

NOT WITH A BANG, BUT A WHIMPER: CONGRESS'S
PROPOSAL TO OVERTURN THE SUPREME
COURT'S *LEEGIN* DECISION WITH THE
DISCOUNT PRICING CONSUMER
PROTECTION ACT OF 2009

PART I: INTRODUCTION

It is not often that the Supreme Court overturns a ninety-six year old precedent, and thus the Court made big news in 2007 when it did just that in the case *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹ The majority overturned *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,² which held that agreements between a manufacturer and a distributor setting minimum resale prices for distributors are illegal *per se* under section 1 of the Sherman Act.³ The antitrust world was abuzz, and many excitedly welcomed the end of *Dr. Miles* and what was generally believed to be its antiquated economic view of the world.⁴ Nevertheless, some feared the change, accusing the Supreme Court of instituting a rule that could potentially harm consumers and destroy the world of discount shopping as we know it.⁵

1. 551 U.S. 877, 881-82 (2007). *See, e.g.*, Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, WALL ST. J., Aug. 18, 2008, at A1 (announcing change in Supreme Court precedent that vertical minimum price fixing had become legal practice under some circumstances).

2. 220 U.S. 373 (1911).

3. *See Leegin*, 551 U.S. at 881-82 (overturning *Dr. Miles* decision and subjecting vertical price fixing agreements to rule of reason analysis). It was clear, at least by 2007, that *Dr. Miles* made illegal only minimum RPM, not all vertical price-fixing agreements.

4. *See, e.g.*, Douglas R. Cole & J. Bruce McDonald, *Dr. Miles Receives its Coup de Grace*, JONES DAY (July 2007) (praising new precedent set forth by *Leegin*); Thom Lambert, *Dr. Miles (1911 – 2007)*, TRUTH ON THE MARKET (June 29, 2007), <http://truthonthemarket.com/2007/06/29/dr-miles-1911-2007/> (lauding *Leegin* decision and explaining economic justifications for Supreme Court ruling); Josh Wright, *Evaluating Leegin*, TRUTH ON THE MARKET (June 30, 2007), <http://truthonthemarket.com/2007/06/30/evaluating-leegin/> (assessing *Leegin*'s consistency with modern antitrust policy and further supporting Supreme Court decision).

5. *See, e.g.*, S. 2261, 110th Cong. (as presented Oct. 30, 2007) (proposing to reinstate *per se* ban on vertical price fixing agreements because of potential harm to consumers); Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32 (2008) (expressing fears that allowing vertical price fixing will hurt consumers); Mike Himowitz, *Electronic Bargains of Today will be Gone by This Time Next Year*, BALT. SUN, July 5, 2007, at 7D (forecasting that all electronics companies will institute vertical price agreements thus uniformly raising consumer prices). Some states have also placed a ban on vertical price fixing agreements. *See, e.g.*, Joseph Pereira, *State Law Targets 'Minimum Pricing,'* WALL ST.

Mostly, it has been big business opposing the new rule, declaring it harmful not only to consumers, but also to small mom-and-pop establishments.⁶ Predictably, the person most vocal about the new standard is Herb Kohl, Senator of Wisconsin, and a founder of Kohl's Department Stores, a discount retailing chain.⁷ Endorsed by others, Senator Kohl has proposed a bill before the Senate; Congressman Johnson of Georgia is to present the bill before the House of Representatives.⁸ If passed into law, the Discount Pricing Consumer Protection Act of 2009 will overturn the *Leegin* decision, instating a blanket ban on vertical minimum pricing agreements between manufacturers and resale dealers.⁹

Senator Kohl has tried to show *Leegin's* potential threat to consumers by claiming a large number of manufacturers have been "exploiting" the new rule and needlessly setting minimum retail

J. (Apr. 28, 2009) (reporting on Maryland's decision to ban minimum price fixing agreements).

6. See *eBay Voices Strong Support for the 'Discount Pricing Consumer Protection Act'*, EBAY MAIN STREET (July 16, 2009), <http://www.ebaymainstreet.com/news-events/cohen-urges-congress-support-hr3190> (stating eBay's support for bill proposing to eliminate vertical minimum price fixing agreements); Heather M. Cooper & Jennifer M. Driscoll-Chippendale, *A Window into Washington: Proposed Legislation to Prohibit Resale Price Maintenance Agreements*, SHEPPARD MULLIN, RICHTER, AND HAMPTON LLP: ANTITRUST LAW BLOG (Apr. 28, 2010), <http://www.antitrustlawblog.com/2010/04/articles/article/a-window-into-washington-proposed-legislation-to-prohibit-resale-price-maintenance-agreements/> (listing supporters of bill, among which is amazon.com). In a press release, Senator Kohl claimed that internet and small businesses have complained of manufacturers instituting harmful minimum price agreements. See *Legislation is Response to Supreme Court's Decision to Overturn Ban on Vertical Price Fixing*, NEWSROOM SENATOR HERB KOHL (Mar. 18, 2010), http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=3500 (advocating pending legislative ban on vertical minimum price fixing agreements) [hereinafter Newsroom Senator Kohl]. Competing arguments state that not allowing vertical price fixing agreements may actually harm small businesses which would previously have been able to compete with larger price-only based competitors by offering superior services as a compliment to certain products. See Jonathan Moore, *Looking Out for the Big Guys*, AMERICAN SPECTATOR (Mar. 9, 2010, 6:07 AM), <http://spectator.org/archives/2010/03/09/looking-out-for-the-big-guys/print> (arguing that eliminating vertical minimum price fixing agreements could in fact benefit large corporations and not small businesses).

7. See *Biography*, SENATOR HERB KOHL: UNITED STATES SENATOR FOR WISCONSIN, <http://kohl.senate.gov/bio.cfm> (last visited Feb. 10, 2011) ("Before coming to the Senate, Kohl helped build his family-owned business, Kohl's grocery and department stores. He served as president from 1970 through the sale of the corporation in 1979.").

