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RESTRAINTS ON ALIENATION IN ANTITRUST LAW: A PAST WITH NO FUTURE

C. Paul Rogers III*

I. INTRODUCTION

The old common law rule prohibiting restraints on alienation was soundly discredited as a viable antitrust goal by the Supreme Court in its watershed Continental T. V. v. GTE Sylvania decision almost twenty years ago. However, early antitrust decisions, some of which are the cornerstones of modern antitrust law, are liberally sprinkled with references to the alienation concept. Indeed, at least one early landmark decision seems to have rested primarily on a trader’s right to compete free of another’s interference. Thus, the restraint on alienation issue is perhaps relevant to modern antitrust jurisprudence, for even if it is agreed that the alienation concept is an inappropriate antitrust tool, the fact remains that some existing antitrust law owes allegiance to it.

In the antitrust arena, freedom from a restraint on alienation refers to the right of an owner of goods to make decisions in the marketplace free from the interference of others. For example, a resale price maintenance agreement between manufacturer and wholesaler would restrict the right of alienation of the wholesaler, since the wholesaler would not be free under the agreement to set his own resale price for his goods. Such an agreement would constitute a restraint on alienation.

The alienation concept is anathema to efficiency concerns, since it causes manufacturers to lose all control over their goods immediately.

* Dean and Professor of Law, Southern Methodist University School of Law. B.A. 1970, J.D. 1973, University of Texas; LL.M. 1977, Columbia University. Although this article may not be worthy of the memory of Ken Pye, I very much wanted it included in this volume in his honor. Ken provided me a summer grant to support the research for this piece shortly after he assumed the SMU presidency. That August, I became a full-time university administrator, and despite the best of intentions, the article lay in the drawer (actually in the computer) until prompted to completion by my desire to contribute to this volume. I would like to acknowledge the fine research of two former students, Leslie Klaassen and Bruce Reemsnyder, and, more recently, the assistance of Greg Ivy of the Underwood Law Library.

2. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 409 (1911).
upon sale. Of course, a restraint on alienation may occur in a situation in which a manufacturer has dominant market power and is exercising it in a way so as to assure distributional control over its goods to the detriment of competition in the market. But the alienation concept, in its simplest marketplace form, protects the opportunity of one to compete rather than protecting competition itself or consumer welfare.4

The Supreme Court's decision in Business Electronics Corp. v. Sharp Electronics Corp.5 suggests that protection of restraints against alienation cannot be considered completely obsolete in the vertical restraints arena. In that case, the Court held that a vertical restraint is not illegal per se unless it contains an agreement on price or price levels.6 In distinguishing the per se rule for resale price maintenance established long ago in Dr. Miles, the Sharp Electronics majority acknowledged the common law property underpinnings of that early decision.7 Thus, it may be asked whether restraint on alienation is still a factor to be reckoned with in the modern antitrust world.

This article will attempt to measure the historical significance of restraints on alienation in the development of important antitrust doctrines such as resale price maintenance. It will then evaluate the contemporary role of alienation concepts in antitrust today and consider whether alienation as an antitrust goal should once and for all be discarded as anti-efficient and anti-consumer. Finally, the article will analyze the effect of changing alienation-influenced antitrust doctrine or removing it from current antitrust law.

II. THE HISTORICAL FOUNDATIONS OF ALIENATION

At common law, alienation refers to the voluntary transfer of the title of property by the owner to another.8 Thus, a restraint on alienability simply refers to some type of restriction on the salability or transferability of property. The common law, both in England and the United States, has traditionally favored the free alienation or transferability of property and looked askance at restrictions on alienation, particularly if privately imposed.9 Restraints upon alienation are typically permitted only for articulated public policy reasons, for general public policy strongly favors

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4. Although it might be preferable from a consumer welfare perspective that the manufacturer control the price and other distributional facets of marketing a product, an alienation approach would intercede on behalf of the independence of the middleman.
6. Id. at 735-36.
7. Id. at 733. The Court went on to rule that the per se rule articulated in Dr. Miles did not apply to the facts before it since "no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury." Id.
the free alienation of property.\textsuperscript{10}

Historically, restraints on alienation of personalty as well as real property were objectionable.\textsuperscript{11} Lord Coke viewed both as anathema to public policy, as set forth in the following oft-quoted passage:

If a man be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.\textsuperscript{12}

Coke's reference to "trade and traffic" was apparently influential in heightening awareness of the importance of the alienability of chattels. By the turn of this century, English and American courts, although perhaps not solely because of Lord Coke, were treating restraints on alienation of movables under the "restraint of trade" rubric. English courts used, in cryptic language, the right of alienation to strike down resale price maintenance agreements.\textsuperscript{13} At the same time American courts, including the Supreme Court, were following suit.

III. THE EARLY AMERICAN PATENT CASES

The earliest restraint of trade cases utilizing restraint of alienation reasoning in America involved patents. The first cases did not involve the patent holder's right to control price after sale of the patented product, but rather concerned the patent holder's right to control the use of the article after sale or transfer. The cases typically involved an attempt by the patent holder to impose a time limit on the use of the patented article by the purchaser.

In Bloomer v. McQuewan,\textsuperscript{14} Chief Justice Taney distinguished between

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\item \textsuperscript{10} Id. at 2-6; see also John D. Park & Sons v. Hartman, 153 F. 24, 39 (6th Cir. 1907) ("The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.").
\item \textsuperscript{11} Restraints on the alienation of real property were more frequently permitted and generally less objectionable in England than restraints on movables. See, e.g., Tulk v. Moxhay, 2 Ph. 774, 779, 41 Eng. Rep. 1143 (P.C. 1848) (holding that equity would permit an injunction to enforce a negative covenant where the subsequent purchaser took with notice); cf. National Phonograph Co. v. Menc, 111 App. Cas. 336 (P.C. 1910) (appeal taken from Austl.); McGruther v. Pitcher, [1904] 2 Ch. 306 (Eng. C.A. 1904); Taddy & Co. v. Sterious & Co., [1904] 1 Ch. 354 (Eng. 1903); Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146 (Eng. C.A. 1901). See also Zechariah Chafee, Jr., Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 977-80 (1928).
\item \textsuperscript{12} COKE, INSTITUTES OF THE LAWS OF ENGLAND § 360 (Day ed. 1812). There is some suggestion in England that the alienability of real property was originally viewed as less important than the alienability of chattels. See Spencer's Case, 77 Eng. Rep. 72, 74 (K.B. 1583).
\item \textsuperscript{13} See Dunlop Pneumatic Tyre Co. v. Selfridge & Co., 1915 App. Cas. 847 (1915) (appeal taken from Eng.); Gillette Safety Razor Co. v. A. W. Gamage Ltd., 25 T.L.R. 808 (1909); National Phonograph, 111 App. Cas. at 336; McGruther, [1904] 2 Ch. at 306; Taddy, [1904] 1 Ch. at 354.
\item \textsuperscript{14} 55 U.S. (14 How.) 539 (1852).
\end{itemize}
a grant by the patent holder of the right to make and sell the product and the grant of the right to use it. According to the Court, the right to make or vend a patented good derives directly from the monopoly conferred by statute, and thus can be limited by the patent holder even where Congress has extended the monopoly period conferred. However, the Court found that the purchaser who intends merely to use the article is not exercising any patent-derived rights; "[t]he implement or machine becomes his private, individual property, ... protected by ... the laws of the State in which it is situated." The Court concluded that "it can hardly be maintained that Congress could lawfully deprive a citizen of the use of his property after he had purchased the absolute and unlimited right from the inventor."  

Subsequently, in Mitchell v. Hawley, the Supreme Court was confronted with a conditioned sale, in contrast to the unconditioned sale in Bloomer. The Court upheld a condition in the original agreement which limited the purchaser's right to sell or use the patented article to the original term of the patent grant, even though Congress had later extended the patent term. Next, in Adams v. Burke, the Court considered the right of a patent holder to control subsequent purchasers' actions with respect to the patented article. The dispute involved an undertaker who had purchased patented coffin lids from licensed manufacturers having the right to make, use, and sell the product only within a ten-mile radius of Boston. An injunction was sought to preclude the undertaker from using the lids outside of the radius. The Court, citing both Bloomer and Mitchell, upheld the right of the subsequent purchaser to use the patented lids beyond the radius. "[I]n the essential nature of things," according to the Court, "when the patentee ... sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use."  

