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The Core of Antitrust and the Slow Death of Dr. Miles

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"Interbrand competition . . . is the primary concern of antitrust law."
—Continental T.V., Inc. v. GTE Sylvania, Inc.
(1977) (Powell, J.)[1]

FROM its nineteenth century beginnings to the present, American antitrust law has dealt with the problem of monopoly power created by cartels, large horizontal mergers, and predatory exclusion. At the same time it has striven, to a greater or lesser extent, not to restrict productive cooperation among competitors, smaller mergers, or the exclusion of less efficient firms by more efficient ones. Over the years, of course, there has been much controversy over how to distinguish cartels from productive joint ventures, too large from acceptable mergers, and predation from superior efficiency, but all have agreed that these are basic issues. This is the core of antitrust.

At times, other economic[2] and even non-economic social and political concerns[3] have affected antitrust law and policy: protection of small businesses from more efficient rivals, autonomy for distributors, preservation of traditional property rights, and an antipathy toward big business, to name the most significant. While these concerns have strongly influenced antitrust law in certain eras, they and the legal doctrines based on them have lacked the staying power of the core antitrust concerns that have shaped antitrust law throughout its history. Their prime contribution to antitrust doctrine has been to unsettle it, as the Supreme Court has balanced these non-statutory concerns against core antitrust values with no

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1. 433 U.S. 36, 51 n.19 (1977).

2. *See* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 2-5 (1977) (monopolistic competition model); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1520-23, 1541-47 (oligopoly model).

3. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1141 (1981) ("Antitrust emerged from the 1960s as a philosophy and body of law reflecting American democracy."). *See generally* Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1967) (describing how Warren Court antitrust decisions emphasized preservation of economic opportunity and uncoerced, fully independent decision making without regard to economic cost); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

statutory guidance.[4]

The core of antitrust, by contrast, provides a basis for principled judicial decision making in two fundamental ways. First, it confines the reach of the antitrust statutes to the original "trust problem" that provoked them, the problems presented by cartels, mergers to monopoly, and predation. Other issues of business regulation are outside the statutes, to be dealt with by other regulatory regimes. They do not raise antirust issues. Within the core of antitrust, judicial decision making is guided by the original vices: cartels, mergers to monopoly, and predatory exclusion, and the original countervailing virtues: cooperation in aid of production and competitive success based on superior products, services, and prices. While the judicial task under the core of antitrust is still daunting, it is at least doable. Guided by core antitrust concerns, courts can produce a more coherent, stable, and workable doctrine.

The second way is even more fundamental. Judicial decisions based on the statutory core of antitrust are legitimate in ways the free form judicial lawmaking outside the core can never be. If based on the original Congressional choices embedded in the core of antitrust, judicial decision making in antitrust is a traditional judicial task, rather than a quasi-legislative one based on nothing more than judges' personal views of appropriate business regulation. This regulatory task is more appropriate for an administrative agency or, better, Congress itself. Basing decisions on core statutory antitrust questions and values by no means eliminates judicial discretion in antitrust, but it does cabin it significantly.

In the last generation, the Supreme Court, while not expressly relying on the core of antitrust, has been returning antitrust law to its core. In the process, it has produced a body of doctrine that is far more internally coherent and faithful to the original statues. The Court's decisions on vertical restraints have been part of this return to the core of antitrust. By themselves, resale price maintenance (RPM) and other forms of intrabrand distributional restraints[5] are not part of the core of antitrust. There is no reason for antitrust law to forbid these productive practices.

In some cases, however, RPM can be used by a cartel. A manufacturers' cartel can require members to use RPM, to discourage members from cheating on the cartel price. A dealers' cartel can force a manufacturer to

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4. *See generally* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263 (1986) [hereinafter Arthur, *Farewell*]; Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163 (1988) [hereinafter Arthur, *Workable*].

5. Not all manufacturer-imposed restraints are intrabrand restraints, that is, those which affect only intrabrand competition, which is competition among dealers of a single brand. Interbrand distributional restraints, such as tying and exclusive dealing, prevent purchasers from buying competing goods and present different issues, which are beyond the scope of this Article. Distributional restraints are also known as vertical restraints (between buyers and sellers), in contrast to horizontal restraints between competitors at the same level of distribution, for example, manufacturers. This Article uses the terms "restricted distribution," "vertical restraints," "intrabrand restraints" and "distributional restraints" interchangeably to refer to the same thing: manufacturer-imposed restraints on the wholesalers and/or distributors of its own brand.

"impose" RPM on its members to increase their margins and protect themselves from competition by discounters. These uses of RPM, of course, do affect the core of antitrust and should be forbidden as part of an effective anticartel policy.

In 1911, however, the Supreme Court held in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* that *all* forms of RPM,[6] whether connected to a cartel or not, violated section 1 of the Sherman Act.[7] In time, *Dr. Miles* was considered to have established a per se rule against all use of RPM, even if no cartel was involved. In 2007, the Court overruled *Dr. Miles* in *Leegin Leather Products, Inc. v. PSKS, Inc.*, holding that RPM must be evaluated under the rule of reason, like all other intrabrand restraints.[8] This decision was sharply criticized in Justice Breyer's dissenting opinion[9] and also by commentators[10] and politicians[11] as betraying basic antitrust principles[12] and for "its departure from ordinary considerations of *stare decisis*" in overruling a precedent "upon which the legal profession, business, and the public have relied for close to a century."[13]

This harsh criticism is unfounded. As this Article will show, simple RPM does not implicate any core antitrust concern, and RPM used in connection with a cartel can still be forbidden under the rule of reason. *Dr. Miles*'s overbroad rule was based on an economic mistake and on property law concerns unrelated to the core of antitrust. Unsupported by core antitrust principles, *Dr. Miles* has not been the pillar of antitrust doctrine described by Justice Breyer's dissent. Far from establishing a clear cut, easily administrable bright line rule, *Dr. Miles* has been a source of confusion and formalistic line drawing from its very beginning, as the Court has permitted it to be evaded by practices which have the same economic effect.

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6. This Article will refer to RPM unconnected to any cartel as "simple RPM."

7. 220 U.S. 373, 385 (1911).

8. 127 S. Ct. 2705, 2710 (2007).

9. *Id.* at 2725 (Breyer, J., dissenting). Justices Stevens, Souter and Ginsburg joined this opinion. *Id.*

10. For representative samples, see generally, Mark D. Bauer, *Whither* Dr. Miles?, 20 LOYOLA CONSUMER L. REV. 1 (2007); Richard M. Brunell, *Overruling* Dr. Miles: *The Supreme Trade Commission in Action*, 52 ANTITRUST BULL. 475 (2007); Marina Lao, Leegin *and Resale Price Maintenance—A Model for Emulation or for Caution for the World?*, 39 INT'L REV. OF INTELL. PROP. & COMPETITION L. 253 (2008). Other commentators have praised the majority's decision, of course. *See, e.g.*, Daniel J. Gifford & E. Thomas Sullivan, *The Roberts Antitrust Court: A Transformative Beginning*, 52 ANTITRUST BULL. 435, 445 (2007); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?*, 3 COMPETITION POLICY INT'L 59, 59-68 (2007); George A. Hay, *The Quiet Revolution in U.S. Law*, 26 U. QUEENSLAND L.J. 27, 35-36 (2007); Thomas A. Lambert, Dr. Miles *is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Maintenance*, 50 WM. & MARY L. REV. (forthcoming 2009) (manuscript at 1-2, on file with author).

11. *See* Bauer, *supra* note 10, at 2 n.9 (collecting statements).

12. *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting) (stating that the *Dr. Miles* per se rule "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)").

13. *Id.* at 2726.

Only for a brief time during the Warren Court era was there a true per se prohibition on RPM, which was based on non-core concerns that have proved insufficient to preserve it. Since then, the Court has turned back to the core of antitrust, both generally and in the law of distributional restraints. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, perhaps the most important case in this development, the Court in 1977 overruled a Warren Court precedent[14] to hold that all nonprice distributional restraints must be evaluated under the rule of reason.[15] But the *Sylvania* decision failed to overturn the *Dr. Miles* per se rule, even though there is no demonstrable distinction between the economic effect of RPM and other distributional restraints.[16] The formalistic line between *Sylvania* and *Dr. Miles* proved to be a major source of confusion, forcing the Court to cut back drastically on the scope of the per se rule to protect manufacturers' rights under *Sylvania*, which finally led to *Leegin*.

This Article has three parts. Part I will establish that the problems presented by cartels, monopolistic mergers, and predatory exclusion are the core of antitrust and that simple RPM and other intrabrand restraints do not implicate these core antitrust concerns. Part II will trace the history of antitrust decisions on RPM until the current era, which began with *Sylvania*, and show that *Dr. Miles*'s overbroad per se rule was not based on core antitrust concerns. Its property law foundation induced the Court to modify its scope in response to competing property rights, which created loopholes through which manufacturers could impose RPM. These loopholes were not closed until 1964. Even then, a statutory loophole allowed states to authorize RPM; this loophole was not closed until 1975. Part III will describe the Court's increasing reliance on core antitrust principles since *Sylvania*, which ultimately doomed *Dr. Miles*. This part will show that by the time of *Leegin*, *Dr. Miles*'s per se rule was so inconsistent with the rest of section 1 doctrine and so eroded in its scope that, far from being an example of unprincipled judicial activism, the Court's decision in *Leegin* was a textbook example of the law working itself clear. *Leegin* finally limits the Sherman Act's application to distributional restraints to core antitrust principles and adds needed consistency to section 1 doctrine.

I. RPM AND THE CORE OF ANTITRUST

The basic antitrust laws, the Sherman,[17] Clayton[18] and FTC[19] Acts, were directed, of course, at what was then termed the "trust problem,"

14. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
15. *See* 433 U.S. 36, 37 (1977).
16. *See infra* notes 327-30 and accompanying text.
17. Ch. 647, §§ 1-8, 124-35, 26 Stat. 209, 209-10 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).
18. Ch. 323, §§ 1-26, 38 Stat. 730, 730-40 (1914) (codified as amended at 15 U.S. C. §§ 12-27 (2006)).
19. Ch. 311, §§ 1-11, 38 Stat. 717 (1914) (codified as amended at 15 U.S. C. §§ 41-58 (2006)).

which was a major domestic legal and political issue from the late 1880s until World War I. RPM was not part of the trust problem and was hardly mentioned in the debates over the basic antitrust statutes, nor was it part of the Justice Department's efforts to enforce them. None of this should be surprising. Simple RPM does not implicate core antitrust concerns.

A. The Trust Problem

As the term suggests, the primary concern was over the great industrial trusts that sprang up in the late nineteenth and early twentieth centuries.[20] The essence of the trust problem was the combination of competitors to create monopoly power, accompanied (or at least thought to be) by predatory practices used to force unwilling firms to join cartels, sell out to larger combinations, or simply expire.[21] Combinations came in two forms, popularly referred to as "loose" and "tight."[22] Tight combinations were the new firms created by monopolistic mergers.[23] These were the trusts that sprang up in the 1880s and quickly dominated national markets in key commodities. Among them were Standard Oil, American Tobacco, the Sugar Trust, the Whiskey Trust, and many others.[24] Loose combinations were cartels that sought market control by collusion among their members and exclusion of actual and potential competitors.[25]

As with any contested political issue, Americans in the formative period of antitrust differed in their opinions as to the nature and extent of the trust problem and how to deal with it.[26] More than a few, including Justice Holmes, thought there was no real problem at all. To them, big business, and even monopolies, were a natural consequence of technolog-

20. *See generally* Richard Hofstadter, The Age of Reform 227-56 (1955) (antitrust movement in Progressive Era); William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 54-70 (1966) (opposition to trusts); Thomas K. McCraw, Prophets of Regulation 77-78 (1984); Glenn Porter, The Rise of Big Business, 1860-1910, at 85-101 (1973); Hans B. Thorelli, The Federal Antitrust Policy: Origination of an American Tradition 108-63 (1954) (growth of opposition to trusts. See also President Grover Cleveland's Fourth Annual State of the Union Message, given Dec. 3, 1888, deploring the rise of "trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel," quoted in Rowe, *supra* note 2, at 1515.

21. Phillip Areeda, Louis Kaplow & Aaron Edlin, Antitrust Analysis: Problems, Text, and Cases 34-35 (6th ed. 2004) (perceived predatory exclusion); McCraw, *supra* note 20, at 65-79; Porter, *supra* note 20, at 54-84 (combinations); *id.* at 93 (perceived predatory exclusion); Thorelli, *supra* note 20, at 63-96.

22. Thorelli, *supra* note 20, at 72-85 (describing "loose" and "tight" combinations); *see also* Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business 315-36 (1977) (formation of loose and tight combinations); McCraw, *supra* note 20, at 95-101 (evolution of tight from loose combinations).

23. Thorelli, *supra* note 20, at 72.

24. *Id.* at 76-78.

25. *Id.* at 72-74.

26. *See generally* Hofstadter, *supra* note 20, at 131-269 (noting the often ambivalent views toward big business in Progressive Era).

ical and economic progress.[27] They did not support antitrust legislation at all.[28] Another group, including Theodore Roosevelt, agreed that big business, and even monopolies, were here to stay, but that federal regulation of their business practices was necessary, mostly to prevent predation and exploitation of workers. There was no need to dissolve or prevent the formation of properly regulated "good trusts," although a few "bad trusts," like Standard Oil and American Tobacco, which resisted reformation, might be dissolved.[29]

At the opposite end of the spectrum were those who feared what Louis Brandeis famously termed the "curse of bigness."[30] Theirs was a Jeffersonian antipathy to big business and big government. To them, the vice at the heart of the trust problem was the elimination of small, locally owned businesses by consolidation and predation,[31] resulting in the loss of the industrial and commercial equivalent of the Jeffersonian yeoman and the concomitant loss of individual liberty, opportunity, and even democracy itself, in a nation of clerks beholden to distant giant corporations for their livelihood.[32] Their quarrel with the trusts was more political and social than economic, although Brandeis convinced himself that big businesses were inherently inefficient and survived only through monopolistic exclusion.[33] But his real concern was the threat big business posed to workers and small businesses.[34] Small businessmen, of course, shared this view for more pragmatic reasons, as they feared the loss of their businesses to the trusts' apparently predatory practices, especially local price cutting. For this group, tight combinations and their perceived predatorily exclusionary practices were the primary concern.

Yet another group had concerns that more closely track modern views. For them, the vice of the new combinations was the market power that enabled the trusts to reduce output and dictate prices to consumers, and even more importantly, to suppliers.[35] Farmers in particular blamed the whiskey, tobacco, and cotton bagging trusts for suppressing commodity

27. 1 The Pollock-Holmes Letters 141 (Mark DeWolfe Howe ed., 1941) (admiring "the originality, the courage, the insight shown by the great masters of combinations") (quoting Justice Holmes)).

28. *Id.* at 163 (stating that "the Sherman Act is a humbug based on economic ignorance and incompetence" (quoting Justice Holmes)).

29. Hofstadter, *supra* note 20, at 245-48; The Writings of Theodore Roosevelt 84-92 (William H. Harbaugh ed., 1967).

30. *See generally* Louis D. Brandeis, The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis (Osmond K. Fraenkel ed., 1965).

31. Porter, *supra* note 20, at 88-89.

32. Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* The Paranoid Style in American Politics and Other Essays 168, 195-97 (1965); McCraw, *supra* note 20, at 108-09.

33. Brandeis, *supra* note 30, at 104-05, 114-21; Philippa Strum, Louis D. Brandeis: Justice for the People 147-49; *see also* McCraw, *supra* note 20, at 99-101 (criticizing Justice Brandeis's view).

34. Melvin I. Urofsky, Louis D. Brandeis and the Progressive Tradition 70-71 (1981).

35. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Ohio St. L.J. 257, 286 (1989).

prices on what they sold.[36] Others worried about monopoly pricing. But many in this group also appreciated the obvious efficiency, reflected in lower prices, that big business firms were able to achieve.[37] Typical of this group were John Sherman,[38] Woodrow Wilson,[39] and William Howard Taft,[40] all three of whom understood that even large combinations were necessary to continue the unprecedented wealth created by the industrial revolution in America but believed a line could be drawn between combinations in aid of production and those seeking monopoly power. Like Wilson, they were "for big business" but "against the trusts."[41]

While we cannot know what proportion of the public subscribed to these different views on the trust problem,[42] we do know that the first group, the one that saw no problem at all, was outnumbered. All the other groups supported at least parts of the core of antitrust, and this support produced the statutes of 1890 and 1914.[43] They all agreed that at a minimum the tight combinations needed attention.[44] Even the Roosevelt group agreed that the "bad trusts" needed curbing. For the "curse of bigness" group, tight combinations, not loose ones, were the heart of the problem.

For a great many other Americans, however, loose combinations were very much a part of the trust problem. Cartelization mushroomed in this era and its effect on prices engendered substantial political opposition.[45] Analytically, it was difficult to distinguish the harmful economic effects of loose and tight combinations.[46] Both were formed to achieve market control. The original trusts had evolved from cartels to enable more effective collusion.[47] Both combinations, if successful, reduced output and raised prices to purchasers while lowering them to suppliers.

Significantly, no one considered simple RPM, like that in *Leegin*, or any other intrabrand distributional restraint, part of the trust problem.[48] RPM seems to have been even more common in the early years of the twentieth century, yet it was not seen as an antitrust problem unless

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36. Letwin, *supra* note 20, at 59; Thorelli, *supra* note 20, at 143-47.

37. Hofstadter, *supra* note 20 at 227-33; Hofstadter, *supra* note 32, at 192.

38. *See* Thorelli, *supra* note 20, at 180-86; Arthur, *Farewell*, *supra* note 4, at 286-87.

39. *See* The Political Thought of Woodrow Wilson 214-15 (E. David Cronon ed., 1965); Hoftstadter, *supra* note 20, at 249-50.

40. *See* William Howard Taft, The Anti-trust Act and the Supreme Court 129-33 (1914).

41. Arthur, *Farewell*, *supra* note 4, at 285 (quoting Woodrow Wilson, The New Freedom 109 (W. Leuchtenburg ed. 1961)).

42. Thorelli, *supra* note 20, at 108 ("After the elapse of 60–80 years there is no way to measure accurately or conclusively 'public opinion' on [the trust problem].").

43. May, *supra* note 35, at 288.

44. *Id.* at 293-95.