8. See S. 148, 111th Cong. (2009) (asking that Senate amend Sherman Act to place ban on vertical minimum price fixing agreements); H.R. 3190, 111th Cong. (2009) (proposing that House of Representatives vote to enact legislation that would place ban on vertical minimum price fixing agreements).

9. See S. 148, 111th Cong. § 2 (2009) (pushing to overturn Supreme Court decision in *Leegin*).

prices for their products.¹⁰ Manufacturers are generally silent about the new rule in the press, probably due to the difficulty of defending *Leegin* in one sound byte.¹¹ Nevertheless, there have been some small notes of excitement evidenced in certain industries, namely in the music industry.¹² Again, while this is not widespread, at least one author, Ed Christman, has identified a couple of notable advantages that minimum price fixing agreements between manufacturers and retailers could provide for both artists and consumers alike.¹³

Since the arrival of digital downloading and electronic music storage, compact disc sales have dropped significantly.¹⁴ This is largely due to the heightened convenience and lower cost to consumers that digital recordings offer.¹⁵ Consumers have benefitted

10. See Newsroom Senator Kohl, *supra* note 6 (“Since the Court’s decision three years ago, we have heard reports from all across the nation of manufacturers demanding an end to discounting engaged in by all types of retailers, from small mom-and-pop stores to giant Internet retailers.”) (statement of Senator Kohl).

11. Understanding how higher retail prices can benefit consumers requires the ability to follow an argument with more than one-step reasoning. See Jen Haberkorn, *Law Urged Against Price Floors*, WASH. TIMES (Aug. 1, 2007) (“Companies aren’t jumping at the opportunity [to fix prices].”) (quoting Janet L. McDavid, an antitrust attorney at Hogan & Harston in Washington, DC); Beth L. Fancsali, Esq. & Paul Olszowka, Esq., *How Wide Did the Supreme Court Open the Door to Minimum Resale Pricing*, 15 ANDREWS LITIG. REP. No. 6 (2007) (laying out law as implied by *Leegin* decision and noting ambiguity as to what extent manufacturers will employ vertical price fixing agreements with distributors and retailers).

12. See Ed Christman, *Why Labels Should Set Minimum Price Restraints*, BILLBOARD, Sept. 1, 2007, at 14 [hereinafter Christman I] (arguing that by setting minimum price agreements with retailers, record labels could better promote small musicians and smaller music businesses). *But see* Ed Christman, *Why Labels Won’t Set Minimum-Pricing Restraints*, BILLBOARD, Sept. 8, 2007, at 14 [hereinafter Christman II] (explaining that setting minimum prices is still too risky for big businesses because of legal repercussions of anticompetitive behavior).

13. By setting minimum prices on music from smaller markets, record labels could both help the market become established and give these smaller markets a way to compete with the larger popular music markets. See Christman I, *supra* note 12, at 14 (discussing how businesses like Wal-Mart and Circuit City have been controlling shape of new music production by making profits on individual songs/CDs so low that only largest sellers can survive). A higher price on CDs or other non-digital media in such markets could keep less profitable musicians afloat in a heavily depressed price market. See Christman I, *supra* note 12, at 14 (asserting that imposing minimum pricing on retailers would ensure that artists are represented in retail market). Retailers would then also have more incentive to take on the less profitable musicians and to promote those musicians to their customers. See *id.* at 14 (suggesting that if labels promise to set minimum prices, indie and small-chain merchants would bear less risk in “breaking” or promoting emerging artists).

14. See David Goldman, *Music’s Lost Decade: Sales Cut in Half*, CNN MONEY.COM (Feb. 3, 2010), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/ (documenting average of eight percent annual decrease in album sales which is largely attributed to digital downloads).

15. See *The NPD Group: Continued Sales Declines in 2008, but Music Listening and Digital Downloads Increase*, NPD GROUP (Mar. 17, 2008), <http://www.npd.com/>

from the lower prices of music and the lowered transaction costs.¹⁶ Some argue that given all the new digital options, consumers now receive better services.¹⁷ But while the digital age has expanded the music business in many ways, digitalization has also had a stifling effect on certain specialized areas of the industry.¹⁸ Some poignant examples of hard hit areas are the classical and jazz music industries.¹⁹

press/releases/press_090317a.html (surveying NPD's annual market research on music industry and noting that consumers cited immediate download and enjoyment of media, and ability to select only the desired songs from an album as reasons why digital downloads were superior to traditional music media formats).

16. See Zoonky Lee & Sanjay Gosain, *A Longitudinal Price Comparison for Music CDs in Electronic and Brick-and-Mortar Markets: Pricing Strategies in Emergent Electro*, J. BUS. STRATEGIES (Spring, 2002) at 1, available at http://www.entrepreneur.com/tradejournals/article/87206220_1.html (last visited Feb. 10, 2011) (noting that digital music transfers lower consumer transaction costs).

17. Software features like iTunes's genius or websites like amazon.com allow consumers to find a host of music options that conform to their individual tastes. These sites take record of customers' prior music preferences and then try to match those with new options. Such widespread individualized shopping would be impossible to match by hiring music experts to interface one-on-one with consumers. See Joel Johnson, *A Look at iTunes "Genius" Music Recommendation Engine*, BOING BOING (Sept. 9, 2008, 4:04 PM), <http://gadgets.boingboing.net/2008/09/09/a-look-at-itunes-gen.html>, (describing capabilities of iTunes's genius software feature). Another improved area of service is that of music sampling. Customers can now sample most music instantaneously through iTunes, Amazon.com, YouTube, Pandora, and musicians' own web pages. See Greg Sandoval, *Music Publishers: iTunes Not Paying Fair Share*, CNET NEWS (Sept. 17, 2009), http://news.cnet.com/8301-1023_3-10355448-93.html (criticizing record labels' recent attempts to place royalty fees on sound sampling clips).