Adams made clear that an agreement between a patentee (or his assignee) and a manufacturer could not bind a subsequent purchaser for use. Thus, after Bloomer, Mitchell, and Adams, it appeared that a patent holder could control use of the patented article only by placing conditions

15. Id. at 549. This distinction was first made in Wilson v. Rousseau, 45 U.S. (4 How.) 646, 688 (1846). See also Chaffee v. Boston Belting Co., 63 U.S. (22 How.) 217, 223 (1859).
16. Bloomer, 55 U.S. (14 How.) at 550. Taney also wrote that "when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it . . . ." Id. at 549.
17. Id. at 553.
18. 83 U.S. (16 Wall.) 544 (1872).
19. Id. at 550-51.
20. 84 U.S. (17 Wall.) 453 (1873).
21. Id. at 456 n.*.
22. Id. at 456.
23. Id. The Court went on to say:

[The patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.

Id.
on the purchaser at the time of sale; even that, however, could not bind a subsequent use purchaser. But later decisions, beginning with *Peninsular Button-Fastener*,24 expanded the patentee's control of both the use and resale of patented articles. In that case, the Sixth Circuit held that a notice of conditions of use permanently and conspicuously affixed to a patented article was sufficient to bind a purchaser to those conditions.25 This type of notice was also found to be effective against subsequent purchasers who bought the patented machines from jobbers.26 Even more significantly, the court held that a patentee's enforceable conditions of use could extend to articles beyond the coverage of the patent. Thus, a patentee could lawfully tie the use of a non-patented product, typically also produced by the patentee, to the use of the patented product.27

Subsequent decisions upheld the right of patent holders to control the terms of resale, including price, of patented goods.28 In *Victor Talking Machine Co. v. The Fair*,29 the Seventh Circuit upheld the right of a patent holder to control the resale price of its patented article, even against a subsequent purchaser from a jobber, where the subsequent purchaser was aware of the price limitations placed upon the jobber.30 Two Supreme Court decisions confirmed that the patentee's monopoly rights extended to the control of the terms of sale or resale of the patented product.31

These cases granting patentees preferred positions, although later restricted32 and, in the case of *Henry*, overruled,33 were unsuccessfully relied upon to support resale price agreements in non-patent transactions. The Supreme Court rejected the analogy to patents in a copyright case, holding that a copyright holder does not have the right to impose a price limitation upon future purchasers as to the retail sale of a copyrighted book.34 It can be said that the lack of a patent relationship is one of the principal reasons that resale price maintenance was found to violate the Sherman Act in the seminal *Dr. Miles* decision35 and its closely related

25. Id. at 290-91.
26. Id. at 291.
29. 123 F. 424 (7th Cir. 1903).
30. Id. at 427. It was this case in which Judge Baker penned the oft-quoted phrase, "Within his domain, the patentee is czar." Id. at 426.

The early patent and copyright opinions focus on the intent and reach of the Congressional grant of monopoly; the right of a user to control the use or resale of the article seems to be assumed if the statutory authorization falls short. However, those decisions are not noted for their elaboration of alienation principles. It is necessary to look at the non-patent and non-copyright cases to gain insight into the judiciary’s early view of the alienability of chattels.

IV. ALIENATION IN NON-PATENT CASES

The early cases, in applying the common law, treated restraints on the alienation of chattels as restraints of trade. For example, in *Fowle v. Park,* the Supreme Court upheld an agreement restricting the territory in which a licensee could sell a secret formula medicine. The Court found the territorial restriction justified under the reasonableness standard employed in the historic English case, *Mitchel v. Reynolds.* According to the Court, vendors are “entitled to sell to the best advantage, and in doing so to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit.”

The Court’s approval of the restraint was consistent with the policy of encouraging “useful discoveries” by granting rights to those who make discoveries; further, the public was not harmed by the restriction since its only interest was the availability of the balm, not the identity of the seller. Thus, the alienation rights of licensees of the secret formula were given short shrift in *Fowle.* The case was decided one year prior to the passage of the Sherman Act, however, and resale price maintenance was not directly at issue. Subsequently, in *Garst v. Harris,* the Supreme Judicial Court of Massachusetts did uphold resale price maintenance agreements, although the court later balked at extending the protection to subsequent purchasers who had not entered into an agreement with the original vendor. The court’s reasoning in the former decision centered upon contract law and the superior rights afforded secret formula product

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37. 131 U.S. 88 (1888).
39. 131 U.S. at 97.
40. Id.
41. The agreement did contain a resale price minimum, but apparently that restriction was not litigated. Id. at 94.
42. 58 N.E. 174 (Mass. 1900); see also Garst v. Charles, 72 N.E. 839 (Mass. 1905).
developers, at least as against purchasers who intended to resell the product. The later Hall & Lyon decision viewed Harris "as founded on the personal contract alone." According to the court, "[t]o say that this contract is attached to the property, and follows it through successive sales which severally pass title, is a very different proposition. We know of no authority, not of any sound principle, which will justify us in so holding." The Massachusetts decisions reflect the continuing conflict between alienation and patent law principles. Even absent a patent, the courts tended to grant some measure of marketing protection to the maker of a secret process. Beyond the privity of a contract entered into by the process developer, in Massachusetts at least, alienation principles took precedence. Those principles recognize that movement in chattels should not be restrained and that subsequent purchasers should have the right to dispose of their property without encumbrance.

V. JOHN D. PARK & SONS v. HARTMAN

The application of patent law principles to the distribution of products made from non-patented secret processes was thoroughly debunked by the Sixth Circuit in the Hartman case. The decision is important because it was the first resale price maintenance case to rest unabashedly upon alienation principles.

Hartman involved a challenge to a drug manufacturer that required its wholesalers to agree to sell only to specified retailers and at specified prices. The manufacturer had sought an injunction against an authorized distributor who was price cutting and selling the plaintiff's goods to unauthorized retailers. Judge Lurton, who had authored the Peninsular Button-Fastener opinion that had expanded a patentee's rights to control a patented article's distribution, believed that a patentee's rights derived from its congressionally sanctioned monopoly. Since secret process manufacturers could look to no statute granting similar rights, resort to common law restraint of trade principles became necessary.

In applying the common law, the court first looked directly to alienation principles. In its view, "[t]he right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as

44. Id.
45. Id. at 219-20.
46. The court in Hall & Lyon ruled that "[t]he purchaser from a purchaser has an absolute right to dispose of the property." Id. at 219.
48. The manufacturer actually sought injunctive relief against the defendant who was surreptitiously obtaining the manufacturer's drugs and selling them at discount prices. Id. at 24-25.
49. Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 F. 288 (6th Cir. 1896); see supra text accompanying notes 24-27.
pass from hand to hand." The court concluded that a price and customer restriction intended to bind even those not in a contractual relationship with the manufacturer did amount to a restraint on alienation.\footnote{Id. at 39.}

The court then proceeded to consider whether the restraint on alienation was authorized to protect the interests of the manufacturer selling its goods. It held that only if the restraint was ancillary to some lawful main contractual purpose could it withstand scrutiny.\footnote{Id. at 40-41.} The court concluded that, particularly given the large number of restrictive contracts entered into by the plaintiff, the main purpose and the sole effect of the agreements were to stifle trade at the wholesale and retail levels.\footnote{Hartman, 153 F. at 42.}

VI. DR. MILES MEDICAL CO. V. JOHN D. PARK & SONS

The Hartman result and reasoning were heartily embraced by the Supreme Court in the landmark Dr. Miles decision.\footnote{Dr. Miles, 220 U.S. at 373 (1911). Dr. Miles arose from the Sixth Circuit, where Judge Lurton characterized the case as being controlled by Hartman. 164 F. 803, 804-07 (6th Cir. 1908).} The plaintiff in Dr. Miles was a drug manufacturer who brought a tortious interference action against a wholesale drug concern that was procuring plaintiff's products and selling them at "cut prices."\footnote{Dr. Miles, 220 U.S. at 375.} The defendant had refused to enter into a resale price maintenance agreement with the plaintiff and was allegedly inducing those who had done so to violate their price restric-

\footnote{Dr. Miles Medical Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911). Dr. Miles arose from the Sixth Circuit, where Judge Lurton characterized the case as being controlled by Hartman. 164 F. 803, 804-07 (6th Cir. 1908).}
The plaintiff, in an effort to avoid the Hartman precedent, consigned rather than sold its drugs to its authorized distributors. It still required, however, a resale price maintenance agreement of its wholesalers and retailers. In addition, the contracts were held to apply to the plaintiff's goods which were obtained by distributors or retailers from other sources.