45. *Id.* at 286.

46. Thorelli, *supra* note 20, at 72-73.

47. Chandler, *supra* note 22, at 315-36; McCraw, *supra* note 20, at 65-74.

48. Joseph E. Fortenberry, *A History of the Antitrust Law of Vertical Practices*, 11 Res. L. & Econ. 133, 146 (1988) (noting that RPM received little attention prior to 1890); *id.* at 209 n.161 (noting that RPM was not condemned in the Sherman Act debates).

foisted on manufacturers by dealer cartels.[49]

B. THE RESULTING ANTITRUST STATUTES

The fifty-first Congress included the core of antitrust in the Sherman Act. There is much debate over the ultimate "goals" of this Congress and the one that enacted the Clayton and FTC Acts twenty-four years later.[50] This is not surprising, as Congressmen reflected the varying views of the public at large.[51] But there is less room, much less, for debate over what these Congresses actually *did*, regardless of what individual Congressmen may have *said* in the debates,[52] especially in view of the political purposes behind legislators' public statements.[53] Procuring agreement on *the* goal (or goals) to guide judges as they create national microeconomic policy has been a hopeless task. The key to understanding the Sherman Act is to treat it as a statute, using the traditional tools of statutory construction.[54]

Many commentators, joined by the Supreme Court after the 1940s, have assumed that the Sherman and Clayton Acts merely delegated to the federal courts the power to cure any perceived competitive ill—regardless of its connection to the original problem of cartels, monopolistic mergers, and predatory exclusion—guided by some vague goal such as economic efficiency, consumer welfare, or fairness.[55] But these constructions of the Act provide no useful standard for decision and have proved inadequate to produce coherent and settled law.[56] Worse, they impose no limit on judicial lawmaking discretion, permitting the federal courts to

49. Fortenberry, *supra* note 48, at 147 (RPM "flourishing at the turn of the century and in the decade thereafter"); *see infra* notes 83-86 and accompanying text (only Justice Department cases against RPM involved cartels).

50. *Compare* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) (concluding that the sole goal was economic efficiency) *with* Fox, *supra* note 3, at 1146-55 (identifying multiple goals, such as distrust of power and interests of consumers, small businesses, and entrepreneurs; efficiency was *not* one of these goals, although "*[s]ome measure* of productive and allocative efficiency is a by-product")(emphasis added)) *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 81-142 (1982) (finding that cartel/monopoly overcharges were the primary concern, but also there were goals of protecting small business and curbing social and political power of trusts).

51. ANDREW I. GAVIL, AN ANTITRUST ANTHOLOGY 35-36 (1996); Arthur, *Farewell*, *supra* note 4, at 273.

52. Indeed, the author of the most comprehensive study of the Sherman Act has observed that "[n]ot much time was wasted in Congress on the display of the merits of competition. For purposes of legislation it was more important to get a clear picture of the evil to be remedied." And that evil "probably was not more dimly conceived than in many other instances in which legislation has since become imperative." THORELLI, *supra* note 20, at 227.

53. Less cynically, as several students of the debates have suggested, see, for example, May, *supra* note 35, at 299, it is possible that the Congressmen did not realize that, in practice, their stated goals might be in conflict.

54. Arthur, *Farewell, supra* note 4, at 270-71, 273-91; Arthur, *Workable, supra* note 4, at 1169-70, 1172-73.

55. Arthur, *Farewell, supra* note 4, at 267-70, 267 n.9 (collecting sources).

56. *Id.* at 322-26; Arthur, *Workable, supra* note 4, at 1191-1201.

regulate any form of "imperfect" or "unfair" competition to advance the stated goal, a power approaching that of Congress under the Commerce Clause.[57]

At a minimum, the scope of the basic antitrust Acts should be construed the in light of the statutory text, the evil to be addressed, and the concrete solutions that the sponsors of the legislation stated that the proposed legislation would provide. Construing the Acts this way reveals the original core of antitrust. As demonstrated above, the evil to which the Acts were addressed was the trust problem.[58] Congress responded with the Sherman, Clayton, and FTC Acts, which define the core of antitrust.

1. The Sherman Act

The first and most important antitrust statute reflected the views of all but the group that saw no real trust problem at all. But only the views of the group epitomized by Sherman, Wilson, and Taft were fully implemented. The 1890 Congress made the following decisions. First, despite concerns for labor unions and farmers, they banned cartels, the loose combinations that sought to control markets through collusion and boycotts.[59] Second, they also banned monopolistic mergers, the tight combinations that sought monopoly through consolidation and predation.[60] Third, they forbade monopoly achieved through predation, even if no combination was involved.[61] At the same time, they did not forbid combinations "in aid of production," which clearly included even large mergers short of monopoly and productive cooperation among loose combinations of competitors.[62] It was also made clear that section 2's prohibitions did not extend to single firms that achieved monopoly power by superior efficiency.[63]

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57. Arthur, *Farewell*, *supra* note 4, at 327-28.

58. A careful study of the legislative history of the Sherman Act, which also focuses on the evil addressed rather than amorphous "goals," defines the evil as "cartelization," defined as "agreements among competitors that possess market power, formed with the intent or that have the necessary tendency to restrict the output of the cartel members." Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1130 (1985). This includes both tight and loose combinations, and predatory practices are also included as means toward successful reduction of market output. *Id.* at 1135-36. This analysis is consistent with this Article's view of the core of antitrust.

59. *Id.* at 1141-42; Arthur, *Farewell*, *supra* note 4, at 289; Bork, *supra* note 50, at 21-25, 31.

60. Arthur, *Farewell*, *supra* note 4, at 285-87; Bork, *supra* note 50, at 25-26; Clark, *supra* note 58, at 1142-45.

61. Arthur, *Farewell*, *supra* note 4, at 288; Bork, *supra* note 50, at 25; Clark, *supra* note 58, at 1145-46.

62. *See* Arthur, *Farewell*, *supra* note 4, at 287; Bork, *supra* note 50, at 26-28; Clark, *supra* note 58, at 1142.

63. Arthur, *Farewell*, *supra* note 4, at 288; Bork, *supra* note 50, at 28-31. Thorelli concludes that "[b]ills and debates present a kaleidoscopic picture of definitions of trusts, monopolies and combinations in restraint of trade .... The aim of Congress, to rid commerce of monopolies and restraints of trade, was explicitly set forth in the Sherman Act. It had been set forth in substantially the same terms in numerous bills and a multitude of speeches." THORELLI, *supra* note 20, at 227.

No decisions were made with respect to RPM. No Senator even mentioned it. The only reference to RPM came from two Representatives, one of whom favored RPM. The other's position is hard to ascertain, but the best interpretation is that he "was not opposed to resale price maintenance as such but only opposed to predatory practices, including predatory practices of which resale price maintenance was a component."[64]

Spokesmen for the statute in both houses stated that section 1, the heart of the new statute, would incorporate common law doctrines in its prohibition of "contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade."[65] They cited specific cases embodying their view of what this common law forbade: cartels, monopolistic mergers, and predatory practices.[66] No case involving RPM or any other distributional restraint was mentioned, which is not surprising inasmuch as RPM agreements were generally upheld at common law.[67]

Finally, the new Act required the courts to draw the specific lines between cartels and productive loose combinations, monopolistic and benign mergers, and predatory and efficient exclusion. This was a substantial delegation to the federal courts, but not an unlimited one, which would be especially surprising in a statute imposing criminal and treble, or punitive, damages sanctions.[68] The version of the common law cited in the legislative debates may have been "artificial,"[69] but it nevertheless was intended to[70] and did provide the materials from which the Supreme Court over the next half century constructed a body of doctrine reasonably faithful to the 1890 Congress's policy choices,[71] except for the misstep in *Dr. Miles.*

2. *The Clayton and Federal Trade Commission Acts*

The 1914 statutes were a reaction to the vague rule of reason standard the Supreme Court announced in 1911 in *Standard Oil*, which seemed to give judges too much discretion to rule in favor of the trusts.[72] Their

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64. Fortenberry, *supra* note 48, at 209 n.161.

65. Arthur, *Farewell*, *supra* note 4, at 279-80; *see* 15 U.S.C. § 1 (2000). Much ink has been spilt debating what that common law was, especially whether it permitted "reasonable" cartels or really provided doctrinal support for productive cooperation. Arthur, *Farewell*, *supra* note 4, at 280; *see, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836–1937, at 268-95 (1991). That debate is beyond the scope of this Article.

66. Arthur, *Farewell*, *supra* note 4, at 288 n.115 (monopolistic merger cases cited by Sherman); *id.* at 289 n.123 (cartel cases cited by Sherman); Bork, *supra* note 50, at 25 n.54 (predation cases cited by Sherman).

67. HOVENKAMP, *supra* note 65, at 341; Fortenberry, *supra* note 48, at 208 n.155.

68. Arthur, *Farewell*, *supra* note 4, at 289-91.

69. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 20 (1978).

70. As Thorelli concluded, it "seems futile and superfluous to discuss whether the Sherman Act was intended to bring the body of common law on the subject within reach of the United States courts. Authors questioning that this was the intent of Congress manifest a striking lack of familiarity with the records of legislative proceedings." THORELLI, *supra* note 20, at 228,

71. Arthur, *Workable*, *supra* note 4, at 1172-73 & n.37 (collecting cases).

72. *See generally* LETWIN, *supra* note 20, at 253-78; MCCRAW, *supra* note 20, at 114-27.

passage was a significant part of President Wilson's New Freedom legislative program, outlined in his 1912 presidential campaign. The trust problem was, along with the tariff and banking reform, the leading domestic issue in 1912's three-way contest among Roosevelt, Wilson, and Taft.[73] The new statutes are further evidence of what that era regarded as the trust problem.

Significantly, the new Clayton Act, designed to prohibit specific anticompetitive practices in terms,[74] was limited to the ways that business combinations supposedly gained monopoly power: local price cutting,[75] exclusive dealing and tying,[76] horizontal mergers,[77] and interlocking directorates among competitors.[78] Nothing in the statute dealt with RPM or any other intrabrand distributional restraint.

The Federal Trade Commission (FTC) Act dealt with no specific practice. It created a new regulatory commission authorized to issue cease and desist orders against "unfair methods of competition."[79] While this conceivably could include RPM, the concern was for methods of competition that resulted in monopoly, not distributional restraints. As explained by the House and Senate conference committee's report: it "is now generally recognized that the only effective means of establishing and maintaining monopoly . . . is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition."[80]

3. *Government Enforcement of the New Antitrust Statutes*

Government enforcement of the Sherman Act in its infancy also confirms the understanding that the legislation was limited to cartels, monopolistic mergers, and predatory exclusion. In the formative era of antitrust

73. *Id.* at 109-12; R. HOFSTADTER, *supra* note 20, at 248-52.

74. LETWIN, *supra* note 20, at 271-72 (President Wilson's message to Congress); *id.* at 273-76 (Congressional action on specific provisions).

75. *See* Clayton Act § 2, 15 U.S.C. § 13 (2006).

76. *See* Clayton Act § 3, 15 U.S.C. § 14 (2006).

77. *See* Clayton Act § 7, 15 U.S.C. § 18 (2006). This section was amended in 1950 to extend its coverage to asset acquisitions, which had been used to evade the statute's coverage, to unsplit an infinitive, and to cover vertical and conglomerate acquisitions. The amendments did not alter the " may . . . substantially . . . lessen competition, or tend to create a monopoly" substantive standard for judging acquisitions. *See* Celler-Kefauver Act, ch. 1184, §§ 7, 11, 64 Stat. 1125, 1125-28 (1950) (current version at 15 U.S.C. § 18 (2006)). The Warren Court relied on the legislative history of the Amendments to invalidate mergers that posed no threat of monopoly or even oligopoly, relying on a mixture of oligopoly theory and populism. Brown Shoe Co. v. United States, 370 U.S. 294, 316-17 (1962). *See* Rowe, *supra* note 2, at 1524-33. There is no question that the sentiments in opposition to "rising concentration" and favoring the preservation of small businesses cited in *Brown Shoe* can be found in the Congressional Record. Whether these sentiments should be used to form the meaning of a statute passed thirty-six years earlier is debatable in view of the 1950 Congress's failure to amend the 1914 Congress's substantive standard. This question is beyond the scope of this Article, inasmuch as Clayton Act section 7 applies only to mergers and acquisitions.

78. Clayton Act § 8, 15 U.S.C. § 19 (2006).

79. FTC Act § 5, 15 U.S.C. § 45 (2006).

80. LETWIN, *supra* note 20, at 277.

(1890-1914) every one of the Justice Department's civil and criminal antitrust cases involved either loose or tight combinations.[81] The loose combination cases attacked price fixing, market division, and boycotts against competitors of cartel members. The other cases attacked many of the tight combinations. Some challenged larger mergers, while others like the cases against Standard Oil and American Tobacco, also cited their exclusionary practices as illegal.[82]

Even after the decision in *Dr. Miles*, the Department brought no RPM case until it secured an indictment against Colgate on December 18, 1917, asserting that its RPM program was a violation of the Act.[83] The Government did bring a case against a dealer cartel which had either persuaded or coerced manufacturers into enforcing it by an elaborate system of RPM.[84] Significantly, the consent decree entered in this case, while enjoining the manufacturers from employing this system in aid of the dealer cartel, expressly exempted their use of simple RPM,[85] the same result that *Leegin* requires today.[86] Thus, until six years after the Supreme Court held in a private case that RPM violated the Act, the Justice Department had no enforcement program against it. At the same time, the Roosevelt, Taft and Wilson Administrations were noted for antitrust enforcement. The clear implication is that RPM was not considered by these Administrations to be part of the trust problem.

C. The Economics of RPM and the Core of Antitrust

That RPM was not considered part of the trust problem and was almost entirely absent from the Congressional deliberations of 1890 and 1914 should be no surprise. Except when used as part of a cartel, RPM does not tend to produce market power by either exclusion or collusion. Its only possible contribution to a manufacturer's market power is to provide a more effective means for marketing its brand.

81. Commerce Clearing House's "Blue Book" lists every Justice Department action under the Sherman and Clayton Acts. This section relies on the 1952 edition, CCH, The Federal Antitrust Laws with Summary of Cases Instituted by the United States, 1890-1951, at 67-115 (1952), listing all cases brought from the passage of the Sherman Act until the indictment in *United States v. Colgate*, the 195th case brought.

82. CCH, *supra* note 81, at 67-115.

83. CCH, *supra* note 81, at 115 (Case No. 195, United States v. Colgate & Co., Criminal No. 1294 (E.D.Va. indictment filed Dec. 18, 1917)).

84. CCH, *supra* note 81, at 75 (Case No. 32, United States v. Nat'l Ass'n of Retail Druggists, Equity No. 10593 (D. Ind. petition filed May 9, 1906)).

85. Fortenberry, *supra* note 48, at 148, 212 n.90. There are also allegations of RPM in the case brought against the Whiskey Trust, one of the first actions ever brought by the Department. CCH, *supra* note 81, at 68 (Case No. 5, United States v. Greenhut, Criminal Nos. 461, 570 (D. Mass. indictments returned Feb. 23, 1892, May 10, 1892)). The key charge was that the trust had acquired or leased seventy-eight competing distilleries which produced seventy-five percent of all spirits sold nationally. *Id.* As part of the scheme to monopolize, it sold to dealers under exclusive contracts which also included RPM. *Id.* It is not clear what role the RPM played in the scheme, but it is clear that this was not a case brought against the use of simple RPM.

86. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715-16 (2007).

1. The Three Basic Types of Distribution

If the world were actually like the perfect competition model of the textbooks, all manufacturers would simply leave product distribution to the market. No one, either manufacturer or dealer, would ever promote a product. In a world of perfect information and standardized products (widgets!), consumers would already know all they needed to know. Marketing would not exist.[87] But in the real world of imperfect information, differentiated products and strategic behavior,[88] a manufacturer must search for the most effective way to market and distribute its products.

Basically, there are three ways: unrestricted distribution, self-distribution, or restricted distribution through dealers.[89] A manufacturer opting for unrestricted distribution sells its product, typically a commodity, to anyone who wishes to buy it.[90] By contrast, a vertically integrated, self-distributing manufacturer sells only to end-users.[91] If it sells consumer products, it may use company stores, catalogs or a website to serve customers. These manufacturers may see a need for point of sales marketing efforts and services. For example, it may be necessary to afford consumers opportunities to "test drive" or at least examine the product. Large inventories of some products are necessary for products like furniture, appliances and automobiles, where product lines are large and customers value product variety: different models, colors, styles, etc. Some consumers may need information about complicated products. For example, think about the varieties of motor vehicles or, even better, new large screen digital and high-definition televisions. Many customers will not buy these products without information from salespersons about the differences among models, what each can and cannot do, what you get for a more costly model, what extra features are used for, whether a particular customer will really use them, and so on. Customers will also need assurance about warranties, parts, and service. Company outlets are one way a manufacturer can provide necessary information and services.

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87. *See* Thomas C. Arthur, *The Costly Quest for Perfect Competition:* Kodak *and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 10 (1994). This is the basic insight of Coase's classic 1937 article. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), *reprinted in* R. H. COASE, THE FIRM, THE MARKET, AND THE LAW, at 33 (1988). *See also* Alan J. Meese, *Intrabrand Competition and the Theory of the Firm*, 83 N.C. L. REV. 5, 38-61 (2004) (explaining the differences between traditional and Coasian view of firms and vertical integration).

88. For a comparison of the textbook model of perfect competition with competition in the real world, see Arthur, *supra* note 87, at 7-12.

89. Thomas C. Arthur, *"Formalistic Line Drawing": Exclusion of Unauthorized Servicers from Single Brand Aftermarkets Under* Kodak *and* Sylvania, 24 J. CORP. L. 603, 630-32 (1999).

90. In the artificial world of perfect competition, all distribution would be unrestricted, for other market participants would provide every service that a manufacturer or customer might need. In the real world of transaction costs and imperfect information, however, manufacturers and consumers of complex products cannot always depend on other market participants for these services. *See id.*

91. *Id.* at 631.

Another way to do this is restricted distribution, where the manufacturer shares the task of distribution and promotion with selected distributors who agree to perform the same tasks that would otherwise be done in a company owned outlet: maintain inventories, provide sales and repair services, and the like.[92] In a word, they agree to distributional restraints which contractually limit their autonomy.[93] In return they get to carry the product; others do not.