18. See Christopher Morris, *Album Sales Drop, Digital Sales Soar: Strong Releases Helped Slow Decline of New Album Sales*, VARIETY (July 7, 2010) (noting declining CD sales and increasing digital downloads across various sectors of music industry). Allowing consumers to purchase individual songs rather than requiring them to purchase an entire album's worth of music has decreased music industry revenues. This has impacted smaller, un-cushioned music markets more profoundly than mainstream music. See Christman I, *supra* note 12, at 14 (commenting on how discounters like Wal-Mart and Circuit City control face of smaller music industries now that digital sales are taking away from CD sales).

19. See Christman I, *supra* note 12, at 14 (discussing difficulties faced by jazz and indie markets now that large discounting chains control CD sales). In industries with seriously declining live performance audiences, CD sales are ever more important for keeping the sector alive. Although popularity in digital downloads may be booming, the profit margins are so small that industries without live performance or CD income have a hard time staying alive. See *Album Sales Plunge, Digital Downloads Up*, MSNBC TODAY MUSIC (Jan. 1, 2009) <http://today.msnbc.msn.com/id/28463074> (reporting that classical music saw largest shift from CD to digital sales and commenting on how lower revenues are impacting labels' abilities to invest in new artists). While independent or "indie" music may have once fallen into the category of specialized music that required promotion by individual sellers, the internet is now the ideal medium for such artists to promote their works. See *New Websites Help Indie Musicians Discover Audiences on the Internet*, ARTICLE SNACKS.COM (Feb. 22, 2011) <http://www.articlesnacks.com/new-websites-help-indie-musicians-discover-audiences-on-the-internet> (explaining how indie groups

Each of these genres tends to represent smaller music markets that oftentimes appeal to a more knowledgeable subset of listeners—ones who would prefer to purchase CDs because the medium offers more complexity and depth of sound.²⁰ Markets for these types of music do exist, but CD sales in these markets have been noticeably shrinking since digital music appeared in a way that threatens the life of those industries.²¹ While this may be due to the natural evolution of consumer preference, some argue that because these types of music rely so heavily on a non-digital format, large deep discounting chains have obliterated a small but otherwise vibrant market.²² The result is less selection for consumers within each of these small markets and fewer choices for consumers overall because each industry can only support so many artists.²³ This makes for an extremely hard-to-enter market, ultimately limiting consumer choice to the more popular types of music and potentially leaving the market less opportunity to evolve in these fringe categories.²⁴

One solution to these problems may be for manufacturers, or in this case, small record labels supporting these less favored markets, to set minimum price agreements with retailers.²⁵ Doing so

now have greater access to audiences through internet blogs, networking sites and special indie music websites).

20. See John Atkinson, *MP3 vs. AAC vs. FLAC vs. CD*, STEREOPHILE (Mar. 8, 2008) <http://www.stereophile.com/features/308mp3cd/> (asserting that CDs and other hard music media have superior sound quality to that of most mp3 options). Note that digital music quality can equal that of CDs if downloaded in a “lossless” format, available on iTunes. See *id.* (comparing lossless to “lossy” music formats).

21. See *Album Sales Plunge*, *supra* note 19 (implying shrinking CD sales in smaller markets are having large impact on revenue despite increased digital sales); Christman I, *supra* note 12, at 14 (commenting on serious effects decreased CD sales have had on smaller music industries).

22. See Douglas Dempster, *Wither the Audience for Classical Music?*, 11 HARMONY 43, 44-45 (2000) (noting long lamented decline of classical music and offering argument that industry is still alive and well, just in different context); Christman I, *supra* note 12, at 14 (noting big chains like Wal-Mart, Circuit City, Best Buy and Target now effectively control smaller music markets because of discount chains’ control of prices).

23. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61 (Free Press, 1993) (1978) (stating more choice benefits consumer welfare).

24. See Christman II, *supra* note 12, at 14 (looking at indie music market and noting smaller industries’ difficulties in supporting wide array of emerging artists).

25. See *id.* (reasoning that minimum vertical price restraints as means to support smaller-market artists). *But see* Himowitz, *supra* note 5 at 7D (arguing that record labels will exploit minimum price fixing agreements if given opportunity to do so). Note that such a price fixing agreement would probably only be appropriate when affixed to CD prices. There are many who argue that smaller music markets, such as classical music, have been able to reach more consumers thanks to internet availability and low download prices. Also the ‘services’ would only truly

could help record labels, small retailers, and potentially struggling artists.²⁶ Having a minimum price for certain artists could help record labels fund small artists—something hard for labels to do when small and taking hits from large retailers and low-cost download sellers.²⁷ Further, this could encourage small retailers to support new artists (and large retailers if they decide to take on an artist) by allowing retailers a share in the profits for their promotion of the new music.²⁸ Finally, minimum prices could open the market for a larger number of artists, potentially helping the smallest unit on the sale chain.²⁹

The music industry is just one example of an area in which vertical minimum price fixing could benefit consumers and perhaps an entire industry.³⁰ Unfortunately, at this point there are few examples of instances where vertical minimum price fixing agreements act to benefit the market because *Leegin* has been the rule for such a short period of time.³¹ This comment revisits the *Leegin* decision, which argued that vertical price minimums should not always be illegal but rather subject to review under the rule of

attach to a hard version of the media – higher sound quality of a CD or vinyl recording and small dealer product promotion/customer matching. See, e.g., *The Cultural Liberation of the Digital Age*, CHARGE SHOT (Aug. 6, 2010, 3:00 PM), <http://www.charge-shot.com/2010/08/cultural-liberation-of-digital-age.html> (championing digital formats of classical music for their ability to penetrate larger market).

26. See Christman I, *supra* note 12, at 14 (presenting model that would band together new artists and smaller music retailers with help of vertical price minimums).

27. See *id.* (proposing a new model to support emerging artists); See *Album Sales Plunge*, *supra* note 19 (observing how record labels have become more conservative in their support of new artists because of decreased revenue).

28. See Christman II, *supra* note 12, at 14 (setting out minimum price fixing model for smaller areas of music industry).

29. See *id.* (giving proposal for retailer-artist relationship). A larger number of artists in a particular market is better for consumers because it provides that consumers with greater choices. See BORK, *supra* note 23, at 61 (commenting on benefits of choice to consumer welfare).