Chief Justice Hughes relied on the findings of the court below in considering the ownership issue. There, Judge Lurton had found the consignment agreements an effort "to disguise the wholesale dealers in the mask of agency" and had concluded that "the jobber must be regarded as the general owner and engaged in selling for himself." The Court went on to rule that the dealer acquired title to the goods, irrespective of the enforceability of the agency and consignment agreements, because of inconsistencies in Dr. Miles' pleadings. Dr. Miles had failed to aver that the distributor acquired the patented medicine from a consignee, so the Court could not support Dr. Miles' claim that it retained title to the goods at issue.

The Supreme Court then followed the Hartman reasoning closely in condemning the practice in question as violative of the Sherman Act. In addition, it quoted extensively from Hartman on the alienation issue. The Court, per Justice Hughes, rejected the assertion that a manufacturer is entitled to control prices on subsequent sales of its products. "[B]ecause a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid."

The Dr. Miles Court, as had the Sixth Circuit in Hartman, next considered whether the restraint on alienation amounted to a restraint of trade or was reasonably necessary to protect legitimate interests of the manufacturer. It concluded that a resale price maintenance agreement was "not analogous to that of a sale of good will, or of an interest in business, or of the grant of a right to use a process of manufacture;" that the manufacturer had "not parted with any interest in its business or instrumentalities of production;" and that it had "conferred no right by virtue of which purchasers of its products may compete with it." The Court concluded

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57. Plaintiff, in an effort to exact maximum control over the price and distribution of its products, entered into consignment contracts with wholesalers and "retail agency contracts" with retailers, both of which required the maintenance of resale prices. *Id.* at 394.
58. *Id.* at 410 (Holmes, J. dissenting).
59. *Id.* at 395 (quoting *Dr. Miles*, 164 F. at 805).
60. *Id.* at 397-99; see Rudolph J. Peritz, A Genealogy of Vertical Restraints Doctrine, 40 *Hastings L.J.* 511, 518-519 (1989).
62. *Dr. Miles*, 220 U.S. at 405-06.
63. Judge Lurton, author of the Peninsular Button-Fastener, Hartman, and lower court *Dr. Miles* opinions, had been appointed to the Supreme Court by the time that Court heard the *Dr. Miles* appeal. He did not participate in the decision. *Id.* at 409.
64. *Id.* at 404.
65. *Id.* at 407.
that a restraint of trade resulted because the resale price agreements prevented competition among the product's distributors.66

While *Dr. Miles* came before the articulation of per se rules, the Court's abrupt rejection of the proffered justifications led to its classification as a per se decision in later Supreme Court decisions.67 The alienation issue plays a prominent part in the decision; it appears that the Court believed that a finding of a restraint on alienation was a necessary predicate to its restraint of trade determination. The Court based the latter finding on the elimination of competition among dealers who would otherwise be competing for Dr. Miles' products.68 The Court's point seems to be that a dealer cannot effectively compete with its rivals unless it has the right of alienation of its own goods. The Court recognized price and other restrictions hamper competition at each level of distribution; that is, vertical restraints have horizontal competitive effects.69 In fact, it specifically equated the effect of Dr. Miles' resale price agreements with a conspiracy between dealers to set prices among themselves.70

It is noteworthy that the alienation concept in *Dr. Miles* was discussed both with respect to the importance of the movability of chattels and with regard to the freedom of dealers to control the distribution of their products.71 Historically, the consideration of alienation has brought about a public policy focus on the importance of movement in chattels to com-

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66. *Id.* This was particularly true, according to the Court, given the large number of agreements containing the price restrictions. *Id.* at 407. Dr. Miles apparently had contracts with over 400 wholesalers and 25,000 retailers. See William R. Andersen, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality*, 54 WASH. L. REV. 763, 768 (1979).

Justice Holmes vigorously dissented. He believed that a manufacturer should have the right to control the price of its products. He believed that "we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article . . . as fixing a fair price." *Dr. Miles*, 220 U.S. at 412. According to Holmes, a fair price to consumers will be assured by the "equilibrium of social desires," meaning that consumers will refuse to pay more than their wants mandate for products such as Dr. Miles' drugs. *Id.* Holmes viewed the defendant's price cutting as "fraudulent," with "no merits of its own to recommend it to the favor of the court." *Id.* He wrote:

I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

*Id.* As will be seen, this view is closely akin to modern objections to "free riders" and to the implicit support a right of alienation approach provides such price-cutting "knaves."


68. *Dr. Miles*, 220 U.S. at 407-08.

69. *Id.* at 408.

70. *Id.*

71. On the latter point the Court stated: "If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell." *Id.* at 407-08. The Court concluded that the manufacturer was not so entitled. *Id.* at 408.
Dr. Miles, again following the lead established by Hartman, looked to the effects restraints on alienation have upon competitors and competition. It is, of course, this interposition of the right of alienation into the competitive sphere that has proven so controversial.

VII. UNITED STATES V. COLGATE & CO.

Following Dr. Miles, it appeared that a manufacturer could not control the resale prices of its products absent, as Justice Holmes noted in his dissent, downstream integration. The Supreme Court extended this principle to the patent cases, holding that a patentee has no right to control the resale price of a patented article once it has sold and received consideration for the article. However, in the controversial Colgate case, the Supreme Court gave manufacturers and suppliers hope for some control over the distribution of their products.

Colgate was a criminal case in which the government charged the defendant with orchestrating a conspiracy with wholesale and retail dealers for the purpose of maintaining resale prices. To defend itself, Colgate went so far as to retain Charles Evan Hughes, who had resigned from the Supreme Court a few years before, to represent it. The district court gave Hughes something to work with when it ruled that the indictment did not charge that the defendant had secured agreements or contracts with its distributors to secure resale prices. Subsequently, the Supreme Court believed that it was bound by that interpretation.

Therein lay a distinction from Dr. Miles with which the Court could feel comfortable. Faced with the ongoing conflict over the control of goods between manufacturers and distributors, the Court found reason on this occasion to side with the manufacturers. Accordingly, the Court held that

[i]n the absence of 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.

72. See supra notes 8-13 and accompanying text.
73. Dr. Miles, 220 U.S. at 411 (Holmes, J., dissenting).
76. Hughes was, of course, the author of the Dr. Miles opinion. According to Chafee, Hughes “piloted the battered hulks of price maintenance up a tortuous channel between the familiar rocks and shoals presented by his former colleagues, into safe anchorage.” Chafee, supra note 11, at 990.
77. Colgate, 250 U.S. at 304.
78. Id. at 306-07.
79. Id. at 307. The Court's monopolization exception was, of course, in deference to § 2 of the Sherman Act.
In sum, the Court ruled that absent an agreement to control resale prices, the manufacturer has a chance to actually control resale prices. A manufacturer could announce the terms on which it would sell its products, including resale prices, as long as it did not require an agreement of its distributors; further, it could refuse to sell to those not adhering to its resale prices.