The choice among modes of distribution turns on the manufacturer's judgment about the most effective and least costly means of marketing its product. Self-distributing manufacturers believe that complete vertical integration into distribution is the least costly or most effective way to market branded products. Sellers of commodities, on the other hand, usually employ unrestricted distribution. Some manufacturers employ restricted distribution to obtain in-store marketing when company-owned outlets are impractical[94] or to obtain the advantages of independently owned outlets, whose owners may be more effective and motivated marketers than the manufacturer's employees would be.[95]

2. *Restricted Distribution*

The three basic modes of distribution are on a spectrum from complete vertical integration into distribution to none at all, with restricted distribution in between.[96] Restricted distribution is a form of partial integration by contract, in which a manufacturer and its dealers become partners in the marketing and distribution of the product.[97] The degree of partial integration can vary widely, depending on the manufacturer's perceived needs.[98] Some products (for example, autos, tires, and gasoline) are sold through authorized dealers who sell only that manufacturer's products and are to buyers indistinguishable from company outlets. Others are sold by dealers who carry many products, perhaps even competing brands of the same product

Similarly, the degree of intrabrand competition reduced by various distributional restraints also varies. Some, the so-called "airtight" restraints on territories and classes of customers, may eliminate all competition among dealers.[99] Airtight restrictions end all competition among dealers; each is a "monopolist" of that brand, enabled to sell to consumers on a

92. *Id.* at 631; Meese, *supra* note 87, at 55-57.

93. Meese, *supra* note 87, at 23.

94. For example, it is not practical to have single-brand outlets for products that must be widely available, such as toiletries, soft drinks, or over the counter drugs.

95. *See* Meese, *supra* note 87, at 54-55 (costs of complete integration); *id.* at 56-57 (use of integration by contract to avoid these costs); *see also* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 157-58 (auto manufactures' decision to use franchised dealers rather than company outlets).

96. Arthur, *supra* note 89, at 631-32.

97. Meese, *supra* note 87, at 55-61.

98. Arthur, *supra* note 89, at 625.

99. *See* Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 4 n.10 (1978) ("'Airtight' territorial or customer alloca-

"take it or leave it" basis. The contracts between soft drink companies and their bottlers are a good example.[100] Other restraints may leave considerable room for intrabrand competition. Location clauses, which restrict dealers to retail sales from specified outlets, may permit a lot of competition among dealers of the same brand if the authorized locations are not too far apart.[101] As the Supreme Court correctly stated in *Sylvania*, these distinctions among distributional restraints are merely differences of degree and form, just like the distinction between self-distribution (complete vertical integration) and restricted distribution (partial vertical integration by contract). Manufacturers choose among forms of restricted distribution in the same "most bang for the buck" way that they choose among the three basic methods.[102]

Restricted distribution in all its forms increases dealer margins to induce them to carry and promote the brand. Often this is necessary to prevent free riding by discounters who provide few of the necessary sales efforts, but take sales from authorized dealers that do when consumers take advantage of the authorized dealer's services and later purchase the product from the discounter.[103] But preventing free riding is not the only reason to ensure that authorized dealers have higher margins. A dealer's margin is like a salesperson's commission. For the manufacturer, it is part of the cost of distribution.[104] For the store, it is compensation for carrying and promoting that manufacturer's product rather than others'.[105] Retailer time, effort, and shelf space are scarce resources, and stores must choose among products to carry. Other things being equal, they carry the products that will make them the most money: those with the best combination of sales volume and product markup.[106] Manufacturers may have to ensure higher margins to attract dealers to devote shelf and floor space, sales efforts, and the benefits of their reputations for carrying qual-

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tion simply means that these restrictions are absolute, so that the dealer has exclusive rights with respect to that supplier's product or service in the designated area of sale.").

100. *See, e.g.*, Tomac, Inc. v. Coca-Cola Co., 418 F. Supp. 359, 359-61 (C.D. Cal. 1976) (describing Coca-Cola's restrictions on bottlers).

101. *See* Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 42-43 (1977). Location clauses permit a manufacturer to vary the degree of intrabrand competition based on its judgment of local conditions. It may give a very successful dealer the functional equivalent of an exclusive territory by franchising no other stores in that locality. On the other hand, it may authorize more, and nearby, locations in a locality where the existing dealer has been unsuccessful. This is what sparked the dispute between Continental TV and Sylvania. Dissatisfied with Continental's results in San Francisco, Sylvania authorized another San Francisco retailer to sell its televisions from a location less than a mile from Continental's outlet. *Id.* at 39. At the same time, Sylvania refused to authorize Continental to carry its products in Sacramento, where it had achieved exceptional results. *Id.* at 39-40.

102. *See id.* at 58 n.29; *see* Arthur, *supra* note 89, at 631.

103. BORK, *supra* note 69, at 290-91; RICHARD A. POSNER, ANTITRUST LAW 172-73 (2d ed. 2001).

104. POSNER, *supra* note 103, at 171.

105. Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736, 739-40 (1984).

106. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 460 (3d ed. 2005).

ity products to products,[107] even if no free riding is involved,[108] just as it might have to pay higher commission rates to its own sales people in a company outlet. Even if no in-store services are necessary, a manufacturer may need to ensure some level of dealer margin to induce stores to carry the product at all. This is especially likely if the product is new and unknown,[109] or one that must be available in myriad outlets.[110]

The most important thing to understand about these higher dealer margins is their function: to provide dealers incentives to carry the product, to promote it, to agree to provide necessary services, above all, to do whatever it takes to make sales. With the appropriate incentive, manufacturer and dealer interests in moving the product are aligned, making it unnecessary to enforce contractual obligations to perform services.[111] In some cases, dealers may know better than manufacturers how to sell the product. In that case there may be few requirements imposed on the dealer, since the margin induces it to use its superior expertise to sell the goods.[112]

The dealer efforts induced by higher margins may in turn allow the manufacturer to spend less on advertising and marketing, which leads to a lower wholesale price and, perhaps, even a lower retail price, despite the higher dealer margins. It is important to remember that the manufacturer has no interest in spending more on marketing than necessary to maximize sales. After all, it does not share in the dealer's higher markup; its revenues are the product of its total sales times its wholesale price. Dealer margins are a just another cost of distribution, which the manufacturer wishes to minimize.[113] The manufacturer is indifferent as to whether it incurs these costs directly or indirectly via higher dealer markups. For this reason, the interests of consumers and manufacturers are also aligned. Both want the lowest feasible retail price.

The key point is that the manufacturer's choice among modes of distribution, including restricted distribution, cannot threaten the core of antitrust. It bears repeating that the distinction between vertical integration and partial integration in distribution is only a matter of form and degree, as are the distinctions among the various forms of restricted distribution. The competitive impact of all forms of integration into wholesaling and

107. *See* Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 348 (1984).

108. HOVENKAMP, *supra* note 106, at 459-62; Goldberg, *supra* note 105, at 740-41.

109. 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 183-96 (2d ed. 2004) (restricted distribution generally); *id.* at 308 (RPM). Marvel & McCafferty, *supra* note 107, at 349. Both opinions in *Leegin* recognized the use of restricted distribution, including RPM, to ease the market entry of new products. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2716 (2007) (majority opinion); *id.* at 27-28 (Breyer, J., dissenting).

110. AREEDA & HOVENKAMP, *supra* note 109, at 307.

111. Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 266-67 (1988).

112. *Id.* at 294.

113. POSNER, *supra* note 103, at 171.

retailing is the same.[114] A completely vertically-integrated, self-distributing manufacturer "fixes" its retail prices, keeps its products from discounting retailers, and permits no intrabrand competition.[115] Yet no one has ever suggested that its unilateral pricing decisions should be subject to antitrust challenge, despite the total absence of intrabrand competition.[116] Clearly, its decision to self-distribute produces no artificial market power. Its evident purpose is to obtain the most efficient distribution of the product and to compete more effectively with other brands.

Restricted distribution also provides the manufacturer no artificial market power. Competition from other brands remains unchanged.[117] The manufacturer's partial integration with its distributors is intended to achieve the most efficient product distribution. Indeed, unless airtight restrictions are used, partial integration permits some, and often a lot of, intrabrand competition. If self-distribution poses no threat to the core of antitrust, *a fortiori* no form of restricted distribution does either.

3. *RPM: Another Form of Restricted Distribution*

RPM is another form of restricted distribution,[118] whether used alone or in conjunction with other distributional restraints. The facts in *Leegin* are an example of a manufacturer's use of RPM as part of a marketing strategy that relies on in-store service.[119] Leegin produces the Brighton brand of belts, handbags, and other fashion accessories for women, which it sells nationally in over 5,000 stores, mostly small independent boutiques and specialty stores.[120] Leegin's marketing strategy relies on the promotional activities of these smaller outlets, believing that they "treat customers better, provide customers more services, and make [customers'] shopping experience more satisfactory than do larger, more impersonal retailers."[121] Per its president, Leegin "want[s] the consumers to get a different experience than they get in Sam's Club or in Wal-Mart. And you can't get that kind of experience or support or customer service from a store like Wal-Mart."[122] In 1997, Leegin instituted an RPM policy, refusing to sell to retailers who failed to observe Leegin's suggested retail prices, in order to induce in-store promotion and also out of con-

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114. Meese, *supra* note 87, at 61-69.
115. *Id.* at 61-64 & n.288.
116. *See, e.g.*, *Leegin*, 127 S. Ct. at 2715.
117. *See id.*
118. Posner, *supra* note 2, at 7-9.
119. *Leegin* also illustrates how RPM cases arise from dealer terminations. Plaintiff PSKS, Inc. operates Kay's Kloset, a women's apparel outlet which carries goods from about seventy-five different makers. It began carrying and promoting Brighton's products in 1995 and ultimately those accounted for forty to fifty percent of its profits. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2711 (2007). In December 2002, Leegin discovered that Kay's was discounting the entire Brighton line by twenty percent and asked it to cease. *Id.* When Kay's refused, Leegin stopped selling to the store, costing it considerable revenues. *Id.* PSKS sued, relying on *Dr. Miles*. *Id.* at 2712.
120. *Id.* at 2710.
121. *Id.* at 2710-11.
122. *Id.* at 2711.

cern that discounting harmed Brighton's brand image and reputation for quality.[123]

Of the modes of restricted distribution, RPM by itself embodies only a small degree of vertical integration.[124] Nevertheless, it still is a form of partial integration by contract in which the dealer gives up some of its discretion and acts at the direction of the manufacturer, as the employees in a company store do. In return, the dealer gets a higher markup on the product, which induces it to carry and promote it and, if necessary, ensures that discounters can't free ride on its marketing efforts.[125] Where products must be sold in many outlets, RPM may be the only practical form of restricted distribution.[126]

While RPM restricts intrabrand competition to a substantial extent, there are more restrictive distributional restraints. Some manufacturers impose "airtight" territorial and customer restrictions on dealers.[127] Others employ location clauses to achieve the same result by spacing authorized dealers farther apart.[128] RPM by itself prohibits no form of nonprice competition by dealers.[129] They remain free to vie for business by providing better service, more pleasant stores, nicer sales people and the like.

In short, the competitive effects of simple RPM are no different from those of other forms of restricted distribution, which in turn do not differ from those of full vertical integration into retailing. So RPM, like the other forms of restricted distribution, does not implicate the core of antitrust.

What, then, explains the relatively greater concern that many exhibit over RPM and the result in *Leegin*? There are three primary reasons for this extra concern. The first is the most important. The analysis so far has been of simple RPM, like that in *Leegin*, which is imposed on dealers by a manufacturer's unilateral, good faith decision that this is the most effective way to distribute its product. This is not part of the core of antitrust. But RPM imposed on a manufacturer coerced by the threat of

123. *Id.* The policy made an exception for poorly-selling products that the store did not plan to reorder. *Id.* A year later, Leegin created a marketing strategy that provided retailers additional incentives to become "Heart Stores." *Id.* In exchange, Heart Stores pledged, *inter alia*, to observe Leegin's resale prices. *Id.* Kay's Kloset became a Heart Store, but after a Leegin representative visited the store and found it "unattractive," the parties agreed that Kay's would no longer participate in this program. *Id.* at 2711-12

124. On the other hand, RPM may accompany other contractual provisions that provide a great deal of partial integration by contract.

125. The higher retail price may also signal higher product quality to consumers, which may be more important to them than lower prices. George R. Ackert, *An Argument for Exempting Prestige Goods from the Per Se Ban on Resale Price Maintenance*, 73 TEX. L. REV. 1185, 1192-93 (1995). After all, as the L'Oreal models say, "I'm worth it."

126. HOVENKAMP, *supra* note 106, at 460; Posner, *supra* note 2, at 9.

127. See *supra* notes 99-101 and accompanying text. The majority in *Leegin* recognized that such restraints "reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition." *Leegin*, 127 S. Ct. at 2723.

128. See *supra* note 101 and accompanying text.

129. Alan J. Meese, *Property Rights and Intrabrand Restraints*, 89 CORNELL L. REV. 553, 564 (2004).

boycott from a cartel of dealers, or employed by manufacturers to facilitate a cartel,[130] *does* pose the same antitrust concerns as any other form of cartel action.[131] An effective anticartel program should prevent these uses of RPM.

The second and third explanations come from those who look back to the era of expansive antitrust from 1940-1970, in which antitrust prohibitions expanded far beyond core antitrust concerns, with little regard for costs to productive efficiency.[132] The second explanation is a lingering belief that the proper scope of antitrust law is not limited to its core, but should eliminate other "competitive" harms that have no relation to the core of antitrust, but are derived from theories of imperfect competition that were developed decades after passage of the Sherman Act, in particular the theories of monopolistic competition, which deal with oligopoly[133] and differentiated products.[134] Suspicion of differentiated products and promotion, especially brand image advertising, were seen as threats to "workable competition," the real world approximation of the perfect competition model and the proper goal of antitrust.[135] As substitutes for advertising, RPM and other forms of restricted distribution were viewed askance by mid-century industrial organization economists and the Justice Department, which sought to expand the *Dr. Miles* rule.[136]

The final explanation is another form of nostalgia for the old days of antitrust, in this instance from the Brandeis group, whose support of small businesses morphed in the era of the Warren Court from the old tolerance for the defensive use of horizontal restraints by little guys to a

130. Lambert, *supra* note 10, at 5.

131. AREEDA & HOVENKAMP, *supra* note 109, at 83-85; Lambert, *supra* note 10, at 6-9 (noting that RPM aids in the detection of secret price cuts, as resale prices are easier to monitor and also reduces incentives to cheat on cartel price, as dealers cannot pass costs on to consumers). Some have also theorized that RPM could be imposed on a manufacturer by a dominant retailer as part of a strategy to exclude other retailers. Lambert, *supra* note 10, at 9-10. If so, this also would implicate a core antitrust concern. But while this is theoretically possible, it is unlikely. First, do such retailers exist? Second, the ones usually thought of as having some degree of "buying power" (but not enough to be monopsonists), especially Wal-Mart, are discounters. If anything, they would be likely to make manufacturers abandon restricted distribution, not impose it. In any event whether the dominant retailer theory poses a real world antitrust concern is beyond the scope of this Article.

132. Arthur, *Workable*, *supra* note 4, at 1188-90 & nn.127-29; Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 350-51 (2000) [hereinafter Arthur, *Rule*].

133. Oligopoly theory posits that sellers in concentrated markets, where a few firms together make most of the sales, will tend not to compete on price. As a result prices will be "sticky," even absent collusion. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 199-226 (3d ed. 1990). For a brief summary and critique, see Rowe, *supra* note 2, at 1541-47. This theory was widely adhered to in the middle of the twentieth century, *id.* at 1544-45, but has been heavily criticized since then, with the result that modern oligopoly theory is much more nuanced, predicting oligopolistic interdependence only in particular circumstances. SCHERER & ROSS, *supra*, at 277-315.

134. See *supra* notes 2-3 and accompanying text.

135. PHILLIP AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 9-12, 15-17 (1st ed. 1967).

136. EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933); *see infra* note 212. .

concern for the autonomy of the small businesses involved in restricted distribution. The aspect of partial integration that permits manufacturers for some purposes to direct dealers as they would their own employees, as with RPM, is the perceived vice that offends the old Brandeisian concern with a nation of clerks. Along with the economic concern with imperfect competition, this autonomy of dealers rationale had a large effect on antitrust doctrine from 1940-1970, especially under the Warren Court.[137]

The concerns behind the last two explanations may be legitimate,[138] but they are not part of the core of antitrust. The views of the Brandeis group have certainly influenced antitrust over its history, but did not prevail in 1890. The theories of imperfect competition were unknown during the formative era of antitrust, and thus could not have been viewed as part of the trust problem or as playing any role in the passage of the Sherman, Clayton, or FTC Acts.[139] These contested factors cannot support a coherent and stable body of doctrine. Adding their promotion to the already difficult task actually delegated to the federal courts by these statutes is a recipe for disaster, as illustrated in the expansive period of antitrust in the mid-twentieth century.[140] They are the proper subject of other regulatory regimes.

II. *DR. MILES* AND THE (ALMOST) PER SE PROHIBITION OF RPM

There is a vast and very informative literature on *Dr. Miles* and its progeny. Many commentators have emphasized two major but mutually inconsistent points: that (1) *Dr. Miles* held RPM per se illegal, even if it was only simple RPM, like that employed by Leegin, with no conceivable connection to a cartel at either the dealer or manufacturer level and (2) until the Warren Court's expansive vertical restraints cases in the 1960s, there were two significant loopholes in the *Dr. Miles* rule: firms could legally impose RPM by using their right to refuse to deal to induce tacit and even express agreements to maintain minimum resale prices and by consigning, rather than selling, their goods.[141] Obviously, both points cannot be true. Just as obviously, the second point is the true one. Thus,

137. This was explained by Justice White in his concurring opinion in *Sylvania*. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 66-69 (1977) (White J., concurring); *see infra* note 223; *see also* Fox, *supra* note 3, at 1152 ("[F]rom the 1950s to the early 1970s, the Court emphasized freedom of traders and competition among many players, not efficiency."); *id.* at 1184 ("The per se rule against vertical price-fixing reflects the value that sellers of goods should have the freedom to charge the price they see fit.").

138. This question is beyond the scope of this Article.

139. Modern merger law under the 1950 amendments to section 7 of the Clayton Act has been used to prevent oligopoly, especially in the days of the Warren Court. *See* Rowe, *supra* note 2, at 1523-24. No other antirust statute applies to it.