30. See Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 277-82 (2008) (presenting theory that consumers desire higher prices for some goods because of additional benefits). The luxury goods market is one in which both consumers and the product market benefit from higher fixed prices. See *id.* (giving examples of luxury markets fueled by consumer desire for status and services).

31. Because *Leegin* has been in place for less than three years, there is difficulty charting the overall effect of minimum price fixing in various markets. This is not to say such agreements are always beneficial. In fact, the *Leegin* majority emphasized that such agreements could be abusive, which supports the view that minimum price fixing agreements are *not per se legal* but are subject to the rule of reason. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 892-94 (2007) (recognizing instances where minimum vertical price fixing can be anticompetitive).

reason—being illegal only when they are on balance anticompetitive.³² It examines the Supreme Court’s reasoning, pays special attention to the economic analysis behind the decision, argues that allowing vertical price minimums is often the best construct for consumers and the market and conclude that the Supreme Court’s decision in *Leegin* is correct.³³

Part II gives an overview of the goals of the antitrust laws and a brief history of the Court’s approach to vertical price restraints.³⁴ Part III takes a closer look at the *Leegin* decision, paying particular attention to the economic justifications behind the Court’s analysis.³⁵ Part IV introduces the Discount Pricing Consumer Protection Act of 2009 and discusses its possible effect on vertical price restraints.³⁶ Part V looks at the possible effects *Leegin* and the Discount Consumer Protection Act of 2009 could have on the music industry.³⁷ The comment then concludes with the possible implications for future antitrust litigation should the proposed Act become law and whether such an Act will work in favor of consumer welfare.³⁸

PART II: HISTORY AND BACKGROUND OF VERTICAL PRICE RESTRAINTS

A. The Sherman Antitrust Act: A Brief History

The latter part of the nineteenth century was a time of previously unimagined progress and innovation, but along with all of its positive changes, the Industrial Revolution also brought a “rampant cartelization and monopolization of the American economy.”³⁹ The constructs of big business at the time allowed a small group of powerful individuals and corporations to suddenly accumulate mas-

32. For further discussion of the *Leegin* decision, see *infra* notes 97-120 and accompanying text.

33. For further analysis of the Supreme Court’s rationale for and analysis of the *Leegin* decision, see *infra* notes 121-67 and accompanying text.

34. For further background and judicial history of antitrust law, see *infra* notes 37-96 and accompanying text.

35. For further discussion of economic justifications for *Leegin* decision, see *infra* notes 97-167 and accompanying text.

36. For further description regarding the possible impact of the Discount Pricing Consumer Act of 2009, see *infra* notes 168-204 and accompanying text.

37. See *infra* notes 214-230 and accompanying text (discussing possible effects of Discount Pricing Consumer Act of 2009 on music industry).

38. See *infra* notes 205-10 and accompanying text (discussing implications of enacting law).

39. THOMAS DiLORENZO, HOW CAPITALISM SAVED AMERICA: THE UNTOLD HISTORY OF OUR COUNTRY, FROM THE PILGRIMS TO THE PRESENT 135 (2004) (citation omitted) (quoting Judge Richard Posner’s comment on U.S. economic climate prior to Sherman Act).

sive fortunes and to create agreements that would help further that wealth.⁴⁰ Fearful that this small group of individuals would stifle competition, Congress passed the Sherman Act in July 1890, federalizing the fight against cartels.⁴¹

Section 1 of the Sherman Act declares illegal “[e]very contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States.”⁴² Read literally, the Sherman Act makes any agreement to restrain trade illegal, but the courts have substantially narrowed this broad language to mean only any unreasonable restraint on trade.⁴³ The courts have not had to adhere to the plain meaning of the statute because the Supreme Court views the Sherman Act as a common law statute—one that the courts can freely interpret to fit with the economic concerns of the time.⁴⁴ As a result, Supreme Court jurisprudence on

40. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911) (noting that even though there was common law tradition that precluded monopolistic behavior, drastic change in economic landscape prompted Congress to enact federal statute against economic behavior threatening consumer welfare).

41. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966) (discussing rationale behind Sherman Act). A “cartel” is a group of producers of any product that bands together with the intent to lower output and raise the price of that product. By unilaterally lowering quantity and raising price, cartel members eliminate inter-producer competition. Theoretically, reducing competition among producers creates a disincentive to lower prices, harming consumers. See RICHARD A. POSNER, *ANTITRUST LAW* 28-29 (2d ed. 2001) (explaining that competition increases efficiency and thus lowers prices, benefiting consumers). Prior to the Sherman Act, only the common law and state codifications limited monopolistic behavior. Congress passing the Sherman Act not only shows profound national concern about the concentration of corporate power, but also marks the beginning of a new era where antitrust had become a national, not merely a local concern. See DiLORENZO, *supra* note 39, at 134 (noting prior to Sherman Act, states enacted own statutes beginning in 1880s).

42. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

43. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)) (“[T]he Court has repeated time and time again that § 1 ‘outlaw[s] only unreasonable restraints.’”). Early antitrust jurisprudence reflects the courts’ initial uncertainty on how to interpret section 1—restricting all restraints on trade or only those that were unreasonable. See *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 327 (1897) (discussing activity Congress intended to restrict when writing section 1 of Sherman Act).

44. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (stating Congress never intended for court to interpret Sherman Act literally); see 21 Cong. Rec. 245 (1890) (documenting statement of Sen. John Sherman); see Robin Carey, *The Sherman Act: What Did Congress Intend?*, 34 *ANTITRUST BULL.* 337, 344-45 (1989) (discussing members of Congress’s intent when instituting Sherman Antitrust Act); see Leegin, 551 U.S. at 885 (citation omitted) (“[T]he Court has never ‘taken a literal approach to [the Sherman Act’s] language.’”).

the Sherman Act has transformed substantially over the years, matching changes in economic conditions and understanding.⁴⁵

Although what constitutes an antitrust violation has changed substantially over the years, the Court has remained faithful to the principal goal of the Sherman Act—to protect consumer welfare by promoting free market competition.⁴⁶ At the Sherman Act's inception, the concern for consumer welfare could be translated into a fear of large private economic power.⁴⁷ While too much private power may always be an overarching concern, in modern day antitrust law as influenced by the Chicago school, the overriding goal is the protection of consumers in the form of lower prices and increased output, regardless of which businesses (large or small) may be benefitted incidentally.⁴⁸ Under both models, consumer welfare is key; in the modern era there is simply a new understanding of what economic behavior benefits consumers—i.e. that sometimes the interests of consumers align with those of big businesses and sometimes with those of small businesses.⁴⁹

Modern day economics focuses on efficiency because efficient businesses are best able to lower production costs and increase the overall value of goods and services, thus promoting material social

45. See Robert T. Miller, *The End of the Road for Dr. Miles: Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, ENGAGE, Oct. 2007, at 40 (explaining difference in Supreme Court's antitrust analysis following 1977, when Court adopted Robert Bork and other University of Chicago economists' modern economic approach to antitrust litigation).

46. See BORK, supra note 23, at 17 (stating advancing consumer welfare was the dominant goal in passing Sherman Act). Robert Bork's book presented a scathing view of Supreme Court antitrust jurisprudence prior to 1977, which at the time stood contrary to modern economic principles. Following the publication of Bork's book and publications of other Chicago School thinkers, the Supreme Court changed its approach to antitrust analysis, systematically overturning decisions inconsistent with modern economic understanding. See Miller, supra note 45, at 40 (noting impact of Bork's book on Supreme Court's approach to Sherman Act jurisprudence).

47. See Carey, supra note 44, at 338-41 (describing social and political climate at time of Sherman Act and citing examples of general fear of concentrated economic power).

48. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (stating that Sherman Act was designed to preserve "unfettered competition" so competitive forces could allow for greatest material progress); BORK, supra note 23, at 66 (arguing consumer welfare was central consideration in instituting Sherman Act). Although antitrust law does not fear big business, Congress often remains in fear. See *id.* at 5 (pointing out Congress's mistaken blame of big business for array of economic problems).

49. There has been a long-standing question over the definition of "consumer welfare" and how best to protect it. See BORK, supra note 23, at 50-70 (analyzing and comparing meaning of consumer welfare from Sherman Act drafters' perspective to modern views of Act); *but see* Carey, supra note 44, at 337-38 (opposing Bork's view of consumer welfare and alluding to conflict over term's definition).

progress.⁵⁰ Efficiency, though, is hard to measure, so the courts determine antitrust violations by looking at the competitive effects of a practice.⁵¹ The courts strike down anti-competitive activity—that which unreasonably restrains trade—and seek to promote pro-competitive activity.⁵² In a nutshell, anti-competitive activity is any activity which could have the effect of raising prices and lowering quantity in a particular market; pro-competitive activity is activity that lowers prices and increases quantity in a particular market.⁵³

To decide whether an activity is anti-competitive, courts typically perform a “rule of reason” analysis, initially placing the burden to prove illegal activity on the plaintiff, whether the plaintiff is the government or a private party.⁵⁴ Under the rule of reason, “the factfinder weighs all of the circumstances of a case” to determine whether an activity is placing an unreasonable restraint on trade.⁵⁵ The court considers factors that include “specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.”⁵⁶

Although rule of reason analysis is the general analytical standard for determining an activity’s competitive effects, in specific instances, courts may declare an activity *per se* illegal.⁵⁷ In general, the

50. See BORK *supra* note 23, at 7 (commenting on Supreme Court’s prior ignorance regarding importance of efficient business practices).

51. See POSNER, *supra* note 41, at 29 (writing “efficiency is the ultimate goal of antitrust, but competition, a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further”); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (noting that court looks to whether restraint on trade has anti-competitive or pro-competitive effect).

52. See *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (noting that restrictive practices are only illegal if they “impos[e] an unreasonable restraint on competition.”). Note that pro-competitive restraints on trade are perfectly legal, the law only forbids anti-competitive restraints. See *id.* at 49-50 (“Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.”).

53. See Miller, *supra* note 45, at 42 (explaining anti-competitive behavior is that which both raises prices and reduces quantity).

54. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (stating “this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anti-competitive before it will be found unlawful”).

55. *Cont’l T.V., Inc.*, 433 U.S. at 49.

56. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). This is not an all-inclusive list. For example, the court also gives heavy weight to a company’s market power. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (defining rule of reason as “an inquiry into market power and market structure designed to assess the combination’s actual effect”).

57. See *Khan*, 522 U.S. at 10 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting that restraints with “predictable and pernicious anticompetitive

Supreme Court defines a practice as illegal *per se* when it “facially appears to be one that would always or almost always tend to restrict competition and decrease output”⁵⁸ These are instances in which the court has so much experience allowing the court to predict with certainty that a rule of reason analysis will show an anticompetitive effect.⁵⁹

Early antitrust jurisprudence is characterized by wide usage of the *per se* label, mostly because the courts were still trying to get a handle on what behavior the Sherman Act sought to prevent.⁶⁰ When *per se* reasoning dominated, the Supreme Court began with a *per se* ban on activity, perhaps because the Court discovered that not everything made illegal by the *per se* rule was truly harmful to competition, the court then allowed exceptions to that ban.⁶¹ After

effect” are *per se* illegal)); *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 342-43 (1982) (giving overview of rule of reason and *per se* analysis).

58. *Broad. Music Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979).

59. *See id.* at 19 n.33 (explaining why in most cases court performs rule of reason analysis). The Supreme Court allows for *per se* illegality in some cases because it recognizes the high costs and difficulties of proof in rule of reason cases. *See Nw. Wholesale Stationers Inc., v. Pacific Stationary & Printing*, 472 U.S. 284, 289-91 (1985) (discussing requirements for establishing *per se* rule). The purpose of having *per se* rules is to eliminate the high judicial and actual costs of going through a rule of reason inquiry when such an approach is not appropriate under the facts and circumstances of a particular case. *See id.* (explaining *per se* is meant to conserve judicial resources in cases where court finds clear evidence of anticompetitive acts). Thus, in cases of substantial certainty, the Court yields to judicial efficiency. *See Maricopa Cnty.*, 457 U.S. at 343-44 (explaining judicial experience can also allow for efficiencies in oftentimes expensive and complicated antitrust litigation).