Hughes had argued that the lack of an agreement eliminated restraint on alienation difficulties because there was no qualification of a buyer's title or of his freedom to resell.\(^80\) He distinguished Dr. Miles as involving "the restraint upon the right of alienation of property sold, not the right of the manufacturer to refuse to sell."\(^81\) The Court did not directly address alienation, although in giving manufacturers the latitude that it did, it seemed to agree with Hughes' characterization of the issue. It did specifically distinguish Dr. Miles on the basis of the resale price agreements there present.\(^82\)

In affirming "the long recognized right" of a producer to independently refuse to deal with anyone it finds objectionable,\(^83\) the Court relied principally on two earlier Sherman Act cases, Trans-Missouri\(^84\) and Eastern States Retail Lumber.\(^85\) Those cases both involved horizontal conspiracies to, respectively, fix railroad freight rates and exclude retail lumber competitors. The Court's reference to independent action in Trans-Missouri was to contrast private manufacturers, who are free to sell to anyone, from a railroad, which, the Court said, "must transport all persons and property that come to it."\(^86\) In Eastern States Retail Lumber, the Court distinguished between the right of a retailer to refuse to purchase from a wholesaler and a retailer conspiracy to the same effect.\(^87\) Thus, the Colgate Court, in acknowledging the manufacturers' autonomy as it did, put forth the refusal to deal "right" in a new, vertical context. In doing so, the Court gave manufacturers significant resale control over their products, although subsequent decisions would curtail many of the routes manufacturers thought open to them.\(^88\)

\(^{80}\) See Levi, supra note 36, at 276-77 (citing Brief for Defendant-in-Error at 12); Colgate, 250 U.S. at 300.

\(^{81}\) Levi, supra note 36, at 277 (quoting Charles E. Hughes).

\(^{82}\) Colgate, 250 U.S. at 307-08.

\(^{83}\) Id. at 307.

\(^{84}\) United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

\(^{85}\) Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

\(^{86}\) Trans-Missouri, 166 U.S. at 321. Moreover, the railroad must, according to the Court, "do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business." Id.

\(^{87}\) 234 U.S. at 614. The Colgate Court also cited two consolidation cases, Standard Oil Co. v. United States, 221 U.S. 1, 56 (1911), and United States v. American Tobacco Co., 221 U.S. 106, 180 (1911), and one of the cases which significantly limited patentees' rights to control the distribution of patented articles, Boston Store v. American Graphophone Co., 246 U.S. 8 (1918).

\(^{88}\) See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920). The subsequent erosion of Colgate may have been due to its somewhat unique posture. The Court's hold-
As noted, in granting the manufacturers control over resale absent an agreement the Colgate Court did not directly address alienation, arguably because it agreed with Hughes that no restraint existed. But Dr. Miles' emphasis on the freedom of traders to exercise unfettered control over their goods certainly squares philosophically with Colgate's recognition of manufacturer resale control. Indeed, the tension between Dr. Miles and Colgate, and their resolution of the conflict between manufacturers and distributors, can perhaps best be understood by resort to the alienation principle articulated in Dr. Miles (which was borrowed from Hartman). If alienation recognizes the freedom of dealers to control distribution of their products, it must also support the right of manufacturers to do the same. Since an obvious conflict occurs when both manufacturer and dealer seek to assert that right, at least where the manufacturer is attempting to control the terms of resale, some middle ground must be reached. Colgate expressly recognized the manufacturer's side of the conflict and effected a compromise between the competing interests by focusing on the presence or absence of an agreement forcing the manufacturer's desires on the distributor.

It remains to consider the competitive impact of the compromise. The Dr. Miles Court likened the effect of the resale price agreements to a conspiracy among dealers to set prices; today we would point to the elimination of intrabrand competition among the participating dealers. Certainly, the same competitive effect results in the Colgate situation, at least to the extent that the manufacturer is successful in imposing its desires upon distributors absent an agreement. The greater the manufacturer's success, the greater the interference with intrabrand competition.

The competitive impact on the market caused by the elimination of intrabrand competition through resale price maintenance depends upon the percentage of the market controlled by the product and the percentage of the manufacturer's product subject to the resale prices. Even assuming that a manufacturer is successful in mandating resale prices for all of a product distributed, the elimination of competition on the market as a whole is insignificant unless that product controls a substantial market share.

For non-price vertical restraints, the elimination of intrabrand competition is balanced, under the rule of reason, against the distributional efficiency gains which may result from the restrictions (thus promoting interbrand competition). Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). But no such balancing can take place for resale price maintenance, assuming distributional efficiencies there are at least theoretically possible, because of the continuing existence of the per se rule.

91. A price-fixing conspiracy among dealers of the same brand product has the effect of eliminating intrabrand competition just as if the resale price were mandated by the supplier.

92. The effect of a manufacturer's refusal to deal similarly with price-cutting distributors is to impede intrabrand competition, since the distributor is unable to obtain the de-
Thus, Colgate permits an anticompetitive effect expressly forbidden in Dr. Miles. If, as suggested above, the result in Colgate represents a compromise of the conflict between manufacturers and distributors and an implicit recognition of alienation principles, it still seems to be at the expense of intrabrand competition. That competitive permissiveness is undoubtedly one reason subsequent Supreme Court opinions, at least until recently when new thinking about the economic impact of vertical restraints influenced the Court,93 narrowly confined Colgate.94

The absence of an allegation of an express agreement in Colgate also appears to have been somewhat of a subterfuge. Section 1 of the Sherman Act, of course, forbids “contract[s], combination[s] . . . or conspirac[ies];”95 and at the time of the decision, the finding of inferential conspiracies in other cases had already occurred.96 However, the Colgate Court elected not to consider whether the indictment charged such a conspiracy, instead referring to the right of manufacturers to control the sale of their products.

VIII. POST-COLGATE DECISIONS

In post-Colgate decisions, the Supreme Court set about defining the reach of both Colgate and Dr. Miles. In United States v. A. Schrader’s Son, Inc.,97 the Court reaffirmed that Colgate did not implicitly overrule or erode Dr. Miles and ruled that the Dr. Miles prohibition applied to resale price agreements “whether express or implied from a course of dealing or other circumstances.”98 The next term, in Frey & Son, Inc. v. Cudahy Packing Co.,99 the Court held that the existence of an express or implied agreement was a question of fact for the jury.100

The following year, the Court, in FTC v. Beech-Nut Packing Co.,101 struck down a resale pricing scheme in which the defendant solicited from complying distributors the names of recalcitrant wholesalers and kept a list of the offenders. In addition, the defendant exercised pressure to keep complying distributors from selling to noncompliers. Noncompliers had to provide assurance that they would follow the defendant’s resale pricing policy in order to get off the list and obtain the defendant’s products.

94. See infra text accompanying notes 97-117.
96. See, e.g., Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914).
97. 252 U.S. 85 (1920).
98. Id. at 99.
99. 256 U.S. 208 (1921).
100. Id. at 210.
101. 257 U.S. 441 (1922).
In drawing the line between *Dr. Miles* and *Colgate*, the Court held that the Beech-Nut system went "far beyond the simple refusal to sell goods to persons who will not sell at stated prices." Its language seems to dispense with the contract "express or implied" requirement, focusing instead on the anticompetitive impact of defendant's scheme. In so doing, the majority lost the vote of Justice McReynolds, who had authored the *Schrader's Sons* and *Frey* opinions. McReynolds argued that the lack of agreement, which was stipulated by the parties, meant that the defendant's actions were protected by *Colgate*.

The *Beech-Nut* decision certainly seemed to constrict the reach of *Colgate* to simple, uncomplicated unilateral refusals to deal. The Court rested its tight-line drawing around *Colgate*, however, on pure competitive principles rather than restraint on alienation notions. Thus, immediately after *Colgate*, the proscription against resale price maintenance broadened considerably on competitive grounds rather than property rights.

Twenty-two years later, in *United States v. Bausch & Lomb Optical Co.*, the Supreme Court again strictly construed the reach of *Colgate*. In *Bausch & Lomb*, the Court struck down a resale price plan in which wholesalers cooperated by more than mere acquiescence to the resale price. By cooperating in resale prices and limiting sales only to approved retailers, the defendant crossed the *Colgate* line. According to the Court, "[w]hether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.