140. *See, e.g.*, Arthur, *Farewell*, *supra* note 4, at 309-28; Arthur, *Workable*, *supra* note 4, at 1191-1201.

141. *See, e.g.*, Posner, *supra* note 103, at 176-79. A third loophole was created legislatively. From 1937 to 1975, firms could go further and impose RPM through binding contracts in states that adopted fair trade laws. *See infra* notes 224-29 and accompanying text.

only a narrowly and formalistically defined RPM was actually illegal per se.[142]

A related point has not been emphasized in the literature. The commonly understood rationale for *Dr. Miles*, that the economic effects of vertical and horizontal price restraints are equivalent, would also require proscription of *all* significant restrictions on intrabrand competition: maximum resale prices, territorial and customer restrictions, and perhaps even location clauses. All restrict intrabrand competition and affect resale prices. Yet there was no serious threat to their legality until the 1950s and 1960s.[143]

Not until the Warren Court decisions in the 1960s could *Dr. Miles* accurately be said to have established a real per se rule against PRM. The real per se rule had to wait until the 1960s, when other temporarily popular, peripheral antitrust concerns, namely dealer autonomy and "spurious" product differentiation, motivated the Justice Department and Supreme Court.

A. *Dr. Miles* and the (Supposed) Per Se Rule Against RPM

1. *RPM and Patent Medicines*

RPM was a response to the changes in product distribution caused by the industrial revolution in America. In the generation after the Civil War, the advances in communication and transportation from the invention of the telephone, telegraph, railroad, and steamship, and the rapid improvement of postal services led to mass distribution,[144] which accompanied the growth of mass production begun earlier in the century.[145] Mass production and mass distribution led ultimately to big business and the trusts.[146] Mass distribution also led to big businesses in wholesaling and retailing, first with department stores[147] and later with mail order houses in the nineteenth century,[148] then with chain stores in the mid-twentieth century,[149] and finally with Wal-Mart and the "big box" retailers of today. The superior efficiency of these stores put immense pressure on traditional wholesalers and retailers and was a substantial source of the "loud outcry of small businessmen against big business in the Pro-

142. By contrast, tacit agreements by competitors on prices have consistently been proscribed. *See, e.g.*, United States v. Masonite Corp., 316 U.S. 265, 274-75 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939); Am. Column & Lumber Co. v. United States, 257 U.S. 377, 399, 410-11 (1921); *see also* E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914) (implied boycott).

143. Fortenberry, *supra* note 48, at 179.

144. Chandler, *supra* note 22, at 209-39 (rise of mass distribution).

145. *Id.* at 240-83.

146. *Id.* at 285-336.

147. *Id.* at 224-29.

148. *Id.* at 230-33,

149. *Id.* at 233-35.

gressive period of American history."[150] In particular, the supporters of Brandeis's version of antitrust viewed the new mass distributors as a threat to American values and sought legal means to protect traditional merchants from their competition.[151]

At the same time, the new techniques of mass production, distribution, and communication led to new branded and trademarked products which were marketed nationally, especially in the new mass market magazines. Patent medicines were one of the first such products.[152] The key to success in this highly competitive business lay in advertising and other modes of successful brand promotion and in the widespread availability of the product in myriad outlets. Low prices were of lesser importance in the competition among the leading brands.[153]

RPM was widely used by patent medicine firms, including Dr. Miles. Their trade association even developed standard form contracts for product distribution and otherwise assisted members in maintaining resale prices.[154] At the same time, traditional wholesale and retail druggists promoted RPM as a defense to the threat from the new price cutting mass merchandisers. Both distributor groups formed national trade associations to force manufacturers to "impose" RPM on them and were apparently very effective in doing so.[155]

It is not possible to say whether the manufacturers in this era would have adopted RPM absent this pressure from wholesalers and retailers. But there is reason to believe that they might have, that in this case the interests of manufacturers and traditional distributors may have converged. Many manufacturers of trademarked goods believed that maintaining retail prices was important to attract and keep dealers and to preserve their products' reputation for quality at a fair price.[156] Dr. Miles itself developed the "direct contract" sales plan at issue in *Dr. Miles*[157] and, as shown below, asserted in the litigation that the plan was necessary for the effective marketing of its products, along the lines in the discussion of RPM in Part I.

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150. *Id.* at 233. *See generally* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA. L. REV. 1011 (2005).

151. MCCRAW, *supra* note 20, at 101-08 (noting Brandeis's support for RPM to protect traditional distributors).

152. Rudolph J.R. Peritz, *"Nervine" and Knavery: The Life and Times of* Dr. Miles Medical Company, *in* ANTITRUST STORIES 61, 64-69 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

153. Peritz, *supra* note 152, at 67-68.

154. *Id.* at 74.

155. HOVENKAMP, *supra* note 65, at 341-42; Fortenberry, *supra* note 48, at 147-48, 211 n.187; Peritz, *supra* note 152, at 77-80. The Justice Department sued the retail druggist cartel and obtained a consent decree. *See supra* notes 84-85 and accompanying text.

156. Brandeis argued in his famous article *Competition that Kills*, that discount prices "tend[ ] to make the public believe that either the manufacturer's or the dealer's profits are exorbitant; or in other words, that the [product] is not worth [the usual price]." Louis D. Brandeis, *Competition that Kills*, *in* BUSINESS—A PROFESSION 243, 254 (1933).

157. Fortenberry, *supra* note 48, at 211 n.187.

2. Dr. Miles

Dr. Miles and John D. Park & Sons were repeat players in a series of cases involving RPM. Park was a leader in the "cut rate business" who specialized in sales to discounting retailers and appears to have been an especially effective thorn in the sides of both manufacturers employing RPM and trade associations that sought to impose it.[158] Park sued the National Wholesale Druggists' Association in the New York state courts to obtain an injunction against the wholesalers' standard contract, which included RPM provisions, a case which the New York Court of Appeals decided four to three in the Association's favor on Brandeisian grounds.[159] Park was also the defendant in cases brought by manufacturers seeking to enjoin its interference with their RPM programs. One of these, of course, was *Dr. Miles* itself, which was one of a series of similar cases brought by the company.[160]

The litigation and decisions in *Dr. Miles* have been described many times in the literature. There is no need for another description here. Instead, several distinct points need to be emphasized.

First, *Dr. Miles* was not brought as an action under the Sherman Act by either the Justice Department or a private plaintiff.[161] Dr. Miles sued to enjoin Park's allegedly tortious interference with its wholesaler and retailer contracts.[162] Its case was based on its contract and property rights and Park's defense necessarily relied on common law property and contract doctrines. Park's Sherman Act defense added little, if anything, to its affirmative defense that Dr. Miles's contracts were unenforceable because they were in restraint of trade.[163]

Second, the property law issues in the case played a significant role in the outcome and would be even more important in subsequent cases, leading to the *Colgate* and consignment loopholes. Especially important was whether Dr. Miles's undoubted right not to sell its medicines at all gave it the lesser right to sell under conditions that bound all subsequent purchasers, even ones not in privity with the company.[164] As Edward Levi's classic article shows, courts were more concerned for the property rights of retailers who did not purchase directly from manufacturers. The retailers' property right to alienate the goods they bought from wholesal-

158. Peritz, *supra* note 152, at 73-74, 77.

159. *See generally* John D. Park & Sons Co. v Nat'l Wholesale Druggists' Ass'n, 67 N.E. 136 (N.Y. 1903). This case is described in Peritz, *supra* note 152, at 77-80.

160. Peritz, *supra* note 152, at 74-84.

161. In fact, no simple RPM cases were brought by the Department prior to the indictment in *Colgate*. See *supra* note 83.

162. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 394 (1911).

163. Justice Hughes assumed that the restraint of trade and Sherman Act issues were identical. He concluded the Dr. Miles's RPM was not an ancillary restraint of trade at common law and thus was unenforceable. *Id.* at 383-84.

164. *Id.* at 407. Another issue was whether Dr. Miles's trade secret rights gave it greater rights to impose limitations on subsequent purchasers, as patentees and copyright holders had been held to have. The Court held that whatever extra rights patentees may have to control prices by subsequent vendors did not extend to makers of products manufactured under a secret process. *Id.* at 401-04.

ers tended to overshadow the manufacturer's right to select its wholesale customers,[165] since "the restriction appears to be greater as the vendee becomes more remote from the manufacturer."[166] The "direct contract" plan certainly raised those concerns. Each package of the product bore not only the manufacturer's price, but also a unique number used to trace each one through the distribution system so that price cutting retailers could be identified and cut off.[167] Since retail druggists purchased from Dr. Miles's wholesalers rather than directly from the manufacturer,[168] this seemed very much like a restriction running with the chattel, and the Court rejected Dr. Miles's property rights defense of its system on an opposition to restraints on alienation.[169]

The legality of Dr. Miles's retailer contracts was only reached once it was clear that Dr. Miles's right to impose the "direct contract" on retailers could not rest on its property rights, but only on its agreements with the retailers.[170] This necessarily raised the question whether those contracts were unenforceable because they were unreasonably in restraint of trade under both the common law of contracts and the Sherman Act. Other RPM programs that restricted only direct purchasers thus could be, and later were in *Colgate*, distinguished from *Dr. Miles* on the very property law grounds urged by the manufacturer in *Dr. Miles*.[171]

An additional property law question was raised by Justice Holmes in his dissent, where he asserted that even the majority would have to bow to the rights of a manufacturer that consigned, rather than sold, its products to dealers.[172] After all, Justice Hughes's opinion for the Court had phrased the restraint of trade question as the validity of "agreements restricting the freedom of trade on the part of dealers *who own what they sell*."[173] This paved the way for the consignment loophole.

Third, the fact that the case arose in the context of the wholesaler and retailer cartels' complicity in Dr. Miles's plan may well have explained the result. The most famous part of Justice Hughes's opinion asserted that Dr. Miles's system only benefited its dealers and thus was the functional equivalent of a dealer cartel.[174] Judge Lurton, in his opinions for the Sixth Circuit in *Dr. Miles* and in *John D. Park & Sons Co. v. Hartman*, a similar action brought by another patent medicine concern, had emphasized that the "direct contract" plans in each case completely ended all

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165. Edward H. Levi, *The Parke, Davis–Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 273-77; *see also id.* at 274-75 ("The question whether conditions may run with goods as a type of negative easement or whether this kind of qualification of title is a fatal restriction on alienation is in the background of the resale price maintenance cases.").

166. *Id.* at 273.

167. *Dr. Miles*, 220 U.S. at 377, 381.

168. *Id.* at 386.

169. *Id.* at 404-05.

170. *Id.* at 405-06.

171. *See infra* notes 165-66 and accompanying text.

172. *Dr. Miles*, 220 U.S. at 409-19 (Holmes, J., dissenting).

173. *Dr. Miles*, 220 U.S. at 407-08 (emphasis added).

174. *Id.* at 407-09.

price competition among the hundreds of wholesalers and thousands of retailers selling the complainants' products.[175] In *Hartman*, Judge Lurton had drawn a distinction between such an extensive system and when "a single contract only is involved and when the action is between the contracting parties for a breach."[176]

Whether the judges had the actual cartel in mind or not, they must have been affected by the fact that, in operation, the "direct contract" plan had all the features of a traditional cartel among wholesalers and retailers. It was not limited to a small set of wholesalers and retailers who clearly had no collective market power, but involved over 400 wholesalers and 25,000 retailers, which, per Dr. Miles's bill of complaint, amounted to "'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country.'"[177] All the participants seemed to have "colluded" on the retail price, even though, in fact, it was set unilaterally by Dr. Miles, and the contract provisions forbidding sales to wholesalers and retailers who would not agree to Dr. Miles's terms resembled a boycott by traditional wholesalers and retailers to exclude nontraditional rivals.[178] The system of numbered packages designed to catch cheaters who sold to price-cutters in violation of their contracts also had a cartel feel. The fact that there was, in fact, a reseller cartel involved may well have impelled the judges to the conclusion that the manufacturer's protestations on its own interest in the resale price were pretextual. In any event, it must have underlined the cartel-like features of Dr. Miles's system.

But no dealer cartel was actually before the court in either case. Formally, both cases involved simple RPM, albeit on a grand scale affecting most, if not all, of the non-price-cutting wholesale and retail druggists in the nation. Dr. Miles's bill of complaint naturally did not allege that it had been compelled to adopt the "direct contract" plan by a threatened boycott of its products and, in fact, it may not have, despite the role of the retail and wholesale druggists' associations with RPM in the patent medicine trade. As its bill of complaint alleged, it had good business reasons to adopt RPM: it needed to ensure dealer margins to induce them to carry and promote its products and to preserve the brand's quality image.[179] Dr. Miles, then, urged many of the contemporary justifications for

175. *Id.* at 407; John D. Park & Sons Co. v. Hartman, 153 F. 24, 42-43 (6th Cir. 1907).

176. *Id.* at 43.

177. *Dr. Miles*, 220 U.S. at 381, 400.

178. The Court consistently held that such boycotts violated section 1. *See, e.g.*, E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S, 600, 614 (1914); W.W. Montague & Co. v. Lowry, 193 U.S. 38, 44-47 (1904).

179. Per the Supreme Court's opinion, Dr. Miles's bill of complaint alleged that "most of its sales were made through retail druggists, and that the demand for its remedies largely depended upon their good will and commendation, and their ability to realize a fair profit." *Dr. Miles*, 220 U.S. at 374. Sales by price cutters

> injuriously affected the reputation" and "depleted the sales" of its remedies because "the majority of retail druggists as a rule cannot, or believe that they cannot, realize sufficient profits . . . at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not

RPM. Park did not contest these; its demurrer to the bill was sustained as a matter of law, which the Sixth Circuit affirmed based on its decision in *Hartman*.[180] So there was no evidence in the case either of a dealer cartel or of Dr. Miles's claims that RPM permitted it to market its goods more efficiently.

But Justice Hughes refused even to consider Dr. Miles's arguments. Perhaps he believed that they were pretextual in view of the dealer cartel, whose operations were publicly known. Perhaps he was moved by the fact that the "direct contract" plan restricted the property rights of independent retailers "who own what they sell."[181] Perhaps he really believed that there was no functional distinction between RPM and price agreements among competitors. We do not know.

What we do know is that the opinion by its terms applies even to simple RPM, as it had to in view of the record. The record provided no basis for a dealer cartel theory, which would have provided a means for distinguishing simple RPM, which does not endanger core antitrust values, from dealer cartels, which do. Justice Hughes's analogy of simple RPM to a dealer cartel rendered this functional distinction impossible. Only formalistic line drawing remained as a way to distinguish the case. It was quickly employed by the Supreme Court in the construction of the *Colgate* and consignment loopholes.

3. *The* Colgate *Loophole*

The *Colgate* loophole was defined by the Supreme Court in four confusing, formalistic line drawing opinions: *Colgate* (1919),[182] *Schrader's Son* (1920),[183] *Cudahy* (1921),[184] and *Beech-Nut* (1922).[185] *Colgate*, the most important of the four, famously announced that absent

> any purpose to create or maintain a monopoly, the act does not restrict 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; and, of course, he may announce in advance the circumstances under which he will refuse to sell,

even if the result is a tacit agreement by the buyer to maintain the seller's retail prices.[186]

> keep" the medicines "in stock," or "if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at "cut" or "reduced" price from the established price suffers loss of reputation and becomes of inferior value and demand.

220 U.S. at 374-75.

180. *Id.* at 383; Peritz, *supra* note 152, at 84-86.
181. *Dr. Miles*, 220 U.S. at 407-08.
182. United States v. Colgate & Co., 250 U.S. 300 (1919).
183. United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).
184. Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921).
185. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).
186. *Colgate*, 250 U.S. at 307.

The Court upheld the trial court's dismissal of the indictment against Colgate because it did "not charge Colgate . . . with selling its products to dealers under agreements which *obligated* the latter not to resell except at prices fixed by the company."[187] In other words, the indictment failed not because it failed to allege an agreement on RPM, as the Supreme Court incorrectly claimed in the very next case,[188] but because it only alleged an agreement on RPM that was enforced solely by the seller's refusal to deal. As the district judge in *Schrader's Son* concluded, the distinction between this and *Dr. Miles* makes no normative difference.[189]

The other three cases struggled to find a principled distinction between *Colgate* and *Dr. Miles*, but failed miserably. So long as the seller is allowed to announce in advance or otherwise communicate that it will not sell to those who will not observe its resale prices, the only ground for a principled distinction, that a unilateral refusal to deal for whatever reason cannot satisfy the concerted action requirement of section 1, is impossible. A retailer who buys and then observes a seller's resale prices, at least if it does so repeatedly, has tacitly agreed on resale prices.[190] And there could be no serious claim that *Colgate* was a mere case of refusal to deal with price cutters, even per an announced policy. The indictment in *Colgate*, extensively summarized in the Supreme Court's opinion, clearly alleged much more, including express oral agreements to maintain Colgate's fixed prices.[191]

The Court was forced to draw the line in other ways. It rejected a clear, if formalistic, distinction when it declined, in *Schrader's Son*, to draw a line between express and implied agreements, stating that the indictment in *Colgate* had failed to assert that the defendant had "made agreements, either express *or implied*," which "obligate[d] vendees to ob-

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187. *Id.* (emphasis added). The Court could not "wholly disregard the [the trial court's] statement that—'the retailer . . . could, if he chose, . . . sell it at any price he saw fit,'" his decision "'being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do.'" *Id.* at 305-06.

188. *Schrader's Son*, 252 U.S. at 99-100. The Supreme Court has held to this claim. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (citing *Colgate* for the proposition that a manufacturer "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently").

189. United States v. A. Schrader's Son, Inc., 264 F. 175, 183 (N.D. Ohio 1919), *rev'd*, 252 U.S. 85 (1920). Nevertheless, as a judge on an inferior court, he had to find some way to reconcile the two, settling on the formalistic but clear distinction between written and oral agreements. *Id.*

190. The district judge in *Schrader's Son* saw this clearly: "[t]he tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement." 264 F. at 183.