60. The courts struggled at first with whether to apply the Sherman Act to all restraints on trade. *See United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 327 (1897) (noting Congressmen’s varying perceptions of Sherman Act’s goals). Further, terms like “consumer welfare,” which the Act purported to protect, were at times unclear to the justices. *See Carey*, *supra* note 44, at 342-58 (analyzing individual congressmen’s intent in enacting Sherman Act). For examples of early cases applying *per se* illegality to antitrust suits, *See generally*, *Dr. Miles Med. Co., v. John D. Park & Sons*, 220 U.S. 373 (1911) (holding vertical minimum price restraints *per se* illegal); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (holding that combination formed by newspaper with other company to coerce company into charging only maximum retail price charged by newspaper was illegal under Sherman Act); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (declaring unreasonable for manufacturer to restrict and confine areas where dealers can trade).

61. *See, e.g.*, *Dr. Miles*, 220 U.S. at 373 (modified by *United States v. Colgate & Co.*, 250 U.S. 300 (1919) eight years after *Dr. Miles*). Cases such as *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Broad. Music Inc.*, 441 U.S. at 1 (1979); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Khan*, 522 U.S. 3 (1997); *Verizon Comm’ns, Inc. v. Trinko*, 540 U.S. 398 (2004); and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) all adopted economic views expressed in Robert Bork’s “The Antitrust Paradox” and legalized many previously illegal practices. *See generally* BORK, *supra* note 23 (analyzing antitrust paradox).

the Supreme Court's adoption of modern economic analysis beginning in the 1970s, however, per se illegality became the exception rather than the rule.⁶² This changed approach is evident when we look to the history of the Supreme Court's treatment of vertical price restraints.⁶³

B. An Overview of the Supreme Court's Approach to Vertical Price Restraints: Gradually Limiting *Dr. Miles*

1. *Dr. Miles: Instituting the per se standard for minimum price restraints*

The Supreme Court first addressed the issue of vertical price restraints when it decided the case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁶⁴ The Dr. Miles Medical Company sold a medical compound to wholesale druggists for resale to retailers in what is believed to have been a competitive market for patent home remedies.⁶⁵ To help maintain the premium price for its remedies, Dr. Miles created a Retail Price Management ("RPM") Agreement for both the "jobbers" and wholesalers that sold its products.⁶⁶ John D. Park & Sons was a wholesale druggist selling Dr. Miles's products, but doing so under conditions that violated its agreement with Dr. Miles—selling at a discount that was below the price specified in the agreement.⁶⁷ Dr. Miles sued to enforce its RPM agreement, but was met with an unhappy result to its contract claim.⁶⁸

62. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (stating Court "presumptively" applies rule of reason analysis).

63. See generally Alan H. Silberman, *The Evolving Face of Vertical Restraints*, CORP. L. AND PRAC. COURSE HANDBOOK SERIES 531 (May-June 2009) (giving overview of past and current law controlling vertical price restraints). To clarify, vertical price restraints involve an agreement between a manufacturer and a retailer, thus a top down or vertical agreement. See *id.* at 541 (explaining definition of vertical agreements). An agreement between only manufacturers or only retailers is a horizontal agreement and often indicates but does not confirm a Sherman Act violation. See *id.* (explaining definition of horizontal agreements).

64. 220 U.S. 373 (1911).

65. See Mark D. Bauer, *Whither Dr. Miles?*, 20 LOY. CONSUMER L. REV. 1, 3-4 (2007), available at http://works.bepress.com/mark_bauer/2/ (illustrating historical and economic realities at time of Dr. Miles decision).

66. See *Dr. Miles*, 220 U.S. at 376 (laying out Dr. Miles's business practices and reasons for opposition's suit). The Court noted that Dr. Miles argued fixed higher prices were what ensured retail druggists would commend Dr. Miles's products and allowed the retailers to make a profit on the product. See *id.* (commenting on parties' rationales for actions in question).

67. See *id.* at 379 (stating Dr. Miles charged Park with "cutting prices" after signing lengthy contract agreeing to sell Dr. Miles's products at set price).

68. See *id.* at 376-78 (laying out entire text of contract between parties).

In particular, instead of resolving the contract issue, the Supreme Court ruled for John D. Park & Sons on an antitrust theory, holding that the contract was unenforceable because it violated section 1 of the Sherman Act.⁶⁹ Since the Sherman Act was still fairly new and the Court had little precedent to resolve the case, the Court referenced common law antitrust doctrines.⁷⁰ The Court held that “agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.”⁷¹ Later decisions interpreted this as a unilateral ban on minimum vertical price fixing agreements and RPM agreements.⁷²

2. *Colgate: Modifying Dr. Miles*

Only seven years after the *Dr. Miles* decision, the Supreme Court began to modify its *per se* approach to RPM agreements.⁷³ In *United States v. Colgate & Co.*,⁷⁴ the government accused Colgate of vertical price fixing when the company refused to sell its product to any retailer that failed to follow the company’s established prices.⁷⁵ The Court held that a manufacturer retains the right to decline to deal with retailers that do not adhere to its sales conditions.⁷⁶ To

69. *See id.* at 408 (holding agreements between dealers to fix prices was against public interest and thus illegal).

70. *See id.* at 404 (declaring that by setting minimum prices, Dr. Miles had placed “restraint on alienation” of property which was prohibited by common law and under Sherman Act). The Court’s language comes from an antiquated opinion written by Lord Coke in *Darcy v. Allien*, which is one of the early British common law cases striking down monopoly behavior. *See Darcy v. Allien*, [1601] 77 Eng. Rep. 1260 (K.B.). Robert Bork and other modern economists later mocked this language because the *Dr. Miles* Court took it out of context. *See Miller*, *supra* note 45, at 42 (commenting on reactions to alienation doctrine and noting that while concept does hold some economic merit, there is not enough weight to merit declaring *per se* rule against vertical price restraints).