Alienation principles apparently played no role in the *Bausch & Lomb* decision, although its effect was further to curtail the right of a seller of goods to maintain control over their further disposition. Viewed from the purchaser's perspective, the post-*Colgate* cases had seemingly expanded buyers' rights to resell goods free from interference by a former owner.

The Court next considered the *Dr. Miles/Colgate* discord in the 1960 *United States v. Parke, Davis & Co.* decision. There, the Court specifically recognized that the practice allowed in *Colgate* of a manufacturer announcing a resale pricing policy, had, if complied with by purchasers, the same competitive effect as a combination prohibited by *Dr. Miles* and its progeny. The *Colgate* result "is tolerated... only when it is the...

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102. Id. at 454.
103. The Court stated that the anticompetitive inference was not overcome by the FTC's finding of the lack of a contract in the defendant's merchandising conduct. Id. at 455. According to the Court, the "methods in which the company secure[d] the co-operation of its distributors... [were] quite as effectual as agreements express or implied intended to accomplish the same purpose." Id.
104. Id. at 458 (McReynolds, J., dissenting).
106. Id.
107. Id. at 723.
109. Id. at 44.
consequence of a mere refusal to sell in the exercise of the manufacturer’s right ‘freely to exercise his own independent discretion as to parties with whom he will deal.’”110

The Parke, Davis Court thus exhibited open hostility towards the Colgate doctrine and found that the earlier Beech-Nut and Bausch & Lomb decisions had “narrowly limited Colgate.”111 The Court reiterated that no agreement need be found; if defendant’s actions went beyond unilateral action, an unlawful conspiracy would exist.112

Parke, Davis confirmed that the illegality of resale price schemes extends to the full breadth of Section One’s “contract . . . combination or conspiracy” language.113 But in reaffirming the expanse of Dr. Miles, the Court again made no mention of alienation principles. Rather, it focused on competitive impact, declining to overrule Colgate, but limiting its reach to accommodate only the seller’s unilateral right of freedom of association.114

Eight years after Parke, Davis, the Court expanded the reach of conspiracies in the resale price context even farther in Albrecht v. Herald Co.115 In Albrecht, the Court found an unlawful conspiracy when a newspaper publisher replaced one of its distributors who was unwilling to adhere to a maximum resale price in selling newspapers. No other dealers complained; the publisher was simply attempting to enforce its pricing policy. The publisher threatened to deliver the papers itself, hired an agent to solicit customers away from the recalcitrant dealer, and ultimately engaged another distributor for the plaintiff’s route.

The Court, reversing a jury finding and court of appeals affirmanence that the defendant’s conduct was unilateral, ruled that a conspiracy existed between the defendant and both the soliciting agent and the new distributor. According to the Court, since Parke, Davis recognized a conspiracy based on the coercion of retailers through the use of complying wholesalers, an agreement could be found through the coercion of enforcing a pricing policy by the use of an agent to solicit away customers.116

110. Id. (quoting Colgate, 250 U.S. at 307).
111. Parke, Davis, 362 U.S. at 42. The Court interpreted Beech-Nut and Bausch & Lomb as “announce[ing] principles which subject to Sherman Act liability the producer who secures his customers’ adherence to his resale prices by methods which go beyond the simple refusal to sell to customers who will not resell at stated prices.” Id.
112. Parke, Davis, 362 U.S. at 44. Parke, Davis sought assurances of future compliance from wholesalers of their resale price plan, furnished the names of offending retailers to wholesalers, and generally used wholesalers to enforce its retail resale pricing plan, all of which the Court found beyond the conduct condoned by Colgate. Id. at 45-46.
114. Justice Harlan led a three-judge dissent, taking umbrage at the majority’s use of “‘countervailing’ social policies” to limit Colgate. Parke, Davis, 362 U.S. at 57.
116. Id. at 149-50; see also Edward O. Correia, Resale Price Maintenance—Searching for a Policy, 18 J. LEGIS. 187 (1992). The Court also suggested that there might well be a conspiracy between the defendant and all complying distributors and stated that a claimed conspiracy between the defendant and the plaintiff’s customers was not “frivolous.” Albrecht, 390 U.S. at 150 n.6.
Together, the resale price cases after Dr. Miles expand the prohibition beyond formal contracts or agreements to circumstances involving seller coercion of purchasers.\textsuperscript{117} Although the cases do so without reference to alienation principles, they have the effect of extending the alienation right recognized in Dr. Miles to any seller interference with resale beyond a seller's mere announcement of its resale policy.

If, hypothetically, a seller announces a resale price policy and the purchaser declines to follow it, the seller can discontinue its sales to that buyer. Since the seller owns the goods yet to be sold and the buyer has sold the goods it purchased at a price it set, no restraint on alienation has occurred. But if, in the absence of an agreement with a buyer, a seller uses coercive tactics or third parties to enforce an announced resale price policy, a restraint on the alienation of the buyer's goods, purchased from the seller, has in fact occurred if the buyer goes along. Thus, the development of the law against vertical price fixing is, at least through Parke, Davis, consistent with restraint against alienation notions.

IX. CONSIGNMENTS

In its 1926 decision in United States v. General Electric Co.,\textsuperscript{118} the Supreme Court upheld resale price maintenance effectuated through consignments.\textsuperscript{119} According to the Court, the validity of such plans depended "on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment."\textsuperscript{120}

General Electric claimed to retain title until the sale by its agents to its purchasers and, consistent with its claim, carried insurance, paid taxes, and assumed the risk of the goods until the sale. Chief Justice Taft could find no basis for treating the agency contracts as other than consignment agreements and ruled that "[t]he owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."\textsuperscript{121}

Thus, the common law property concepts of title and ownership controlled to permit resale price maintenance through an independent agent who had no ownership in the goods. General Electric, then, is consistent with the property logic of Dr. Miles and the unilateral action rationale of Colgate. But the decision did not do much for competition in the distri-

\textsuperscript{117} Following the Parke, Davis and Albrecht decisions, many wondered what manufacturer conduct could be considered unilateral and whether Colgate retained any practical value at all. See, e.g., Robert Pitofsky & Kenneth W. Dam, Is the Colgate Doctrine Dead?, 37 \textit{Antitrust L.J.} 772 (1968).
\textsuperscript{118} 272 U.S. 476 (1926).
\textsuperscript{119} General Electric was the owner of three patents on the manufacture of electric lights and dominated their sales. It sold directly to large consumers and by "direct sales" of lamps "on consignment" and "negotiated by agents." \textit{Id.} at 480-81.
\textsuperscript{120} \textit{Id.} at 485.
\textsuperscript{121} \textit{Id.} at 488.
bution of electric lights. With General Electric's dominance through its patents, little interbrand competition existed, and the Court's decision permitting resale price maintenance ensured the lack of intrabrand competition.122

*General Electric* operated to provide a safe haven for resale price maintenance through consignments until the *Simpson v. Union Oil Co.* decision almost forty year later.123 In that case, Simpson, lessee of one of Union Oil's retail gas stations, complained of resale price maintenance for gasoline consigned to it by Union for sale to consumers. Justice Douglas, writing for the Court, ruled that, although consignment agreements served useful economic functions, they could not be used to cloak resale price maintenance agreements from the antitrust laws.124 According to Douglas, the lease and consignment arrangement coerced dealers into selling gasoline at noncompetitive prices, in violation of the antitrust laws.125

Justice Douglas made an unconvincing attempt to distinguish *General Electric* by labeling it as a patent case.126 In fact, the *Simpson* decision reflects a 180-degree departure from *General Electric*.127 It also appears to be a rejection of the title theory of common law property rights espoused so strongly in *Dr. Miles*, since title no longer controlled the right to set prices.128 But rather than looking to the impact on intrabrand competition of the practice, the Court instead focused on its coercive nature and the rights of dealers as independent businessmen to control prices of goods they sell.129

In essence, *Simpson* is akin to the logic of *Colgate* in the *Simpson* Court's recognition that business entities have the right to compete free from the interference or coercion of others. Noncoercive consignments, whatever they might be, would presumably be permitted.130 The *Simp-
son decision, however, is vague as to what constitutes coercion and the court left open the potential for finding any supplier's attempt to impose prices on a consignee as coercive.\textsuperscript{131}

The Supreme Court's treatment of vertical price fixing through the use of consignments reflects anything but a charted course. In \textit{Dr. Miles}, the Court found purported consignment agreements to be, in reality, sales. \textit{General Electric} extended the \textit{Dr. Miles} ownership principles to actual consignment, protecting resale price maintenance. \textit{Simpson} focused on the coercive element of consignments and the rights of the dealers to defeat the practice there while seemingly jettisoning restraint on alienation principles.