191. Specifically, the indictment charged that Colgate had maintained prices by, inter alia, "requests to offending dealers for *assurances and promises* of future adherence to prices, *which were often given*; uniform refusals to sell to any who failed to give the same; sales to those who did; similar *assurances and promises* required of, and given by, other dealers *followed by sales to them*." *Colgate*, 250 U.S. at 303 (emphasis added).

serve specified resale prices."[192] It asserted, without explaining how, that the difference between *Dr. Miles* and *Colgate* was that a refusal to deal per an announced policy somehow was not "a contract or combination which imposes any limitation on the purchaser."[193] There really was not much the Court could explain. As Professor Turner wrote, "once *Dr. Miles* was applied to tacit as well as expressed agreements, any tenable line between 'agreements' and compliance with a manufacturer's stated wishes wholly disappeared."[194]

Cudahy and *Beech-Nut* made things worse. *Cudahy* expressly held that an implied agreement on RPM could violate the Act but disapproved a jury instruction which permitted finding such an agreement when the defendant reminded its distributors of its policy "on very many different occasions" and "the great majority of them" adhered to its fixed prices.[195] Clearly an agreement can be implied from this, but somehow such an agreement would not be a "contract or combination forbidden by the Sherman Anti-Trust Act."[196] The Court provided no way to distinguish implied agreements that "obligated" a retailer to adhere to manufacturer-fixed resale prices from those that did not. Nor did it explain how any agreement, even in a formal, written contract, could "obligate," at least in any legal sense, a retailer to sell at any manufacturer-set retail price after the decision in *Dr. Miles*.

In *Beech-Nut*, the Court upheld an FTC order, despite the Commission's failure to find either an express or implied agreement on prices, because the manufacturer used methods to "secure[ ] the co-operation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."[197] Yet these especially effectual methods were similar to those used in *Colgate*: an announced policy followed by assurances, policed by efforts to detect price-cutting retailers, including reports from salesmen and other distributors and markings on containers that enabled Beech-Nut to trace goods back to specific dealers.[198]

Schrader & Son, *Cudahy* and *Beech-Nut* left the *Colgate* doctrine a formalistic mess—not just arbitrary, but uncertain. Formal written contracts were violations, despite their unenforceability. *Some* implied agreements enforced only by the refusals to deal were permitted, but ones that "obli-

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192. *Schrader's Son*, 252 U.S. at 99 (emphasis added). The trial court's suggested distinction between written and unwritten contracts, see *supra* notes 189-90, was necessarily rejected by this holding.

193. *Id.*

194. Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 688 (1962). The Court would have been hard pressed to adopt an express/implied distinction in view of its finding of an implied agreement in other section 1 cases in the same period. *See infra* note 178.

195. Frey & Son v. Cudahy, 256 U.S. 208, 210-11 (1921).

196. *Id.*

197. FTC v. Beech-Nut, 257 U.S. 441, 455 (1922).

198. Tyler A. Baker, *The Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 VA. L. REV. 1456, 1477 n.79 (1981).

gated" retailers to observe fixed prices in some unexplained non-legal way were not. So while there clearly was a protected area where courts would not be permitted to find an implied agreement that violated the law, the boundaries of that area were uncertain. And particularly effective modes of inducing dealer compliance with RPM, so long as they went beyond simple refusals to deal per announced policy,[199] also might be forbidden, even in the absence of *any* agreement, express or implied. *Beech-Nut* concentrated "the attention of the Federal Trade Commission and the courts on the particular enforcement measures used in resale price agreements."[200]

The concern for property rights in *Dr. Miles* partially explains the Court's twists and turns in these cases. Former Justice Hughes,[201] who represented Colgate before the Supreme Court, stressed that no restraint on alienation was involved, in contrast to the one disapproved of in *Dr. Miles*.[202] This refocused attention on the *seller's* property rights—namely the right to select its customers. Much of the Court's line-drawing can be understood as an effort to balance the property rights of sellers and buyers. *Beech-Nut* and the cases explicating it in the lower courts, for example, turned on the effectiveness of plans that, like Dr. Miles's, "restrict[ed] the freedom of trade on the part of dealers who own what they sell"[203] by creating a de facto restraint on their alienation of goods purchased from a wholesaler, rather than directly from the manufacturer.[204] In cases where the refusal to deal's main effect was on direct purchasers, the resulting loss of pricing discretion appeared less like a restriction that ran with the chattel.[205]

In this balancing of rights, the Court had to permit some form of informal agreements if the right to refuse to deal was to have any real world meaning. At least for products that must be widely available in myriad outlets, like Dr. Miles's remedies and Colgate's soaps, it is not practical to refuse orders with no explanation, which explains why the Court felt compelled to add that a seller could announce in advance its criteria for

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199. *Beech-Nut* confirmed that a trader "may withhold his goods from those who will not sell them at the prices which he fixes for their resale" without violating the Sherman Act. *Beech-Nut*, 257 U.S. at 452-53.

200. Levi, *supra* note 165, at 301-02; *see also id.* at 302-07 (describing cases).

201. Hughes resigned from the Court to run unsuccessfully as the Republican nominee against President Wilson in 1916. He rejoined the Court in 1930 when President Hoover appointed him to replace Chief Justice Taft. Dexter Perkins, Charles Evans Hughes and American Democratic Statesmanship 50-64, 142 (1956).

202. Levi, *supra* note 165, at 276-77.

203. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08 (1911).

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

205. The courts may also have been affected by the number of wholesalers and retailers involved in cases like *Beech-Nut* and *Dr. Miles* and the methods used to enforce the system. *See* Levi, *supra* note 165, at 299 ("*Beech-Nut* was much more like *Dr. Miles* than were *Colgate*, *Schrader's Son*, and *Cudahy*"). The greater the similarity to cartel enforcement plans, especially the "boycotting" of retailers by wholesalers who themselves did not want to be cut off, may also explain the results, *see id.* at 299-301, especially in the lower court cases under *Beech-Nut*. *Id.* at 301-07. The government argued in the Supreme Court that Beech-Nut's system was a "virtual boycott." *Id.* at 300.

choosing customers.[206] But in fact, the right to announce the policy is inadequate for real world marketing, especially when it must be implemented by salesmen, who cannot be expected to choose their words as carefully as lawyers when responding to queries from dealers who have been cut off or fear that they may be. So the courts allowed some room for dealer assurances of future adherence and for reinstating dealers who gave such assurances. When the Court in *Parke, Davis* restricted *Colgate* to the simple refusal to deal based on pre-announced criteria, but not one step more, the *Colgate* loophole was effectively closed.[207]

None of this explains, however, why the Court went to such lengths to preserve the manufacturer's right to refuse to deal with price-cutting dealers if it really believed that even simple RPM posed the same threat to competition that cartels posed, the stated basis of the restraint of trade/ Sherman Act part of *Dr. Miles*.[208] Perhaps the Court did not believe it, at least when no longer faced with the cartel background of *Dr. Miles*. Clearly some courts at the time understood the difference between RPM imposed by a dealer cartel and that imposed by a manufacturer's unilateral decision.[209] In his campaign for RPM Brandeis was careful to make this distinction, emphasizing that a manufacturer's price decision remained subject to the discipline of market competition from other brands.[210] Brandeis was a member of the Court when it decided *Colgate* and the other three cases.[211] He surely urged these points on his brethren and may have persuaded some. Three joined him in dissenting in *Beech-Nut*. These and other justices may have felt constrained by the precedent in *Dr. Miles* and were unwilling to challenge its rationale, while remaining unwilling to follow *Dr. Miles* to its logical conclusion and prohibit all means of imposing RPM.

The most basic cause of the confusion, however, is the fact that simple RPM is not part of the core of antitrust. Hughes' equation of all RPM

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206. *See, e.g.*, *Beech-Nut*, 257 U.S. at 454-55.

207. *See* United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960).

208. *See Dr. Miles*, 220 U.S. at 407-09. In *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228-30 (1899), the Court held that the Sherman Act's prohibition on cartels overrode the freedom of contract rights of cartel members. *See also* HOVENKAMP, *supra* note 65, at 294-95. This strongly suggests that the Court would not have let property rights arguments sustain cartel-like restraints. And the Court had not hesitated to extend its prohibition of cartel restraints to implicit agreements well before its 1919 decision in *Colgate*. E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914). It did so again in 1921, just after *Cudahy* and only a year before *Beech-Nut*. *See* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 399, 410-11 (1921).

209. Court decisions of the era upheld simple RPM. *See* Fortenberry, *supra* note 48, at 146, 210 n.167. The Justice Department accepted a decree that prohibited RPM in connection with the retail druggist cartel while permitting simple RPM. See *supra* notes 84-86 and accompanying text.

210. Brandeis, *On Maintaining Makers' Prices*, *supra* note 156, at 126 ("Operating as an independent manufacturer under competitive conditions, you fix the price at your peril. If you fix it too high . . . either the community won't buy it, or if it does, despite the high prices, some other person will come in and share your prosperity . . . and the price will fall if there is no combination.")

211. President Wilson appointed Justice Brandeis to the Court in 1916. STRUM, *supra* note 33, at 291-99.

and dealer cartels is simply wrong. As long as the Court remained unwilling to admit this mistake, it was compelled to pursue the formalistic line-drawing of *Colgate* and its progeny. It lacked any functional rationale upon which to draw principled distinctions, having already chosen to treat unlike cases alike.

Alternatively, the Court could discover a new rationale for prohibiting simple RPM, which might impel it to clear up the confusion by closing the *Colgate* loophole. As described below,[212] the Justice Department and Warren Court came up with two in the 1960s, dealer autonomy and "spurious product differentiation," and the *Colgate* and consignment loopholes were closed. But as we shall see, neither rationale was part of the core of antitrust and their pursuit imposed substantial costs to productive efficiency, which later Courts and enforcers have proved unwilling to pay.

4. *The Consignment Loophole*

In his *Dr. Miles* dissent, Justice Holmes suggested that if Dr. Miles had consigned its products to dealers, retaining title until the ultimate retail sale, its RPM plan "would be beyond successful attack," as no one could deny that a property owner "was acting within his rights" when he specified a price.[213] Companies promptly adopted his suggestion. Indeed, the plaintiff in *Hartman* had switched to a consignment system in lieu of appealing to the Supreme Court.[214] Consignment promised a solution to both the restraint of trade and restraint on alienation objections to RPM; neither doctrine limited a seller's unilateral right to fix its own sales price.[215]

The Supreme Court, of course, ultimately upheld the consignment mode of effectuating RPM in *General Electric*,[216] despite the government's urging that, but for the economically irrelevant difference between consignment and sale, GE's system of resale price restraints on its over 400 wholesale and 21,000 retail agents, looked and functioned exactly like the Dr. Miles plan.[217] The Court was unmoved by this fact, true though it was. Property law considerations dictated the result. Once the Court decided that GE's contracts created a genuine agency agree-

212. See *infra* Part II.B.1.

213. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 411 (1911).

214. Peritz, *supra* note 152, at 84.

215. *Id.*

216. United States v. Gen. Elec. Co., 272 U.S. 476, 486-88 (1926).

217. In fact, Dr. Miles had tried to use a consignment plan to protect its RPM scheme, but failed to extend the consignment beyond the first sale by its wholesale agents, who sold the goods to other wholesalers and also to retailers. Inasmuch as Park could have purchased the product from a wholesaler or from a retailer who had purchased the goods from a wholesaler as permitted by the contracts, Justice Hughes was able to evade the consignment issues in *Dr. Miles*. *Dr. Miles*, 220 U.S. at 398-99.

ment,[218] the case was over.[219] *Dr. Miles* was distinguished on exactly the grounds Holmes had predicted: the economically irrelevant distinction between sale and consignment.[220] And if, as discussed above,[221] a majority of the justices no longer believed in the equation of RPM and a cartel of dealers, there was no core antitrust concern to temp them to override GE's property rights.

The consignment loophole provided a superior safe harbor for RPM. So long as careful attention was paid to the details of the consignment agreements, safeguarding them from challenges as shams,[222] the arrangements were beyond successful attack just as Holmes had predicted. There were none of the uncertainties that afflicted the *Colgate* loophole. Not surprisingly, the consignment loophole quickly became the method of choice for getting around *Dr. Miles*.[223]

Even more than the *Colgate* loophole, the consignment method of imposing RPM demonstrates that *Dr. Miles* did not create a real per se prohibition on RPM. The property law rationales of both cases are entirely consistent. Dr. Miles was restricting the property rights of its purchasers; GE was not. GE's right to set its own prices was at least as basic as the right to select one's customers. The only difference between self-distribution and the consignment device employed by GE is one of form. The self-distributor tells its employees what price to charge while the consignor instructs his agents. In both cases, the manufacturer is exercising basic property rights.

The practical consequences of the choice of form, of course, could not be starker: RPM was forbidden if the goods were sold to distributors but permitted if the goods were consigned. This distinction has utterly no economic significance, as the Justice Department urged to the Supreme Court to no avail. As a matter of antitrust law, the distinction is wholly formalistic. For this reason, the consignment loophole can easily be criticized. But the fault lies with the *Dr. Miles* court, not with the court that decided *General Electric*. It is hard to see how they could have decided otherwise in view of the prominence of property reasoning in *Dr. Miles*

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218. *Gen. Elec.*, 272 U.S. at 481-86.

219. *Id.* at 488 ("The owner of an article . . . is not violating the common law or the Anti-Trust Act by seeking to dispose of his articles directly to the consumer and fixing the price by which the agents transfer the title from him directly to such consumer.").

220. *Id.* at 487.

221. *See supra* notes 208-11 and accompanying text.

222. This could easily be done by copying GE's forms as closely as possible, as many did. *See* William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 934 (1987) ("Once the Court put its blessings on the particular verbal formulation used in *General Electric*, scores of firms hastened to adopt the identical wording, modified only as absolutely necessary to adopt the contract to the marketing of pharmaceuticals or toasters or laundry detergent rather than light bulbs.").

223. *Id.* ("[M]ost of the business community bypassed *Dr. Miles* by employing the agency device."); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 440 (5th ed. 2003) (noting "the pervasive use of consignment contracts as a means to avoid the *Dr. Miles* proscription against RPM").

and *Colgate* and in view of the control that property law gives manufacturers over their own goods. With consignments, it was the manufacturers, not the dealers, who "own what they sell."

More basically, formalistic distinctions were unavoidable so long as the Court adhered to *Dr. Miles*'s erroneous equation of simple RPM and horizontal price fixing by dealers, even if, as discussed above, a majority of the justices no longer believed it but were unwilling to acknowledge the error and overrule *Dr. Miles*. There also is no economic distinction between self-distribution, which has never posed any antitrust issue, and GE's system of consignments. Even if the Court had ignored property law altogether and decided *Colgate* and *General Electric* consistently with *Dr. Miles*, the law would still have drawn a formalistic line between complete and partial vertical integration in distribution, artificially impelling manufacturers who could self-distribute to do (so even if restricted distribution was more effective), and depriving those who could not practically distribute their goods of valuable competitive tools.

5. *The Fair Trade Loophole*

Not much needs to be said about the fair trade loophole here, as it was legislatively created as an explicit exception to the Sherman Act.[224] Congress passed the Miller-Tydings Fair Trade Amendment[225] in 1937 in response to lobbying by small merchants, especially retail druggists, seeking protection from mass distributors, especially the new chain stores. This statute permitted states to authorize RPM agreements but specified that, to be exempt RPM contracts, the contracts must not facilitate horizontal price fixing among manufacturers or dealers.[226] Forty-six states had such laws at one time or another. After the Supreme Court read the Miller-Tydings Act narrowly in 1951, Congress responded with the McGuire Act of 1952,[227] which permitted states to allow manufacturers to control retail prices more pervasively. Congress repealed the fair trade exemption in 1975,[228] returning the legality of RPM exclusively to judicial interpretation of the Sherman Act.

Fair trade is significant here because it shows the weakness of the political support for antitrust prohibition of simple RPM or for other attacks on restricted distribution until later in the twentieth century. It also shows the strength of the political support for RPM, even among those who generally approved of antitrust. For both the Brandeis wing of the antitrust movement and small businesses, who provided its natural political constituency, RPM, and probably even dealer cartels, were a neces-

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224. *See generally id.* at 435; ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 254-58 (1966).

225. Ch. 690, 50 Stat. 693 (1937).

226. HAWLEY, *supra* note 224, at 258.

227. Ch. 745, 66 Stat. 632 (1952).

228. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

sary defense against the "curse of bigness."[229] Fair trade is also significant because it helped eviscerate the *Dr. Miles* rule for nearly forty years, even after the Warren Court's closure of the *Colgate* and *General Electric* loopholes, with the result that the real per se prohibition of RPM did not become nationwide until 1975. Just two years later, the rule began the long process of erosion that culminated in *Leegin.*

B. The Warren Court Finally Creates a Real Per Se Rule for RPM

Prodded by the Department of Justice, the Supreme Court closed the *Colgate* and *General Electric* loopholes in the 1960s, finally producing a real per se prohibition of RPM. At the same time, it carried this rule part of the way to its logical conclusion, declaring that some nonprice distributional restraints were also per se unlawful. Two new rationales provided the policy justification for these developments. Neither was part of the core of antitrust; neither proved adequate to eliminate formalistic line drawing in the law of vertical restraints.

1. *Closing the Loopholes*

The Warren Court's decisions in *Parke, Davis*[230] and *Albrecht*[231] did not completely close the *Colgate* loophole, but they rendered it useless as a means of imposing RPM. *Albrecht* also extended the *Dr. Miles* rule to maximum resale prices.[232] The basic holding of these cases is that a manufacturer may select its customers, refusing to deal with those who fail to abide by its retail prices, and it may announce its policy in advance.[233] But if it "goes one inch further," as Justice Harlan put it, there is an unlawful "combination" in restraint of trade.[234] In theory, this only narrowed the *Colgate* loophole; in practice it closed it. In the real world of trade, it proved impossible not to go "one inch further," especially when salesmen are involved. This was humorously but accurately demonstrated by an antitrust practitioner who described a hypothetical meeting between a marketing manager and his antitrust lawyer, in which the lawyer pointed out all the pitfalls of trying to impose RPM after *Parke, Davis.* The meeting closed with the marketing manager saying that "even if [the lawyer] could train his people to follow this advice and even if he could keep them and himself from making mistakes, putting in such a program would turn his salesmen into lawyers, and he couldn't sell anything that way."[235]

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229. The Robinson-Patman Act, passed in 1936, was also a response to chain stores and was supported by the same constituency. Hawley, *supra* note 224, at 249-54.

