, unimpeded by a lack of economic expertise or evidence and unbounded by an authorizing statute or other normal constraints on judicial (or agency) power.

²²⁹ Arthur, *supra* note 5, at 310 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 n.10 (1972)).

²³⁰ *Id.*

Copyright of Antitrust Bulletin is the property of Federal Legal Publications Inc. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.