Interestingly, none of the consignment cases focused on the competitive impact of the practices. Rather, they weighed the relative values or rights of the parties, whether or not derived from common law property concepts, to determine the legality of the resale price maintenance.\textsuperscript{132} Although \textit{Simpson} moved away from property concepts as a basis for antitrust policy, it gained relatively little ground toward a competition model of antitrust.

\section*{X. VERTICAL NON-PRICE RESTRAINTS}

\subsection*{A. The Schwinn Case}

Although the law of non-price vertical restraints did not begin to develop until the 1960s, restraint against alienation principles were initially quite influential. The Supreme Court, after refusing to characterize vertical non-price restraints as per se illegal in \textit{White Motor Co. v. United States},\textsuperscript{133} squarely took on the issue in \textit{United States v. Arnold, Schwinn & Co.}\textsuperscript{134} There, the Court confronted the leading bicycle manufacturer's distribution system in which distributors were assigned specific geographic areas and could only sell to franchised retailers.

The Court proceeded to pronounce a bright line, per se rule resting squarely on common law alienation principles, holding that "it is unreasonable without more for a manufacturer to seek to restrict and confine

\textsuperscript{131} Justice Douglas states that "it matters not what the coercive device is." 377 U.S. at 17. He does distinguish consignments of "rug[s] or a painting or other work of art to a merchant or gallery for sale at a minimum price." \textit{Id.} at 18; see William H. Page, \textit{Legal Realism and the Shaping of Modern Antitrust}, 44 \textit{EMORY L.J.} 1, 33 (1995). Lower federal courts have managed to distinguish \textit{Simpson} on the coercion issue, reaffirming the continued validity of \textit{General Electric}. See, e.g., Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339 (9th Cir.), cert. denied, 464 U.S. 820 (1983).

\textsuperscript{132} Lower federal courts have espoused the continuing validity of \textit{General Electric}. See Illinois Corp. Travel v. American Airlines, 889 F.2d 751 (7th Cir. 1989); Kowalski v. Chicago Tribune, 854 F.2d 168 (7th Cir. 1988); Ryko Mfg. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); Morrison v. Murray Biscuit, 797 F.2d 1430 (7th Cir. 1986).

\textsuperscript{133} 372 U.S. 253 (1963). The case had come to the Court on a motion for summary judgment. A five-judge majority (one justice not participating) believed that a trial was necessary to show whether such restraints were so inherently anticompetitive as to justify the application of the per se rule.

\textsuperscript{134} 388 U.S. 365 (1967).
areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."\textsuperscript{135} Customer and territorial restraints where the manufacturer retained title over the goods, as through consignment or agency, were to be judged under the rule of reason.\textsuperscript{136}

The \textit{Schwinn} Court attempted to justify the distinction by reference to the needed flexibility of the rule of reason so as not to "severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers."\textsuperscript{137} The Court made no mention of how the ownership of the goods should affect the small competitors' ability to compete. Since ownership would not appear to have any particular effect on a small manufacturer's ability to compete, the \textit{Schwinn} decision really does appear to rest only on alienation principles.

The \textit{Schwinn} Court examined the "\textit{Schwinn Plan}," which accounted for seventy-five percent of Schwinn's sales and involved no passage of title to the distributors, and found it reasonable under the rule of reason.\textsuperscript{138} The per se rule established in \textit{Schwinn} based on passage of title, however, resulted in a barrage of criticism both from lower courts, which attempted to circumnavigate the applicability of the \textit{Schwinn} precedent at every opportunity,\textsuperscript{139} and from commentators.\textsuperscript{140}

\textsuperscript{135} Id. at 379. "But to allow this freedom 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." \textit{Id.} at 380.

\textsuperscript{136} Id. at 381. The \textit{Dr. Miles} case also involved a consignment arrangement between manufacturer and dealer, yet the Court there treated the price agreements as if title to the goods had passed to the dealers. \textit{Dr. Miles}, 220 U.S. at 398; \textit{see supra} text accompanying notes 59-60.

\textsuperscript{137} \textit{Schwinn}, 388 U.S. at 380.

\textsuperscript{138} Id. at 381.


B. The Sylvania Decision

In 1977, in the watershed Continental T. V. v. GTE Sylvania decision, the Supreme Court did what it rarely does, reversing itself and overruling Schwinn. In so doing, the Court pronounced a rule of reason for all non-price vertical restraints in which the benefits to interbrand competition are to be measured against the harms to intrabrand competition. According to the Court, Schwinn had to be overruled because the passage of title which was the basis for its per se proscription had no competitive significance. Likely benefits to interbrand competition or harms to intrabrand competition bear no relationship to who owns the goods in a given distribution system. The Court characterized Schwinn as "formalist line drawing." In a footnote, the Sylvania Court specifically rejected the relevance of "the ancient rule against restraints on alienation." The Court "quite agree[d] with Mr. Justice Stewart's dissenting comment in Schwinn that 'the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.'"

Even more damning was the Court's rejection of Judge Browning's interpretation of Schwinn, dissenting below in the Ninth Circuit (which had heard the Sylvania case en banc). According to Judge Browning, Schwinn "reflect[ed] the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on 'price, quality, and quantity of goods and services.'"

The Court was "unable to accept" that view, which "is certainly not explicit in Schwinn," a case in which the Court purported to look at the market impact of Schwinn's distribution systems. According to the Court, "[c]ompetitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks." Thus, Sylvania effectively quashed any role that the rule against restraints on alienation might play in the analysis of non-price vertical restraints.

142. "Nor is there even an assertion in the [Schwinn] opinion that the competitive impact of vertical restrictions is significantly affected by the form of the transaction." Id. at 54.
143. Id. at 59.
144. Id. at 54 n.21.
145. Id. (quoting Schwinn, 388 U.S. at 392 (Stewart, J., dissenting)).
146. Id. (quoting Schwinn, 537 F.2d at 1019 (Browning, J., dissenting)).
147. Id.
148. Id.
Even so, Justice White's concurring opinion in *Sylvania* is noteworthy. He would not have overruled *Schwinn*, but would have recognized "failing firm" and "new entrant" exceptions to the per se rule articulated therein.\(^{150}\) He took issue with the majority's characterization of *Schwinn*'s distinction between sale and non-sale transactions as an attempt to measure the intrabrand harm and interbrand benefit of vertical restraints. Rather, the distinction was made, according to Justice White, in deference to "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."\(^{151}\) Justice White pointed specifically to the restraints on alienation underpinnings of the "Court's seminal decision" in *Dr. Miles*.\(^{152}\)

Although Justice White conceded that the majority might be "right in partially abandoning" the restraints against alienation principle and in evaluating non-price vertical restraints solely in terms of "their relevant economic impact," he was concerned by the Court's "lightly reject[ing]" those precedents.\(^{153}\) He noted that the alienation "principle is without question more deeply embedded in our cases than the notions . . . borrowed by the majority from the 'new economics of vertical relationships.'"\(^{154}\)

Justice White notwithstanding, antitrust law following *Sylvania* had different rules for vertical price and non-price restraints. The rule of reason for non-price restraints was based on the Court's assessment of the likely competitive benefits and harms arising from such activities. In articulating the rule, the Court soundly renounced the relevance of property right notions. In contrast, vertical price fixing was still per se illegal even though that rule did derive largely from the common law protection of restraints against alienation and even though the Court had never really undertaken any assessment of the competitive impact of resale price maintenance.\(^{155}\)