230. United States v. Parke, Davis & Co., 362 U.S. 29, 42-45 (1960).

231. Albrecht v. Herald Co., 390 U.S. 145, 149 (1968).

232. *Id.* at 152-53.

233. *Id.* at 149; *Parke, Davis*, 362 U.S. at 46.

234. *Id.* at 163 (Harlan, J., dissenting).

235. Edwin A. Kilburn, *Other Vertical Problems: Pricing, Refusal to Deal, Distribution*, 51 Antitrust L.J. 173, 176-77 (1982); *see also* George W. Warner & Co. v. Black &

The consignment loophole was closed in *Simpson v. Union Oil Co.*,[236] in which the Court, almost forty years later, finally adopted the Justice Department's losing argument in *General Electric* that regardless of their validity as a matter of property law, their economic function was the same as in *Dr. Miles*. Finally serious about prohibiting RPM, the Court would no longer let form triumph over substance: "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would make legality for antitrust purposes turn on clever draftsmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation."[237]

2. *Extending Dr. Miles to Other Vertical Restraints*

The Justice Department urged the Supreme Court to extend the approach of *Dr. Miles* to nonprice restraints, with partial success.[238] In *United States v. Aronold, Schwinn, & Co.*, the Court held unlawful a bicycle maker's restrictions on sale by wholesalers and retailers beyond assigned territories and to unauthorized distributors.[239] These "airtight" territorial and customer restrictions eliminated all intrabrand competition. But Justice Fortas' opinion for the Court seemed to reach much further than necessary to condemn these restraints, stating categorically that "[i]f the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."[240] This expansive language appeared to disallow any manufacturer restrictions upon dealers. Reinforcing this conclusion was the Court's modification of the district court's decree to forbid Schwinn from selling to its distributors under any contractual provision "limiting the [distributor's] freedom as to where and to whom it will [sell] the products."[241]

Taken literally, these statements mean that restricted distribution of any kind would be an antitrust violation—if the goods are sold to distributors. But if consignment was used, *Schwinn* held that the very same restrictions were to be judged under the rule of reason, notwithstanding

Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960) ("The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."); LAWRENCE SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 392-95 (1977).

236. 377 U.S. 13 (1964).

237. *Id.* at 24. Despite his dismissive reference to the defendant's "consignment device," Justice Douglas's opinion did not discuss whether the consignment was valid as a matter of property law. Justice Douglas correctly saw that this should be irrelevant to antitrust concerns. The opinion does leave open the status of consignments used for legitimate business purposes, such as saving small dealers the costs of financing products. *Id.* at 21. This issue was not presented in *Simpson*, where it was obvious that the consignment's only business justification was to get around *Dr. Miles*. *See id.* at 21-22.

238. The Justice Department failed to persuade the Court in its first effort. *See* White Motor Co. v. United States, 372 U.S. 253, 262-64 (1963) (reversing summary judgment based on per se theory); *see also infra* notes 261-62 and accompanying text.

239. United States v. Arnold, Schwinn, & Co., 388 U.S. 365, 370-71 (1967).

240. *Id.* at 379

241. *Id.* at 378.

the Court's position in *Simpson* just three years earlier.[242] Underlining the point, the Court affirmed the district court's decision that the restrictions under the consignment program were reasonable restraints, emphasizing the district court's findings that Schwinn lacked market power in the bicycle market and that its restrictions were reasonably necessary to compete effectively.[243]

It is hard to think of a more formalistic distinction than the one *Schwinn* makes between sale and consignment distribution systems. As the Court held in *Simpson*, the economic effect of the transaction is what matters for antitrust analysis.[244] It is also hard to find a weaker argument in favor of a per se rule. After conceding the utility of restricted distribution as to consignments, Justice Fortas made no argument that restraints in the sales context were somehow less effective or more anticompetitive. He just asserted that to permit the restraints "where the manufacturer has parted with dominion over the goods—the usual marketing situation—would violate the ancient rule against restraints on alienation and open the door to exclusivity of outlets and limitation of territory further than prudence permits."[245] Why this would be imprudent is never explained, nor is the Court's reliance on property law concepts, which had been rejected in *Simpson.*

3. *The Bases of the New Per Se Approach—and Their Weaknesses*

These opinions were part of larger overall trends in Sherman Act jurisprudence that started in 1940 with the establishment of the modern per se rule against cartel price fixing. From *Socony* in 1940 until *Sylvania* in 1977, the per se rules dominated antitrust while the rule of reason withered.[246] The Supreme Court strengthened and extended the per se rules to the other major section 1 categories.[247] The new per se rules were notable for their overbreadth, emphasizing the form of the restraint rather than its economic function. The rules thus forbade both cartel restraints and ancillary restraints used to facilitate productive cooperation, even by parties whose collective market share was so low as to preclude any realistic fear that they were really colluding to achieve market power.[248] This created a per se/rule of reason dichotomy in which the same practice that would be illegal per se would be reasonable under the rule of reason. The "split the baby" decision in *Schwinn* is a classic exam-

242. *Id.* at 380-81.
243. *Id.* at 381-82.
244. *See supra* Part II.B.1.
245. *Id.* at 380.
246. *See generally* Arthur, *Rule*, *supra* note 132, at 349-51. In practice, a plaintiff in a section 1 case either persuaded the court that the challenged conduct was forbidden per se or gave up, as the rule of reason came to be viewed as little more than a "euphemism for an endless economic inquiry resulting in a defense verdict." *Id.* (quoting Maxwell M. Blecher, *The Schwinn Case—An Example of a Genuine Commitment to Antitrust Law*, 44 ANTITRUST L.J. 550, 553 (1975)).
247. *See generally id.* at 349 n.63 (collecting cases).
248. *Id.* at 349-51.

ple. Schwinn's restraints in sales transaction were per se illegal; those in non-sales consignments were upheld under the rule of reason.[249]

This was also a time of expansion of antitrust doctrine far beyond the core of antitrust.[250] The Justice Department and Supreme Court were no longer content to limit monopoly power gained through the traditional modes of combination and predation, but also sought to remedy other market imperfections.[251] As a perceptive English study of American antitrust observed, the emphasis changed "from a negative (literally 'antitrust') approach," limited to preventing the creation of monopoly power by combination and predation, "to a positive ('maintaining competition') aim"[252] which sought to perfect competition and, in the Warren Court era, also to promote noneconomic values, such as the autonomy of small business decision making.[253]

According to Richard Posner, who briefed and argued *Schwinn* for the government,[254] the Justice Department's campaign against restricted distribution was fueled by the theory of monopolistic competition,[255] which refers to the (usually slight) pricing discretion that producers of differentiated products have. This occurs because one of the basic assumptions of perfect competition, homogenous products, no longer obtains. Differentiated products, like Coke and Pepsi, are not perfect substitutes for each other, and competition among them is not solely on price. Many, perhaps most, economists at that time believed that product promotion, especially advertising, was socially wasteful. It helped manufacturers artificially differentiate their products and insulate themselves from price competition. Many economists at that time thought that heavy advertising of products convinced consumers that less heavily advertised and perhaps cheaper brands were not adequate substitutes, even though of equal quality, and thus impeded the less advertised brand's ability to compete on the actual merits of its products.[256]

These economists also viewed the promotional activities induced by RPM and other forms of restricted distribution as forms of advertising, also designed to impede competition on the merits.[257] For the Justice Department of the 1960s, this turned the efficiency arguments in favor of restricted distribution against it and underlay the Department's arguments in *Schwinn*. Posner's brief "suggested that Schwinn had sought to

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249. United States v. Arnold, Schwinn, & Co., 388 U.S. 365, 379-81 (1967).

250. *See* Arthur, *Workable, supra* note 4, at 1189-91.

251. *See id.*

252. A. NEAL & D. GOYDER, ANTITRUST LAWS OF THE U.S.A. 17 (3d ed. 1985).

253. *See generally* Kauper, *supra* note 3 (noting that Warren Court antitrust decisions emphasized preservation of economic opportunity and uncoerced, fully independent decisionmaking without regard to economic cost).

254. Posner, *supra* note 2, at 2.

255. *Id.* at 3.

256. *Id.* at 4.

257. *Id.*; *see id.* at 4 n.14 (citing William Comanor, *Vertical Territorial and Customer Restrictions:* White Motor *and Its Aftermath*, 81 HARV. L. REV. 1419, 1429-30 (1968), as a "representative specimen of this thinking").

restrict the distribution of bicycles in order to reinforce an image of superior quality that would reduce the substitutability of other bicycle brands and thus increase Schwinn's monopoly power in the bicycle market."[258]

The Warren Court decisions were also motivated by the noneconomic value of protecting maverick dealers against large manufacturers. This was made clear by Justice White in his concurring opinion in *Sylvania*, where he explained the "reason for the distinction in *Schwinn* between sale and nonsale transactions" was not based on any competitive considerations, but rather on "the notion in many of our cases involving vertical restraints that independent businessmen should have the freedom to dispose of the goods they own as they see fit."[259] More broadly, the decisions reflected a concern "for the autonomy of independent businessmen."[260]

The decisions were *not* based on the *Dr. Miles* equation of RPM with cartel price fixing. In *White Motor* the Justice Department argued that RPM and horizontal market division closely resembled White's territorial and customer restrictions,[261] but the Court was unwilling to repeat the *Dr. Miles* mistake of equating the economic effects of cartel and manufacturer-imposed restrictions, at least without further information: "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain."[262] In *Schwinn*, the Government took a different tack, as discussed above,[263] and the Court's decision was not based on an analogy either to RPM or to cartel market divisions and price fixing.[264]

Moreover, in his opinion for the Court in *Albrecht*, Justice White rejected Justice Harlan's argument that manufacturer-set maximum resale prices differed materially from minimum ones. Justice Harlan in dissent argued that manufacturers had efficiency reasons to impose maximum resale prices. Thus, unlike ordinary RPM, maximum resale prices could not be equated with price fixing by a dealer cartel.[265] White answered this objection by pointing to the distributional efficiencies manufacturers could obtain through RPM,[266] rejecting the reasoning that Hughes had used in *Dr. Miles* to equate all RPM with cartel price fixing—that the only benefit of RPM was to the dealers. The holding in *Albrecht* was

258. *Id.* at 3. Schwinn had no monopoly power in the bicycle market, of course. The Court expressly recognized Schwinn's lack of market power in upholding Schwinn's restrictions where the bicycles had been consigned. United States v. Arnold, Schwinn, & Co., 388 U.S. 365, 381-82 (1967).

259. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 66-67 (1977) (White, J., concurring).

260. *Id.* at 68.

261. White Motor Co. v. United States, 372 U.S. 253, 266 (1963) (Brennan, J., concurring) (describing government arguments).

262. *Id.* at 263. The Court thus reversed a summary judgment for the Government and remanded for a trial. *Id.* at 264.

263. *See supra* notes 254-57 and accompanying text.

264. *See supra* notes 254-60 and accompanying text.

265. Albrecht v. Herald Co., 390 U.S. 145, 156-59 (1968) (Harlan, J., dissenting).

266. *Id.* at 151 n.7 (majority opinion).

based on something else, the same value served by the prohibition on restraints on alienation—the freedom of traders over their own goods.[267]

The new rationales for the Warren Court's approach to intrabrand restraints were not adequate to produce consistent, lasting doctrine. Lower court judges and future justices did not share the Warren Court's passion for dealer autonomy, especially as economists of the Chicago persuasion revealed the costs of dealer autonomy in terms of business efficiency. General respect for the antitrust laws, shared by all modern federal judges, did not extend to this noneconomic value, which is not at the core of antitrust,[268] especially as Americans in the prolonged economic slump of the 1970s began to worry about national productivity and competitiveness.

Even the Warren Court was not willing to take the new autonomy principle to its logical conclusion. We have already seen the Warren Court's failure to extend the principle to the consignment transactions in *Schwinn*,[269] which also restricted the freedom of participating dealers. Despite the broad "no restraint on alienation" language in *Schwinn*, Justice White's concurrence in *Sylvania* suggests that the Warren Court would not have forbidden all restricted distribution in sales transactions.[270] Instead, it probably would have attempted to balance two incommensurable values: the economic value of the efficiencies from restricted distribution and the social and political value of dealer autonomy, which would inevitably require the drawing of arbitrary lines.

As for the "spurious product differentiation" rationale, it too draws no strength from core antitrust values. Product differentiation does not threaten monopoly. No one in the formative period of antitrust thought Dr. Miles was anything like a monopolist, even though its branded, heavily advertised remedies are classic examples of differentiated products over which the maker has some small degree of pricing discretion. Differentiated products have always been considered to be in the same product markets in antitrust cases.[271] Consumers value the choice between different brands of the same product; some like Coke, others like Pepsi. All like having the choice. And modern economic thinking is not so quick to

267. *See id.* at 152-53. *See also* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 67-68 (1977) (White, J., concurring) (asserting "concern for the freedom of the businessman to dispose of his own goods as he sees fit" is the rationale for all vertical restraint cases from *Dr. Miles* until *Sylvania*).

268. At most, this value is related to the Brandeis concern for small business, but is not really a part of it. As Brandeis's own support for RPM shows, most small businessmen are beneficiaries of RPM, not victims. As Justice Breyer argued in his *Leegin* dissent, discounting retailers like Wal-Mart are the real beneficiaries of *Dr. Miles.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2735 (2007).

269. *See supra* note 242 and accompanying text.

270. *See Sylvania*, 433 U.S. at 59-71.

271. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956) ("[T]his power that . . . automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.").

condemn advertising and promotion.[272] There is no coherent way to distinguish "spurious" from genuine product differentiation,[273] and thus there is no way to build non-arbitrary antitrust law based on it.

III. THE RETURN TO THE CORE OF ANTITRUST AND THE SLOW DEATH OF *DR. MILES*

Beginning with *Sylvania* in 1977, the Supreme Court has gradually, sometimes in fits and starts, abandoned the expansive mode of antitrust that reached its zenith with the Warren Court and returned antitrust law to its core.[274] The Court has eliminated or at least limited the scope of all but one of the per se rules[275] and given real content to the rule of reason, restoring it as a means of resolving cases, even for plaintiffs.[276] The per se/rule of reason dichotomy is now a shadow of its former self.[277] In this process, the Court usually has been guided solely by economic evidence of the competitive significance of challenged practices, not by concerns for the economic autonomy or well-being of small businesses. In particular, the Court has been motivated by the classic core of antitrust concerns: the need to distinguish cartel from productive restraints and predation from exclusion due to superior efficiency. In particular, the Court has heeded modern economic thinking that casts doubt on the economic basis of the decisions in the expansive era from 1940 until the mid-1970s, especially those that motivated the Justice Department's advocacy before the Warren Court. Although this process remains unfinished,[278] the Court has eliminated many formalistic distinctions, producing a much more coherent and functional body of doctrine[279] that is far more faithful to the original statutes. The overruling of *Dr. Miles* was a logical and

272. Posner, *supra* note 2, at 4-5.

273. Although they share the concerns over artificially differentiated products, Professors Scherer and Ross conclude by asking "Can government agencies or courts outperform the market in determining how much variety . . . is correct? Considerable skepticism seems warranted." F. SCHERER & ROSS, *supra* note 133, at 611.

274. Arthur, *Rule*, *supra* note 132, at 354-59; for a similar view, *see* Clark, *supra* note 58, at 1170-80.

275. It has restricted the per se rule against horizontal price fixing to cartel restraints. Broad. Music, Inc. v. Colum. Broad. Sys., 441 U.S. 1, 6-7 (1979). The boycott rule has been limited to predatory attempts to exclude competitors. Nw. Wholesale Stationers v. Pac. Stationery & Printing Co., 472 U.S. 284, 285-88 (1985). In a trio of cases the per se rule against tie-ins has been limited to those imposed by parties with actual power over the tying product. Ill. Tool Works v. Indep. Ink, Inc., 547 U.S. 28, 41-42 (2006) (market power cannot be presumed from patent or copyright); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 7, 31-32 (1984) (no power when tier has thirty percent market share); U.S. Steel Corp. v. Fortner Enters., 429 U.S. 610, 620-21 (1977) (power cannot be inferred by unique product unless maker has competitive advantage over rivals).

276. FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 459-64 (1986); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 116-20 (1984); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978). *See generally* Arthur, *Rule*, *supra* note 132, at 352-53 (discussing *Professional Engineers*, 435 U.S. 69 (1978)).

277. Arthur, *Rule*, *supra* note 132, at 351-55.

278. *See id.* at 355-59 (remaining issues with scope of per se rules); *id.* at 359-67 (unresolved rule of reason issues).

279. Recent decisions of the Roberts Court continue this trend. *See* Gifford & Sullivan, *supra* note 10, at 435 (decisions "imposing a new level of rationality, consistency, and in-

salutary part of this process.[280]

A. *Sylvania* and the Return to the Core of Antitrust for Vertical Nonprice Restraints

1. Sylvania

The Court reversed *Schwinn* in *Sylvania*, holding that all nonprice intrabrand restraints are to be judged under the rule of reason.[281] Unlike *White Motor* and *Schwinn*, *Sylvania* did not eliminate all intrabrand competition among its dealers. Instead, it used location clauses, requiring each dealer to sell only to retail customers from specified locations, to regulate rather precisely the degree of competition among its dealers, adding additional locations where existing dealers underperformed and protecting successful dealers from competition from nearby Sylvania dealers.[282]

The case thus presented the question whether *Schwinn*'s expansive language did in fact herald the end of restrictive distribution. The Ninth Circuit, sitting *en banc*, read *Schwinn* to apply the per se rule only to airtight restrictions, like those in *Schwinn* itself, that eliminated all intrabrand competition.[283] Although Justice White urged the Court to affirm on this ground,[284] the Court declined to do so, overruling *Schwinn* entirely and restoring the rule of reason as the standard for all nonprice vertical intrabrand restraints.[285]

The Court's reasons for rejecting Justice White's approach were particularly important, for they lead inexorably to *Leegin*. Justice Powell's decision for the Court noted that Sylvania's location clause "was neither the least nor the most restrictive provision that it could have used."[286] As a matter of economics, the distinctions among such restraints were merely "differences of degree and form."[287] Because there was no "significant social gain from channeling transactions into one form or another," distinctions among restraints "must be based upon demonstrable economic effect rather than as in *Schwinn* upon formalistic line drawing."[288] And the majority was not interested in weighing these economic effects

deed, predictability upon antitrust law" and "develop[ing] the preexisting doctrinal core, eliminating the inconsistencies that had arisen over time").