71. *Dr. Miles*, 220 U.S. at 408.

72. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881 (2007) (commenting “[i]n [Dr. Miles] the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act . . . for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer’s goods.”).

73. *See United States v. Colgate & Co.*, 250 U.S. 300, 306-07 (1918) (holding only agreements to fix minimum resale prices were illegal *per se*).

74. 250 U.S. 300 (1918)

75. *See id.* at 303 (stating how Colgate sent documents to its retailers urging them to adhere to minimum prices and threatening to cut off any retailer that did not adhere to those minimums). In this case there was no formal contract or agreement; however, the company was essentially setting minimum prices by threat. *See id.* (noting company’s black list for non-complying retailers).

76. *See id.* at 305 (explaining that individual’s right to dispose of property as person wishes and thus refusing to sell to company that does not meet manufacturer requirements is not illegal action under Sherman Act).

support its decision, the Court reasoned that, absent any actual agreement between the parties, there could be no violation of section 1 of the Sherman Act (which makes illegal only a “contract, combination . . . or conspiracy”).⁷⁷ Thus, so long as a manufacturer did not enter into any RPM agreements, but merely unilaterally refused to deal with distributors who did not adhere to its policies, manufacturers could obtain almost the same results without violating the law.⁷⁸

3. *The Court’s Approach to Vertical Non-Price Restraints*

The Supreme Court did not revisit vertical restraints again for over fifty years, addressing them in *White Motor Company v. United States*.⁷⁹ In *White Motor Co.*, the United States accused White Motor Company of violating the Sherman Act by granting its dealers exclusive sales territories and limiting the clients to whom the dealers could sell.⁸⁰ While scrutinizing the vertical territorial limitations used by White Motor Company, the Court emphasized that it was unclear whether such behavior was indeed in restraint of trade, stating that more concrete evidence was needed to determine if such a practice had a “pernicious effect on competition” and was devoid of any “redeeming virtue.”⁸¹ The Court did not venture to say that vertical non-price restraints were *always* legal, but noted an unwillingness to extend the Dr. Miles *per se* illegal ruling without evidence

77. *Id.* at 307.

[T]he 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 . . . he may announce in advance the circumstances under which he will refuse to sell.

Id. The Sherman Act requires that there be (1) an agreement and (2) that the agreement restrain trade in order for an individual to engage in an antitrust violation. See Sherman Antitrust Act, 15 U.S.C. § 1 (2004) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal.”)

78. See *Colgate*, 250 U.S. at 307 (stating conclusion of case). Later, critics noted that, although a manufacturer could technically set a minimum price on products by illicit agreement, doing so was extremely difficult to apply and thus of little use in business. See Brief of PING, Inc. as Amicus Curiae Supporting Petitioner at 9-15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (describing complicated procedure PING needed to employ to utilize freedoms outlined in *Colgate*).

79. 372 U.S. 253 (1963).

80. See *id.* at 255-57 (noting that retailers signed agreements to only sell within certain territory and not to sell to any state or federal government department unless company specifically gave permission in writing).

81. See *id.* at 263 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)) (noting lack of evidence that company had engaged in any acts that dampened competition).

of any actual or potential negative impact on competition.⁸² Thus, in this case, the court applied the rule of reason to vertical restraints—an act not often extended to other *per se* illegal acts—illustrating the Court at least recognized that vertical restraints could have pro-competitive effects.⁸³

Three years later the Supreme Court brushed aside its reasoning in *White Motor Co.*, and instead of looking to possible pro-competitive justifications, the Court once again applied a *per se* rule in a vertical non-price restriction case, *United States v. Arnold, Schwinn, & Co.*⁸⁴ The Court did not, however, overrule *White Motor Co.*, making the argument that antitrust rules apply differently to struggling businesses acting to keep a foothold in the market.⁸⁵ Arnold, Schwinn & Co., a bicycle manufacturer whose share of the United States bicycle market was a mere 12.8%, placed vertical non-price restrictions on the wholesalers to which it sold its bicycles.⁸⁶ Importantly, the Court paid no heed to any of the economic effects of the company's acts and instead focused entirely on principles of alienation and title.⁸⁷

The *per se* ban on vertical non-price restrictions lasted until 1977 but was the first *per se* ruling the Supreme Court overturned in the Court's new economic era.⁸⁸ *Continental T.V. Inc. v. GTE Sylvania Inc.*⁸⁹ overturned *Schwinn*, calling the *Dr. Miles* Court's reading of the Sherman Act into question for the first time through the logic of its decision.⁹⁰ The Court held that all vertical non-price

82. *See id.* (emphasizing that in deciding summary judgment, court could not with certainty rule on whether company's actions indicated any restraint of trade when effects of company's actions were uncertain).

83. *See id.* at 261 (citing *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)) (discussing factors court should consider when performing rule of reason analysis).

84. 388 U.S. 365, 381-82 (1967) (holding vertical non-price restraints were illegal *per se* under *Dr. Miles* and Sherman Act).

85. *See id.* at 374 (suggesting that new or failing firms could be privy to enacting otherwise unreasonable restraints).

86. *See id.* at 368 (explaining market shares of various U.S. bicycle companies and noting *Schwinn's* distribution practices and requirements on wholesalers).

87. *See id.* at 377-79 (noting that manufacturer may not retain control of its products once those products have passed on to retailer and disregarding actual effects of manufacturer's activities on competition).

88. *See Miller, supra* note 45, at 45 (recognizing *GTE Sylvania* was first Supreme Court decision to attack *per se* standard set against vertical price restraints).

89. 433 U.S. 36, 49 (1977).