**XI. THE DEALER TERMINATION CASES**

The Supreme Court next tackled the world of vertical restraints in two dealer termination cases, *Monsanto Co. v. Spray-Rite Service Corp.*\(^{156}\) and

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150. 433 U.S. at 65 (White, J., concurring in the judgment).
152. Id. at 67.
153. Id. at 69.
154. Id. White commented, "The rationale of *Schwinn* is no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be here." *Id.*
155. Certainly, the same potential benefits to interbrand competition are present. Resale price maintenance schemes are typically motivated by the manufacturer's desire to gain and keep competitive advantages over rivals. Similarly, the impact on intrabrand competition is negative, but not necessarily more negative than non-price restraints. Exclusive location clauses or territorial divisions can, for example, eliminate all intrabrand competition. Vertical price fixing without more eliminates only intrabrand price competition; non-price rivalry may still be present and important.
Business Electronics Corp. v. Sharp Electronics Corp.\textsuperscript{157} In Monsanto, the Court ruled that something more than mere dealer complaints to the manufacturer is necessary to establish a price-fixing conspiracy, even when the manufacturer subsequently terminates the suspected price cutter.\textsuperscript{158} In so holding, the Court breathed new life into the Colgate doctrine, stating that a “manufacturer’s strongly felt concern about resale prices does not necessarily mean that it has done more than the Colgate doctrine allows.”\textsuperscript{159}

According to the Monsanto Court, manufacturers and distributors have legitimate reasons to communicate about price and marketing strategies on a constant basis. The maintenance of resale prices may, from the manufacturer’s perspective, be part and parcel of agreed-upon non-price marketing plans which require frequent monitoring.\textsuperscript{160} Thus, the Court concluded that to infer an agreement from the “highly ambiguous evidence” of dealer complaints would be inappropriate and would erode the protection afforded by Colgate.\textsuperscript{161}

The Monsanto Court also noted that the distinctions between price and non-price restraints and concerted and independent action are “in theory . . . reasonably clear, [but] often they are difficult to apply in practice.”\textsuperscript{162} The confusion arises because “the economic effect of all of 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.”\textsuperscript{163} “And judged from a distance,” the Court added, “the conduct of the parties in the various situations can be indistinguishable.”\textsuperscript{164}

Citing Parke, Davis, the Monsanto Court thus reaffirmed that the economic impact is essentially the same for all vertical restrictions, whether or not accompanied by agreement and whether or not involving price. Different rules apply, although the economic effects are usually the same.

This divergence is due in large part to the Supreme Court’s early adherence to the restraint against alienation concept, its concomitant recognition of the right of unilateral action in the vertical price arena, and its later rejection of the alienation principle and focus on the actual economic impact in the non-price areas. Continued refinement of what constitutes an agreement has had the effect of revitalizing the Colgate doctrine and enlarging the circumstances in which a manufacturer’s resale

\textsuperscript{157} 485 U.S. 717 (1988).
\textsuperscript{158} 465 U.S. at 763-64. The Court recognized that manufacturers and dealers have legitimate reasons to discuss price and that to restrict the exchange of information between the two would interfere with the normal operation of the market. \textit{Id.} at 762, 764.
\textsuperscript{159} \textit{Id.} at 763; \textit{see also} Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983) (manufacturer’s suggested pricing system upheld despite widespread compliance by dealers who otherwise would have charged less). \textit{See Andersen, supra} note 66.
\textsuperscript{160} Monsanto, 465 U.S. at 762-63.
\textsuperscript{161} \textit{Id.} at 763.
\textsuperscript{162} \textit{Id.} at 762.
\textsuperscript{163} \textit{Id.} (citing Parke, Davis, 362 U.S. at 43).
\textsuperscript{164} \textit{Id.}
price maintenance scheme, though effective, does not run afoul of the Sherman Act.

The Supreme Court further explored the relationship of price and non-price restraints and the agreement requirement in the *Sharp Electronics* case. There, the Court ruled that an agreement between a manufacturer and a dealer to terminate another price-cutting dealer is not per se illegal absent an underlying agreement on price or price levels to be charged by the complaining dealer.\(^{165}\) In so holding, the Court was wary of expanding the per se rule into what were essentially a manufacturer's non-price restrictions.\(^{166}\)

According to the Court, per se proscriptions of vertical restraints "should be narrow" in scope because non-price restrictions are not overly pernicious and often have procompetitive benefits.\(^{167}\) As a result, the Court stated "that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect ... rather than formalistic distinctions; [and] that interbrand competition is the primary concern of the antitrust laws."\(^{168}\)

The *Sharp Electronics* Court went on to acknowledge the common law restraint on alienation foundation of the *Dr. Miles* decision.\(^{169}\) But since "[i]n the present case ... no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury," the court found that "the common law-rationale of *Dr. Miles* does not apply."\(^{170}\)

Thus, the *Sharp Electronics* decision at once reaffirms the common law underpinning of *Dr. Miles* while, at the same time, narrowing its reach. While still good law, *Dr. Miles* is carefully limited to resale price maintenance schemes where an agreement can be shown. Further, that agreement must actually relate to maintaining a certain price and cannot be inferred just from dealer complaints followed by termination of a supposed price cutter.\(^{171}\)

The collective effect of *Sharp Electronics* and *Monsanto*, then, is to expand the practical reach of the *Colgate* doctrine. The restrictive approach to what constitutes an agreement, the acknowledged bias for interbrand competition, and the recognized blur between price and non-price restraints with the resulting "presumption in favor of a rule-of-reason standard"\(^{172}\) certainly give a manufacturer far more latitude to affect the

\(^{165}\) *Sharp Electronics*, 485 U.S. at 731.

\(^{166}\) *Id.* at 724.

\(^{167}\) *Id.*

\(^{168}\) *Id.* at 726.

\(^{169}\) *Id.* at 733.

\(^{170}\) *Id.* According to the Court, "[P]etitioner's principal contention ... is compelled not by the old common law, but by our more recent Sherman Act precedents." *Id.* The Court rejected the applicability of those precedents as well. *Id.* at 734.

\(^{171}\) In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990), the Court further restricted the practical reach of *Dr. Miles* by ruling that competitors of resale price maintenance schemes do not have standing to bring private antitrust actions. *See also* William L. Reynolds & Spencer W. Waller, *Legal Process and the Past of Antitrust*, 48 SMU L. Rev. 1811, 1821-22 (1995).

\(^{172}\) *Sharp Electronics*, 485 U.S. at 726.
distribution of its products than the post-Colgate cases suggested.\textsuperscript{173}

The resulting limitation of the modern-day influence of Dr. Miles to situations closely approximating its facts means that the vestiges of the common law restraint on alienation are similarly restricted. The Sharp Electronics Court does, however, recognize the common law property underpinnings of Dr. Miles.

\textbf{XII. CURRENT VERTICAL RESTRAINTS LAW}

So what are we left with in the vertical restraints arena? Resale price maintenance (vertical price fixing) is per se illegal because, in large part, such activity violates the restraints on alienation principles of the common law.\textsuperscript{174} Vertical non-price restraints are judged under the rule of reason because of potential benefits to interbrand competition; common law property concepts were specifically found irrelevant. The Supreme Court has nonetheless found that both price and non-price restraints have the same economic consequences in the majority of instances.

That economic impact is present whether a manufacturer's downstream restrictions are pursuant to an agreement or simply adhered to by its dealers. Yet the Court has in recent years expanded upon a manufacturer's permissible behavior by restricting what constitutes an agreement. The principles of Colgate, once thought nearly extinct, have flourished, while the autonomy of distributors, thought important in Dr. Miles, has diminished.

Given the Court's emphasis on the economic impact of vertical restraints, an approach that is difficult to quarrel with, should it simply overrule Dr. Miles as it did Schwinn? If the economic effects of vertical price and non-price restraints are generally comparable, the rule of reason would seem appropriate, particularly if both have the potential to enhance interbrand competition.