280. *Id.* at 439-45 (*Leegin* brought vertical restraints law "into a cohesive relation to the rest of the antitrust corpus").

281. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977).

282. *Id.* at 38. In fact, its dispute with Continental T.V. arose when Sylvania, dissatisfied with sales in San Francisco, authorized a competitor to sell Sylvania products from a location just one mile from Continental, and then refused to permit Continental to sell Sylvania televisions from its store in Sacramento, where the existing dealer's efforts had given Sylvania a fifteen percent market share, way above its national share of five percent. *Id.* at 39-40.

283. *Id.* at 41-42.

284. *Id.* at 59-66 (White, J., concurring).

285. *Id.* at 45-47 (declining to distinguish *Schwinn*); *id.* at 58 (overruling *Schwinn*).

286. *Id.* at 58 n.29.

287. *Id.*

288. *Id.* at 58 n.29, 59.

against noneconomic criteria, in particular the autonomy interest inherent in *Schwinn*'s antipathy to all restraints on alienation.[289] In other words, antitrust cases must turn exclusively on the economic effects of restraints, for "an antitrust policy divorced from market considerations would lack any objective benchmarks."[290]

Having declined to distinguish *Schwinn*, the Court had to either extend *Schwinn*'s per se rule to Sylvania's location clauses or overrule it. The reasoning it used to decide this question has dominated modern section 1 analysis. First, it made the startling announcement that the rule of reason was the "prevailing standard of analysis" in section 1 cases.[291] Per se rules were the exception, reserved for "conduct that is manifestly anticompetitive."[292] More particularly, per se rules had to "be justified under the *demanding standards*" of *Northern Pacific Railway Co. v. United States*,[293] which requires "a pernicious effect on competition and lack [of] any redeeming virtue."[294] None of the prevailing overbroad per se rules actually met this "demanding standard." *Sylvania* thus began the ongoing process of cutting back on those rules and reviving the rule of reason as an effective legal standard.

Having pledged to judge *Schwinn* by the *Northern Pacific* test and looking only at the economic effects of restricted distribution, the Court found the per se rule wanting.[295] Core antitrust concerns drove Justice Powell's analysis and dictated the result. Justice Powell correctly framed the issue when he noted that the "market impact of vertical restrictions" comes from "their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[296] How should an antitrust court weigh this increase in the one and decrease in the other? In a footnote to this statement, Justice Powell revealed the answer: "Interbrand competition . . . is the primary concern of antitrust law."[297] The footnote also recognized, at least implicitly, that intrabrand competition is just not that important to the preservation of interbrand competition and the prevention of monopoly, since the "degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer."[298] With this understanding of antitrust law, Justice Powell's conclusion was inevitable.

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289. *Id.* at 53 n.21.
290. *Id.*
291. *Id.* at 49.
292. *Id.* at 49-50.
293. *Id.* at 50 (emphasis added).
294. *Id.* at 50 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1956)).
295. *Id.* at 58.
296. *Id.* at 51.
297. *Id.* at 51 n.19. This conclusion naturally follows from his understanding in the very next sentence that the "extreme example of a deficiency of interbrand competition is monopoly." *Id.* If inefficient monopoly is the evil to be prevented by antitrust law, how could it be otherwise?
298. *Id.* There might be "fierce intrabrand competition among the distributors" of a monopolist and none among those of "a firm in a highly competitive industry." *Id.*

Significantly, the Court adopted the analysis of intrabrand distributional already given in this Article, drawing it from the analysis first developed by Chicago critics of the expansive antitrust doctrines of the 1940-1970 era.[299] Per Justice Powell, these restraints should not be per se unlawful, because they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" and thus "compete more effectively against other manufacturers."[300] At the same time, there was little or no prospect of competitive injury from any of these restraints, despite the fact that they reduce or even eliminate intrabrand competition, for the reasons already stated in Part I. First, "manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products" because distributor markups are part of the "cost of distribution."[301] Second, interbrand competition provides a "significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product."[302] Thus, the manufacturer's incentives were aligned with the consumer's. The manufacturer had no interest in enriching its dealers at its own expense. Other things being equal, it wanted competition among its dealers to reduce its cost of distribution and lower retail prices, thus attracting more sales.[303]

In sum, applying the *Northern Pacific* test for per se condemnation, "there [had] been no showing . . . that vertical restrictions have or are likely to have a 'pernicious effect on competition' or that they 'lack . . . any redeeming virtue.'"[304] As a result, "the per se rule stated in Schwinn must be overruled."[305]

Sylvania may be the most important decision in modern antitrust law. Its influence on current doctrine, not just with regard to vertical restraints, is enormous. Footnote nineteen, with its famous declaration that interbrand competition "is the primary concern of antitrust law" signaled that the Court was returning antitrust law back to its original core.[306]

Even so, Justice Powell drew his own formalistic line in *Sylvania* when, in a footnote, he limited his analysis to nonprice vertical restraints and left the *Dr. Miles* rule intact,[307] despite the fact, as shown in Part I,[308] that

299. *Id.* at 54-57
300. *Id.* at 54-55.
301. *Id.* at 56 & n.24.
302. *Id.* at 52 n.19.
303. In fact, Justice Powell could have made an even stronger case based on his recognition that the "degree of intrabrand competition is wholly independent of the level of intrabrand competition confronting the manufacturer." *Id.* at 51 n.19. In other words, as stated in Part I, restricted distribution does not add to even a monopolist's market power unless it contributes to its overall superior efficiency. Even a monopolist has no motive to enrich its distributors at its own expense or to keep retail prices any higher than necessary.
304. *Id.* at 58 (quoting N. Pac. Ry. Co., 356 U.S. at 5).
305. *Id.*
306. *Id.* at 51 n.19.
307. *Id.* at 51 n.18.
308. *See supra* notes 124-35 and accompanying text.

there is no demonstrated economic effect that would justify different treatment.[309] In his concurrence, Justice White accurately predicted that this distinction "may be as difficult to justify as that of *Schwinn* under the terms of the majority's analysis" and that the "effect, if not the intention" of Powell's opinion would "necessarily . . . call into question the firmly established rule against price restraints."[310] That is exactly what happened.

2. *The Tension between* Dr. Miles *and* Sylvania*:* Monsanto*,* Business Electronics *and* Khan

The natural tension between *Dr. Miles* and *Sylvania* immediately became apparent in dealer termination litigation. Terminated dealers claimed that they had been let go for noncompliance with RPM. Defendant manufacturers claimed that the dealers had been terminated for failure to live up to their contractual obligations, which imposed only nonprice restraints. Inasmuch as the economic effects of price and nonprice restraints are the same, circumstantial evidence could support both sides' stories. It was easy for a manufacturer using only nonprice restraints to be found liable for using RPM.[311] This problem was a direct result of the formalistic line that had been drawn in *Sylvania* between RPM and all other intrabrand restraints.[312]

Again writing for the Court, Justice Powell admitted this in *Monsanto Co. v. Spray-Rite Service Corp.*[313] He started by highlighting "two important distinctions" at the heart of every dealer termination antitrust case: the first between *Dr. Miles* and *Colgate* and the second between *Dr. Miles*

309. Justice Powell based this distinction on two factors. First, he cited Justice Brennan's bald assertion in *White Motor* that "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." *Sylvania*, 433 U.S. at 51 n.18 (quoting White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J., concurring)) (emphasis added). This could only be true if RPM is used to effectuate a manufacturer cartel. Justice Powell also cited a statement by Richard Posner that "Industry-wide resale price maintenance *might* facilitate cartelizing." *Id.* (quoting Richard Posner, *Antitrust Policy and the Supreme Court*, 75 COL. L. REV. 282, 294 (1975) (emphasis added)). Posner's qualified statement is true, but hardly justifies the complete prohibition of simple RPM. As Posner himself pointed out shortly after *Sylvania* "that [RPM] might sometimes be used to bolster a manufacturer cartel cannot justify per se prohibition under the *Northern Pacific* test, which requires a "pernicious effect on competition" *and* a lack of "*any* redeeming virtue." Posner, *supra* note 2, at 8 (emphasis added). Second, Powell claimed that by ending the exemption for fair trade in 1975, see *supra* note 228 and accompanying text, Congress had "expressed its approval of a per se analysis" of RPM. *Sylvania*, 433 U.S. at 41 n.19. Justice Powell did not explain why the views of Congress in 1975 on the correct reading of a statute passed by a wholly different Congress in 1914 should be binding.

310. *See generally id.* at 70 (White, J., concurring).

311. *See generally* Herbert Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U. L. REV. 521, 521-22 (1984) (discussing that Monsanto probably used only nonprice restraints, despite Supreme Court holding against it); Wesley J. Liebeler, *1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Restraints*, 31 UCLA L. REV. 384 (1983).

312. *See* Liebeler, *supra* note 311, at 389.

313. 465 U.S. 752 (1984).

and *Sylvania*.[314] Justice Powell then admitted that these distinctions were largely artificial and "difficult to apply in practice" because "the economic effect of all the conduct described above—unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical. . . . And judged from a distance, the conduct of the parties in the various situations can be indistinguishable."[315] Justice Powell correctly pointed out that discussions about resale prices did not necessarily indicate a lack of independent action. As quasi-partners in the distribution of the manufacturer's products, both sides had "legitimate reasons to exchange information about the prices and reception of *their* products in the market."[316] And a manufacturer imposing "often costly nonprice restrictions" had "the most interest in distributors' resale prices."[317] It would "want to ensure that its distributors earn sufficient profit to pay for" dealer services and would "want to see that 'free-riders' do not interfere. Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows."[318]

The logical implication was that the distinctions cited by Justice Powell were formalistic and the problem could be solved by treating like conduct alike—by overruling either *Colgate* and *Sylvania* or *Dr. Miles*. Instead, the Court revivified *Colgate* by inventing a heightened evidentiary standard for finding an agreement on resale prices. Evidence of a manufacturer's termination of a price-cutting dealer after complaints from a competing dealer was now made inadequate, as a matter of law, to support an inference of RPM,[319] despite the fact that it otherwise would suffice as substantial evidence in support a jury finding of RPM. This heightened standard was necessary to avoid the "considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded."[320]

Reviving *Colgate* was not enough to protect manufacturers' rights under *Sylvania* to use restricted distribution. In *Business Electronics Corp. v. Sharp Electronics Corp.*, there was no question that defendant manufacturer, in response to a dealer's ultimatum, had terminated plaintiff dealer's rival because of its deep discounting, although the favored dealer and the manufacturer had not agreed on any particular resale price

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314. *Id.* at 760-61. Justice Powell reiterated the right of a manufacturer to "announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Id.* This was still deemed "independent" action and outside the agreement requirement for section 1 liability. *Id.*

315. *Id.* at 762.

316. *Id.* (emphasis added); *see also id.* at 763-64 ("[T]o assure an efficient distribution system, manufacturers and distributors constantly must *coordinate their activities* to assure that their product will reach the consumer persuasively and efficiently." (emphasis added)).

317. *Id.* at 762-63 (citation omitted).

318. *Id.* at 762-63.

319. *Id.* at 763-64.

320. *Id.* at 763.

and the favored manufacturer had on occasion sold below suggested retail prices.[321] Nonetheless, as Justice Stevens argued in his dissent, "an agreement to terminate a dealer because of its price cutting is most certainly not a 'nonprice restraint.'"[322] Yet Justice Scalia's opinion for the Court held that this restraint was not per se illegal under *Dr. Miles*.[323] The *Dr. Miles* rule was limited to agreements on specific resale prices or price levels.[324] Agreements that otherwise had the purpose and effect of raising resale prices were not covered by the per se rule, even an agreement to terminate the only other local dealer, like the agreement in *Business Electronics* itself, leaving the favored dealer with an exclusive territory free of intrabrand competition.[325] Contrast this with the broad definition of per se illegal-cartel price fixing in *Socony*: any collusive scheme for "raising, depressing fixing, pegging, or stabilizing" prices.[326]

The Court's reasoning assumes that simple RPM is not part of the core of antitrust. Justice Scalia first reiterated at some length the rationale behind *Sylvania*,[327] emphasizing the "real potential" of distributor restrictions to "stimulate interbrand competition, 'the primary concern of antitrust law,'" and the adequacy of interbrand competition to "'provide a significant check' on any attempt to exploit intrabrand market power.'"[328] He then stated the Court's basic framework for deciding distributional restraints cases, "guided by the premises" of *Sylvania* and *Monsanto*, which incorporate the inherent primacy of interbrand over intrabrand competition:

> [T]hat there is a presumption in favor of a rule-of-reason standard; that departure from the standard must be justified by demonstrable economic effect . . . rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.[329]

The restricted definition of RPM subject to the *Dr. Miles* rule was necessary to protect *Sylvania*. Juries could not be trusted to distinguish between legitimate and illegitimate dealer terminations. "In the vast majority of cases," Scalia reasoned, "it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price-cutting and some measure of service cutting

321. 485 U.S. 717, 721 (1988).
322. *Id.* at 736 (Stevens, J., dissenting).
323. *Id.* at 735-36.
324. *Id.*
325. The plaintiff had been terminated at the request of the only other Sharp dealer in Houston. *Id.* at 721.
326. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); *see also id.* at 221 ("[*A*]*ny* combination that tampers with price structures") (emphasis added); *id.* at 222 ("Nor is it important that the prices . . . were not fixed in the sense that they were uniform and inflexible. Price-fixing . . . has no such limited meaning.").
327. *Bus. Elecs.*, 485 U.S. at 724-27.
328. *Id.* at 724-25 (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36. 52 n.19 (1977)).
329. *Id.* at 726.

usually go hand it hand."[330] To avoid liability, "[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages."[331] That higher prices might result made no difference, for "vertical nonprice restraints only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand price competition to the point where the dealer's profit margin permits provision of the desired services."[332]

Most importantly, the new restricted definition of illegal RPM was explicitly limited to RPM that might be used to facilitate a cartel: "[t]here has been no showing here that an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer" could facilitate cartelizing, because absent such an agreement "the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organize and hold together a retailer-level cartel."[333] Even the complete loss of intrabrand competition, as in *Business Electronics*, is apparently of no concern to antitrust.[334]

In *State Oil Co. v. Kahn*, the Court in 1997 unanimously overruled *Albrecht*'s per se prohibition on manufacturer-imposed maximum resale prices.[335] The Court once again relied upon the premises of *Sylvania*, particularly the "general view that the primary purpose of the antitrust laws is to protect interbrand competition."[336] The Court's decisions since *Sylvania* had made it clear that maximum RPM could not injure interbrand competition.[337] Significantly, Justice O'Connor reiterated the general economic analysis of restricted distribution, especially the natural incentive of manufacturers to strive for the best mix of marketing services and dealer margins, which aligns manufacturers' interests with consumers' interests.[338] She noted that *Albrecht* had really been grounded on a concern for "dealer freedom,"[339] rather than any concern for core antitrust values.[340] As in *Sylvania* itself, dealer autonomy was no longer an

330. *Id.* at 727-28.

331. *Id.* at 728.

332. *Id.*

333. *Id.* at 726-27 (footnote omitted).

334. Dissenting, Justices Stevens and White clearly saw this: "What is most troubling about the majority's opinion is its failure to attach *any* weight to the value of interbrand competition." *Id.* at 748 (Stevens, J., dissenting) (emphasis added).

335. 522 U.S. 3, 21-22 (1997).

336. *Id.* at 15 (citing *Bus. Elecs.*, 485 U.S. at 726).

337. *Id.* at 14-15.

338. *Id.* at 17.

339. *Id.* at 16.

340. A concern for dealers, of course, would be a core concern for the Brandeis "curse of bigness" school, but not for other supporters of antitrust. *See supra* notes 33-36 and accompanying text. But as observed previously, see *supra* note 268, the prohibition of vertical restraints is more likely to injure dealers than to help them. O'Connor noted that this had been the case with regard to *Albrecht* itself: it had "'prompted many suppliers to integrate forward into distribution, thus eliminating the very independent trader for whom Albrecht expressed solicitude.'" State Oil Co. v. Khan, 522 U.S. 3, 16-17 (1997) (quoting 8

adequate basis for antitrust rules.

In these three decisions, the Supreme Court was confronted with the real world consequences of its failure in *Sylvania* to face up to the functional equivalence of RPM and nonprice vertical restraints. Faced with the choice between *Sylvania* and *Dr. Miles*, the Court in each case opted for *Sylvania* and the core of antitrust. In doing so, it almost completely dismantled the Warren Court's construction of a real per se prohibition on manufacturer-imposed resale prices. Once again, careful manufacturers could use the *Colgate* loophole, as in *Business Electronics*, to at least inhibit sharp departures from suggested resale prices. Their ability to impose "nonprice" restrictions that achieved the same economic result was also ensured, as the lower courts have created a virtual rule of per se legality for nonprice restraints.[341]

Most importantly, the rationale for the restricted scope of the per se rule in *Business Electronics*— that RPM is of antitrust significance only if used to facilitate cartelization—also supports doing away with the per se approach altogether under the *Northern Pacific* test. Most uses of RPM, like that at issue in *Leegin*, obviously have nothing to do with any cartel and thus cannot have a "pernicious effect on competition," at least not on interbrand competition, the only kind at the core of antitrust.[342]

Dr. Miles was now in critical condition, perhaps even on life support. With no support from core antitrust concerns, nor from any concern for dealer autonomy or hostility to marketing, it was no longer a viable part of antitrust law. All it could do was produce formalistic distinctions and traps for the unwary. The time had come for it to be overruled.

B. *LEEGIN* AND THE DEATH OF *DR. MILES*

Unlike *Dr. Miles*, *Leegin* squarely posed the issue whether all forms of RPM should be absolutely prohibited, even those with no relation to a cartel.[343] There was no question that Leegin had imposed its system of restricted distribution as part of a unilateral marketing decision, nor was there any question that its Brighton brand of leather goods faced substantial competition from other brands.[344] The Supreme Court responded by finally overruling *Dr. Miles*.[345] The only surprise was Justice Breyer's harsh dissent and that three other justices joined it.

PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 395 (1989)).

341. *See* Arthur, *supra* note 89, at 621-22. Some lower courts have even permitted the use of consignments to impose RPM. *See, e.g.*, Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005).

342. The restricted per se rule in *Business Electronics* can only be justified on prophylactic grounds. A prophylactic per se rule, while not unreasonable for restraints whose cartelistic and benign uses cannot easily be distinguished, does not fit within the *Northern Pacific* definition of a proper per se rule. In any event, it would be hard to justify a prophylactic rule against even simple RPM.

343. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007).

344. *Id.* at 2711.

345. *Id.* at 2710.

1. The Majority Opinion

Justice Kennedy's majority opinion completed the return to the core of antitrust for intrabrand restraints, relying on the Court's cases since *Sylvania*, both those involving other section 1 per se rules and those on restricted distribution.[346] He started with the overarching principle established in *Sylvania* that the "rule of reason is the accepted standard" under section 1 and that per se rules are reserved for the limited case of restraints that satisfy the *Northern Pacific* standard.[347] Applying the *Northern Pacific* standard to RPM, he noted that the Court's more recent decisions had rejected the restraint on alienation and RPM/dealer cartel equivalence rationales on which *Dr. Miles* had been based.[348] The former had no relevance to the economic effects of RPM[349] and the latter was simply incorrect, due to the inherent economic differences between vertical and horizontal restraints, as explained in *Business Electronics* and *Maricopa*.[350] These rationales could not support a per se rule.[351]

Nor did an economic analysis of RPM support a per se rule. The economics literature is filled with pro-competitive justifications for RPM,[352] which "are similar to those for other vertical restraints."[353] The only anticompetitive uses of RPM, per Justice Kennedy, were related to the core of antitrust, primarily (1) to facilitate cartelization, as the Court had recognized in *Business Electronics* or, less plausibly, (2) those by a dominant retailer or manufacturer to exclude equally efficient rivals.[354] These possible uses did not satisfy the always anticompetitive/never procompetitive standard for a per se rule: RPM agreements "can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."[355] Such cases must be judged under the rule of reason,[356]and the lower courts should develop a structured rule of reason to condemn the use of RPM in connection with illicit collusion or exclusion.[357]

Justice Kennedy also rejected claims that *stare decisis* required the retention of the *Dr. Miles* rule for two basic reasons. First, *stare decisis* is less significant in cases about the scope of the Sherman Act's prohibi-

346. *Id.* at 2721.

347. Justice Kennedy did not cite to *Northern Pacific* directly. But he stated the same standard: "[r]esort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output' . . . and 'lack . . . any redeeming virtue.'" *Id.* at 2713 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 771, 723 (1988); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985)) (internal quotes omitted).

348. *Id.* at 2714.

349. *Leegin*, 127 S. Ct. at 2714.

350. *Id.*

351. *Id.*

352. *Id.* at 2714-16.

353. *Id.* at 2715.

354. *Id.* at 2716-17.

355. *Id.* at 2717.

356. *See id.* at 2718.

357. *Id.* at 2720.

tions, as the Court held in *Khan*.[358] Second, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings."[359] Cases since *Colgate*, especially *Monsanto*, *Business Electronics*, and *Khan*, had so undermined and distinguished *Dr. Miles* that its per se rule had become "inconsistent with a principled framework" for deciding section 1 cases.[360]

2. *Justice Breyer's Dissent*

Justice Breyer's dissent[361] is strange for two reasons. First, it reads like an antirust opinion of the Warren Court in its hostility to restricted distribution and its preference for the old, overbroad per se rules. Justice Breyer argued that RPM can be harmful, not for the core concerns cited by the majority, but for imperfect competition arguments like those in the Justice Department's brief in *Schwinn*.[362] For example, Justice Breyer argued that RPM prevents "dealers from offering customers the lower prices that many customers prefer" and "from responding to changes in demand . . . by cutting prices," thus encouraging them "to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry." Also RPM disfavors discount retailers and thus inhibits the growth of "more efficient modes of retailing."[363]

While Justice Breyer grudgingly conceded that RPM might have some procompetitive advantages, he recognized only two of the many recognized in the economic literature[364]—facilitation of new entry and promo-

358. *Id.* (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)). Significantly, all four dissenters in *Leegin* joined in *Khan*. For similar reasons Justice Kennedy rejected the argument that Congress had mandated the per se rule when it repealed the exemption for fair trade. Congress had only eliminated the statutory exemption for RPM under state fair trade laws; it had not codified the per se rule, but left the matter to the Court. *Id.* at 2724.

359. *Id.* at 2721 (quoting Dickerson v. United States, 530 U.S. 528, 443 (2000)).

360. *Id.* at 2722. Justice Kennedy elaborated that "it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide that 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.* Preserving *Dr. Miles* would draw arbitrary lines between different ways of doing the same thing, e.g., the ability to implement RPM under *Colgate*, *Monsanto*, and *Business Electronics* and the use of self-distribution, both of which had the same effect as the RPM forbidden by *Dr. Miles*. *See id.* at 2722-23. Preserving *Dr. Miles* would be especially unprincipled in view of the fact that airtight territorial restrictions, which unlike RPM eliminate all intrabrand competition, are subject to the rule of reason. *See id.* at 2723.

361. *Id.* at 2725 (Breyer, J., dissenting). This dissent was joined by Justices Stevens, Souter, and Ginsburg.

362. *See supra* notes 271-75 and accompanying text.

363. *Leegin*, 127 S. Ct. at 2727 (Breyer, J., dissenting). As the majority pointed out, these objections can be made against all forms of restricted distribution and even against self-distribution. *Id.* at 2722-23. Justice Breyer also argued that RPM could facilitate oligopoly pricing. *Id.* at 2727 (Breyer, J., dissenting). This is another argument based on imperfect competition. Oligopoly pricing has never been held to be a violation of any antitrust law, although its possibility is a factor in assessing mergers under the 1950 amendments to section 7 of the Clayton Act. *See* Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (2000)).

364. *See supra* notes 125-32 and accompanying text.

tion of dealer services by curbing free riding—expressing his skepticism of the free rider argument.[365] He then argued for a prophylactic per se rule based on administrative convenience, which reflected his beliefs that (1) the balance between the procompetitive and anticompetitive uses of RPM was a close call and (2) that courts would have undue difficulty in distinguishing between them.[366] More fundamentally, this argument implicitly rejected the modern approach to per se illegality, arguing in effect for a return to the overbroad prophylactic per se rules and the rule of reason/per se dichotomy of the 1940-1970 antitrust era. The same argument would support overruling all Court decisions since 1977 on the appropriate scope of the per se rules and the rule of reason.

What is even more striking about this laundry list of supposed virtues and vices of RPM is its complete irrelevance to any theory of collusion at either the manufacturer or dealer level or of predatory exclusion of any manufacturer or dealer. Thus, most of Justice Breyer's perceived vices of RPM are completely unrelated to the core of antitrust and to the basic antitrust statutes. These supposed vices are arguments for microeconomic regulation by the Court based on the old Warren Court biases against nonprice forms of competition and in favor of "no frills" forms of retailing based strictly on discounting. They are a throwback to the expansive view of the antitrust law of the 1940-1970 era, which has been rejected by the Court since the mid-1970s.

Significantly, the dissent's decidedly "old school" assessment of RPM does not reflect prevailing economic views. Per Professor Elhauge, a current Harvard antitrust authority, "[i]f anything was a topic of consensus among the Harvard and Chicago schools, it was the proposition that this rule of per se illegality was misguided."[367] The dissent's arguments for a return to overbroad per se rules also do not reflect current Harvard views about the proper role of per se rules and the rule of reason.[368]

Second, Justice Breyer's principal argument was that *stare decisis* required the preservation of the per se rule, yet he ignored all of the many other section 1 precedents that undermine the *Dr. Miles* rule.[369] His main *stare decisis* argument was that both Congress, in repealing the exemption for fair trade in 1975,[370] and large, discounting retailers had relied upon *Dr. Miles*.[371] As for Congress, he cited persuasive evidence that Congress in 1975 had understood that RPM was per se illegal at that

365. *Leegin*, 127 S. Ct. at 2728-30 (Breyer, J., dissenting).
366. *Id.*
367. Elhauge, *supra* note 10, at 60. Indeed, he asserts, the *Leegin* result, if anything, better reflects *Harvard*, not Chicago antitrust views, because "unlike the Harvard school, Chicago school scholars generally take the next step of insisting the proper rule was one of per se *legality*." *Id.*
368. *Id.* at 60 (dissent's admission of both beneficial and harmful effects "is the classic recipe for applying rule-of-reason review"); *id.* at 61 (dissent's arguments for a per se rule unpersuasive).
369. *Id.*
370. *Leegin*, 127 S. Ct. at 2731-32 (Breyer, J., dissenting).
371. *Id.* at 2735.

time.[372] But that does not prove reliance, certainly not reasonable reliance in view of the Court's traditional "common law" approach to antitrust and the notorious instability of antitrust doctrine over the years. More importantly, as the majority correctly pointed out, the text of the repealing legislation did not codify the per se rule. It merely rescinded the exemption, returning RPM to the general prohibitions of section 1, which have not been altered since 1890. In any event, Justice Breyer conceded that "Congress did not prohibit this Court from reconsidering the *per se* rule,"[373] despite PSKS's arguments that Congress had enacted the per se rule in the repealer.[374] At most this was evidence of the 1975 Congress's view of section 1. Justice Breyer never discussed why the views of the 1975 Congress, which could have but did not prohibit RPM in terms, should be more relevant than that of the 1890 Congress, which did actually enact the operative language of section 1.

Justice Breyer also did not support the dubious claim that discount stores had reasonably relied on *Dr. Miles*, apparently to their impending detriment. RPM was readily available nationally before the Warren Court decisions that created the real per se rule. Even then it could be used in fair trade states until 1975.[375] As the majority pointed out, no more than ten percent of goods were sold subject to RPM.[376] Moreover, discount stores have thrived despite *Sylvania* and its progeny, which protect restricted distribution, including de facto RPM.[377] Is it credible that overruling *Dr. Miles* imperils discounters such as Wal-Mart, the office superstores, the great department stores, and Amazon.com?

More importantly, this discussion ignores the Court's section 1 precedents since *Sylvania* in 1977. Yet these precedents all deal with the same section of the same statute. All are on point unless they can be distinguished on a ground that makes a normative difference. The most important ignored precedent is *Northern Pacific*, whose standard for per se illegality has shaped modern section 1 doctrine since *Sylvania*. Application of the *Northern Pacific* standard requires reversal of *Dr. Miles*, even under Justice Breyer's one-sided account of the economic effects of RPM. He conceded that when "a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some [procompetitive] benefits exist," because of the manufacturer's in-

372. *Id.* at 2731-32.

373. *Id.* at 2732.

374. *Id.* at 2723-24 (majority opinion) ("That the *Dr. Miles* rule applied to vertical price restraints in 1975, according to respondent, shows Congress ratified the rule.").

375. *See id.* at 2731-32.

376. *Id.* at 2725. Justice Breyer countered that ten percent of current sales would be more than $300 billion. *Id.* at 2735-36 (Breyer, J., dissenting). This hardly proves his point. The remaining ninety percent available to discounting would be over $2.7 trillion, enough to allay fears for the future of Wal-Mart et al.

377. As Justice Kennedy responded for the majority, "the narrowness of the [*Dr. Miles*] rule has allowed manufacturers to set minimum resale prices in other ways. And . . . resale price maintenance was legal under fair trade laws in a majority of States for a large part of the past century up until 1975." *Id.* at 2724-25 (majority opinion).

terest in the lowest resale price consistent with effective distribution.[378] Thus it cannot be said that RPM lacks "any redeeming value."[379] Consequently, *Dr. Miles* cannot stand under the *Northern Pacific* standard.

Why should *Northern Pacific* not apply in *Leegin*? After all, the Court has even used it to narrow the scope of the most basic per se rule: *Socony*'s ban on horizontal price restraints.[380] What is so different about even simple RPM that it should be in a special category, deemed the most harmful restraint in all of antitrust? Justice Breyer never explained this. He did not even discuss the *Northern Pacific* standard, even while dissenting from an opinion applying it. This is a strange way to honor *stare decisis.*

Justice Breyer also never discussed *Dr. Miles*'s inconsistency with *Sylvania*, *Monsanto*, *Business Electronics*, and *Khan*, despite the majority's express reliance on those cases.[381] The Court's stated rationale in *Monsanto* and *Business Electronics* for limiting the scope of *Dr. Miles* was that price and nonprice restraints do the same things and can easily be mistaken for each other in litigation.[382] Justice Kennedy correctly relied upon those cases in concluding that *stare decisis* could not justify the continued survival of *Dr. Miles*.[383] After *Monsanto* and *Business Electronics*, *Dr. Miles* left only a trap for the less sophisticated. Overruling it not only removes the formalistic distinction between vertical price and nonprice restraints, as Justice Kennedy argued, but adds to the overall consistency of section 1 doctrine. That "like case be decided alike" is the very heart of *stare decisis*.[384]

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378. *Id.* at 2729; *see also id.* at 2728 (Breyer, J., dissenting) (new entry and free riding arguments for RPM).

379. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

380. Broad. Music, Inc. v. Colum. Broad. Sys., 441 U.S. 1, 8 (1979).

381. *Leegin*, 127 S. Ct. at 2721-23 (majority opinion). If Justice Breyer would not overrule those cases, he never explained why the administrative difficulties of separating anticompetitive from procompetitive vertical price fixing are more difficult than those attending the use of the rule of reason for the horizontal price restraints at issue in *Broadcast Music* and *NCAA*. Nor did he explain why the risk of error in vertical restraint cases is greater and more harmful than in cases of competitor price restraints, which lie at the very core of antitrust.

382. *See supra* notes 311-40 and accompanying text. The problems outlined in *Monsanto* and *Business Electronics*, together with those the courts wrestled with before *Parke-Davis*, *see supra* notes 182-223 and accompanying text, also belie Justice Breyer's claims that judicial implementation of the *Dr. Miles* rule, "even with the complications attendant" the *Colgate* loophole, "has proved practical" over the years and that the "per se rule is well-settled law." *Id.* at 2734-35. They also disprove Justice Breyer's claim that *Sylvania*'s overruling of *Schwinn* was based on a "need to avoid 'confusion' in the law, *a factor totally absent here*." *Id.* at 2736-37 (emphasis added).

383. *Id.* at 2721.

384. The dissent does mention *Khan* and *Sylvania* in its response to the majority's argument that the Court has traditionally acted like a common law court in Sherman Act cases, revising and overruling precedents, pointing expressly to *Khan* and *Sylvania*. *Id.* at 2720, 2721-22. Justice Breyer's reply emphasized that "the Court decided *Sylvania* only a decade after *Schwinn*" and *Khan* "29 years after *Albrecht*—still a significant period, but nowhere near close to the century *Dr. Miles* has stood." *Id.* at 2736. But as this Article has shown, the per se rule did not have any real teeth until the Warren Court closed the *Colgate* and consignment loopholes in the 1960s. Even then RPM was per se legal in fair trade states. Just two years after the repeal of the fair trade exemption in 1975, *Sylvania* undercut the

Near the end of his opinion, Justice Breyer conceded that courts could properly overrule cases by "over time issu[ing] decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest."[385] As this part has shown, that is exactly how the Court overruled *Dr. Miles*.

3. *The Opinions Compared*

The contrast between the majority and dissenting opinions in *Leegin* is stark. They reflect two very different approaches to antitrust. The majority opinion is a traditional judicial approach to a difficult statute. Its retention of antitrust liability under the rule of reason for the use of RPM to facilitate a cartel, but not for its productive uses, is soundly based on the core principles of antitrust. While the majority based its judgment on the modern economic consensus on distributional restraints, it also relied on the *Northern Pacific* standard for per se illegality and the Court's distributional restraint cases since 1977, all of which are consistent with the statutory core of antitrust and embedded in modern antitrust doctrine. It also based its judgment on the need for consistency in its interpretations of section 1, an appropriate goal for all statutory-based law.

By contrast, the dissent's approach is not consistent with the views of most modern economists, but rather with those that prevailed in the days of the Warren Court. Nor is the dissent faithful to the statutory core of antitrust, the prevailing *Northern Pacific* approach to per se liability, the Court's distributional restraints decisions of the last three decades, or the basic principle that like cases should be treated alike.

The point is not that the majority's view of the policy issues raised by RPM is "correct." After all, the dissenters' view was once the view of mainstream economists and is still shared by eminent, competent economists. The real question is how to pick between the competing theories. Is this merely a quasi-legislative policy judgment? Or is there a more judicial approach?

It is the thesis of this Article that there is a more judicial approach—the use of the core of antitrust as a standard—and that the main thrust of the Court's antitrust decisions over the last three decades, including *Leegin*, are consistent with that standard. Despite the inherent necessity to incorporate economics in their judgments, these decisions are fundamentally judicial, not political. The dissent, on the other hand, has no basis in the statutory core of antitrust. If one of the opinions in *Leegin* is to be fairly criticized as more like that of an agency than a court,[386] it is the dissent.

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rationale of *Dr. Miles*, as Justice White's concurrence and contemporary commentators made clear. So for most of its troubled existence, *Dr. Miles* has hardly been the pillar of antitrust law that the dissent suggests.

385. *Id.* at 2736.

386. Brunell, *supra* note 10, at 528-29.

CONCLUSION

Dr. Miles's per se prohibition on even simple RPM was not based on core antitrust values—the ones that inspired passage of the basic antitrust statutes in 1890 and 1914. By itself, RPM does not facilitate collusion, inefficiently exclude competitors from markets, or raise any other core antitrust concern. Consequently, the per se rule against RPM has never been wholeheartedly supported by the Supreme Court, except for a few years under the Warren Court. Even then, the non-core concerns underlying *Dr. Miles* were inadequate to produce a coherent, consistent, and stable doctrine.

As the Court in the 1970s began basing antitrust doctrine on the original, enduring concerns that led to the original statutes, *Dr. Miles*'s per se rule increasingly became inconsistent with the rest of section 1 doctrine, particularly the favorable treatment of nonprice distributional restraints, whose economic effects are substantially similar to those of simple RPM. Interpreting section 1 in light of its original purposes and following the fundamental principle that like cases should be treated alike, the Court appropriately overruled *Dr. Miles.* Far from betraying basic and established antitrust principles, the Court's decision in *Leegin* finally based the law of restricted distribution entirely on the core of antitrust, bringing greater consistency, clarity, and legitimacy, to section 1 doctrine.