Further, the abandonment of Dr. Miles would presumably eliminate the last vestiges of common law property concepts in modern-day antitrust law.\textsuperscript{175} The Court would no longer be in the position of grudgingly accepting the restraint on alienation justification for Dr. Miles which it rejected in Schwinn. Instead of laboring mightily to limit the reach of the per se rule for resale price maintenance, the Court could focus purely on the economic effect of a given scheme under the rule of reason.\textsuperscript{176}

\begin{footnotesize}
\begin{enumerate}
\item[173.] See supra text accompanying notes 97-117.
\item[174.] The economic justification for the per se rule for vertical price fixing recognized in Sylvania was that it could "facilitate cartelizing" between manufacturers by reducing their incentive to cheat on an existing cartel. See Sylvania, 433 U.S. at 52 n.18 (quoting Fosner, supra note 140, at 294).
\item[175.] See Rudolph J. Peritz, A Counter-History of Antitrust Law, 1990 Duke L.J. 263, 295-96 ("[E]xercise of the common law device of retaining title in goods forestalled the operation of competition policy. This property right by retained title, which predates the Sherman Act by several centuries, insulated owners from liability for otherwise illegal resale price maintenance for seventy-five years.").
\item[176.] This would entail balancing the benefits to interbrand competition against the harm to intrabrand competition as under Sylvania. Since the Court has stated that inter-
question of what constitutes a price fixing agreement between manufacturer and distributor would be of less importance if the per se proscription did not lurk behind the finding of an agreement.

The continuing efficacy of the Dr. Miles decision notwithstanding, it is certain that the judiciary has marginalized the relevance of restraints on alienation in contemporary antitrust jurisprudence. Even with the language in Sharp Electronics dutifully acknowledging the common law origins of the prohibition of vertical price fixing, restraints on alienation are seldom raised in modern antitrust litigation. When raised, the courts have had little difficulty disposing of the issue.¹⁷⁷

Given the marginalization of restraints on alienation, the Supreme Court's confinement of the per se rule for vertical price fixing, and the likely political turmoil that the reversal of Dr. Miles would cause,¹⁷⁸ it is perhaps unnecessary for the Court to venture that far. Better symmetry in the law of vertical restraints could be achieved, however, without the common law antecedents of the Dr. Miles decision.

But what of Colgate? The constriction of Dr. Miles and focus on the actual economic effects of vertical relationships have corresponded with the resurgence of Colgate protections for manufacturer distribution decisions. If, as suggested earlier,¹⁷⁹ Colgate was in reality a compromise between competing manufacturer and dealer interests, where does that compromise stand now?

As noted, Colgate tied a manufacturer's authority over its goods not to ownership, but to the lack of formal agreement over price or other distribution restrictions. Since ownership of the goods distributed did not control, Colgate is not a restraint on alienation case, although it arguably comes close. It recognizes the right of a manufacturer to exercise control over its products to the point of actual agreement with a distributor, which restrains trade.

Fundamental to the Dr. Miles decision were both the existence of an agreement to fix resale prices and the distributor's ownership of the


¹⁷⁸ The overruling of Dr. Miles would likely create a strong political backlash from the small business lobby to Congress. In 1991, the House of Representatives passed H.R. 1470, which would have reversed the effects of Monsanto and Sharp Electronics and extended the reach of the per se rule for manufacturers' attempts to impose resale price maintenance schemes. H.R. 1470, 102d Cong., 1st Sess. (1991). However, the measure failed to get through the Senate in the face of a promised presidential veto. See generally Dennis O. Doherty, Note, Business Electronics Corp. v. Sharp Electronics Corp.: Monsanto's Progeny and the Congressional Proposal to Codify the Per Se Rule Against Vertical Price Fixing, 38 Cath. U. L. Rev. 963 (1989).

¹⁷⁹ See supra text accompanying notes 89-94.
goods. The notion of what could constitute an agreement or a conspiracy for Sherman Act purposes expanded considerably in later years, and the authority of manufacturers to control distribution of its products under Colgate waned significantly. This restriction of Colgate was no doubt influenced by judicial thought that vertical price fixing was inherently anticompetitive and should be curtailed whenever possible.

In contrast, contemporary antitrust has focused solely on the economic consequences of vertical activity and has questioned earlier presumptions about its competitive impact. The Supreme Court has given priority to interbrand competition and has recognized, first in Sylvania, that vertical restrictions imposed by manufacturers can enhance interbrand competition. Then, in Sharp Electronics, the Court stated its preference for the rule of reason for vertical restraints and urged caution in the formalistic use of the per se rule for "vertical restraints that contain the word 'price' or that affect the 'prices' charged by dealers" to avoid restricting conduct which could enhance interbrand competition.

As noted, the Court has chosen not to overrule Dr. Miles but has restricted the notion of agreement in the vertical price context. As a result, the pendulum has swung to favor manufacturer interests over those of distributors. The compromise effected by Colgate on dealers' autonomy, first established in Dr. Miles, has shifted away from that autonomy after years in which the Court's expansive treatment of what constitutes an agreement had all but eradicated the manufacturer's ability to control distribution of its goods.

But the shift of the balance of power between manufacturer and distributor has had little, if anything, to do with common law property rights or notions of control or autonomy. Rather, it has had everything to do with modern beliefs about the desirable and undesirable economic consequences of vertical distribution strategies. The pronounced focus on, and recognition of, the benefits of vertical restraints to interbrand competition since Sylvania has effectively caused the shift of prerogative to the manufacturer. Vertical restraints, including those involving price, are simply no longer regarded as necessarily pernicious to competition. It is common understanding that the anticompetitive consequences of successfully imposed manufacturer distribution restrictions are the same whether

180. Dr. Miles, 220 U.S. at 373, 408. Even though the resale price agreements were apparently for drugs resold through consignment arrangements, the Court finessed the ownership issue and clearly viewed ownership as resting with the distributors. See id. at 397-98; see also supra text accompanying notes 59-60.
181. See supra note 88.
182. The constriction of Colgate continued at least through Parke, Davis, 362 U.S. at 29. See supra text accompanying notes 97-117.
183. Sylvania, 433 U.S. at 52.
184. 485 U.S. at 728. According to the Court, vertical non-price restraints reduce interbrand competition as well as to encourage dealers to provide services to enhance interbrand competition. Id.
185. See supra note 177 and accompanying text.
accomplished through express or implied agreement or "suggestion." 186
Colgate in effect "tolerated" that result absent an agreement because of
that Court's recognition of a manufacturer's "right . . . freely to exercise
his own independent discretion as to parties with whom he will deal." 187

The Colgate "right" fell into disfavor and was quite narrowly construed
as long as resale price maintenance was regarded as a true competitive
evil. The new economic learning has, in effect, reversed that presump-
tion, narrowed the reach of the per se rule, and expanded the influence of
Colgate. It is now decidedly more difficult to find the existence of an
agreement where a manufacturer's imposed price is at issue.

XIII. CONCLUSION

As the pendulum between Dr. Miles and Colgate has swung back to-
wards Colgate, ownership and control prerogatives, once fundamental to
the accommodation of manufacturer and distributor interests, have all
but disappeared. Protection of restraints against alienation as an antitrust
policy, dealt a near mortal wound in the Sylvania decision, is now sure to
die of neglect.

Although property rights were part of the foundation of antitrust, their
protection is simply incompatible with an antitrust policy that focuses on
economic impact. Sylvania certainly establishes the fallacy of reliance on
the concept of title as a guide to measuring the competitive effect of dis-
tribution systems. Contemporary antitrust policy should concentrate
neutrally on competition and not competitors. In a country of consumers
as well as competitors, surely we are better off as a result.

186. See Parke, Davis, 362 U.S. at 44, for this observation:
True, there results the same economic effect as is accomplished by a prohib-
ited combination to suppress price competition if each customer, although
induced to do so solely by a manufacturer's announced policy, independently
decides to observe specified resale prices. So long as Colgate is not over-
rulled, this result is tolerated . . . .