90. *See id.* (overturning *Schwinn* by holding vertical non-price restraints should not be subject to *per se* ruling and instead court should apply rule of reason analysis to such cases). *GTE Sylvania Inc.* was a television manufacturer that originally sold only to a large group of retailers. *See id.* at 38 (“[L]ike most other television manufacturers, Sylvania sold its televisions to independent or company-owned distribu-

restraints were to be governed under a rule of reason analysis and that alienation and title were no longer appropriate elements to consider when determining whether a *per se* rule should apply.⁹¹ This rationale stemmed from the Court's discovery that vertical non-price restraints often create efficiencies, which are pro-competitive.⁹² The arguments and examples set forth in *GTE Sylvania*, while not explicitly counter to *Dr. Miles's* reasoning, effectively undermined the holding in that case as many of the Court's justifications for why vertical non-price restrictions were pro-competitive also illustrate why minimum RPM could be pro-competitive.⁹³

tors who in turn resold to a large and diverse group of retailers.”). After losing money with this marketing strategy, Sylvania began to sell directly to a small and select group of franchised retailers. *See id.* (“Prompted by a decline in its market share . . . Sylvania phased out its wholesale distributors and began to sell its televisions directly to a smaller and more select group of franchised retailers.”). The company's plan was to create a smaller group of aggressive retailers more dedicated to the brand. *See id.* (acknowledging that purpose of strategy was to attract more aggressive and competent retailers that company believed necessary to improve its marketing position). Sylvania thus limited the number of franchises within particular geographic areas and required that franchisees only sell within their designated territory. *See id.* (“Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised.”). Continental was a very successful Sylvania franchisee. *See id.* at 39 (noting Continental was one of most successful Sylvania franchisees). When Sylvania allowed another franchisee to sell its products in Continental's territory, Continental and Sylvania came to heads, resulting in Continental's eventual dismissal from the franchise program. *See id.* at 39-40 (“Continental protested that the location of the new franchise violated Sylvania's marketing policy,” and “Sylvania terminated Continental's franchises.”). Continental followed by suing Sylvania under an antitrust theory. *See id.* (“Most important for our purposes was the claim that Sylvania had violated § 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations.”).

91. *See id.* at 54 n.21 (noting critics' negative comments on Court's use of alienation principle, calling it a “misreading of legal history and a perversion of antitrust analysis” (citing Milton Handler, *The Twentieth Annual Antitrust Review*, 53 VA. L. REV. 1667, 1684-86 (1967))).

92. *See id.* at 55-57 (citing both Posner and Bork explaining market efficiencies and how *per se* rule against vertical non-price restraints harms competition). The Court gave the example of vertical non-price restraints encouraging new or established manufacturers to enter new markets by allowing manufacturers to create special incentives for “competent and aggressive retailers.” *See id.* at 55 (giving examples of cases where vertical non-price restraints could create efficiencies and benefit consumers).

93. *See id.* (noting incentives non-price restrictions can create for retailers to provide better services to consumers such as built-in repair costs and better point of sale services).

4. *The Modern Economic Era: Further Modifications to Vertical Price Analysis*

After striking down the *per se* rule against vertical non-price restraints in *Continental T.V. Inc.*, the Supreme Court decided two other cases that further moved in the direction of overturning the *per se* rule banning vertical price restraints.⁹⁴ The first case was *Monsanto Co. v. Spray-Rite Service Corp.*,⁹⁵ in which the Court managed to blur the line between vertical price and non-price restraints by noting that often the two practices had similar economic effects.⁹⁶ In its subsequent case, *Business Electronics Corp. v. Sharp Electronics Corp.*,⁹⁷ the Court noted the importance of interbrand competition.⁹⁸ Because vertical price restraints have a significant negative

94. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 766 (1984) (holding heightened standard of proof in vertical price fixing cases and that whether conspiracy was in place is jury question); see also *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735-36 (1988) (formalizing that vertical trade restraints are not *per se* illegal under Sherman Act unless restraints includes agreement on price or price levels).

95. 465 U.S. 752 (1984).

96. See *id.* at 761-62 (noting practical difficulty in distinguishing between effects of price-based and non-price based vertical restraints). In *Monsanto Co.*, Spray-Rite was a discounting wholesale distributor of agricultural chemicals; Monsanto Co. was an agricultural chemical manufacturer with a relatively small share of the market. See *id.* at 756 (stating that Spray-Rite was “engaged in the wholesale distribution of agricultural chemicals” and that “Spray-Rite was a discount operation, buying in large quantities and selling at a low margin;” explaining that Monsanto manufactures chemical products, including agricultural herbicides, and controlled 15% percent of corn herbicide market and 3% of soybean herbicide market compared with competitors, one which owned 70% of corn herbicide market and two others who owned 30% and 40%, respectively, of soybean herbicide market). After some time working together, Monsanto announced a change in its marketing practices, requiring certain criteria for its retail dealers. See *id.* at 756-57 (“Monsanto announced that it would . . . renew distributorships according to several new criteria.”). After instituting the policy, Monsanto declined to renew its contract with Spray-Rite. See *id.* at 757 (“Monsanto declined to renew Spray-Rite’s distributorship.”). Monsanto’s products made up nearly sixteen percent of Spray-Rite’s sales distribution; thus Spray-Rite was displeased when a year later, Monsanto came out with a new product significantly boosting its share of the agricultural chemical market. See *id.* (“Ninety percent of Spray-Rite’s sales volume was devoted to herbicide sales, and 16% of its sales were of Monsanto products.”). Spray-Rite sued, claiming Monsanto had conspired to fix its retail prices. See *id.* (summarizing Spray-Rite’s allegations under Sherman Act).

97. 485 U.S. 717 (1988).

98. See *id.* at 725-26 (discussing relationship between interbrand and in-trabrand competition in market and values of each). Business Electronics Corporation was the exclusive retailer in Houston, Texas for Sharp Electronic’s electronic calculators. See *id.* at 721 (“In 1968, petitioner became the exclusive retailer in the Houston, Texas, area of electronic calculators manufactured by . . . Sharp Electronics Corporation.”). After four years of being the exclusive retailer, Business Electronics began to sell to another retailer in the area. See *id.* (“In 1972, respondent appointed Gilbert Hartwell as a second retailer in the Houston area.”). Sharp published a list of suggested retail prices, but did not force either dealer to

impact on intrabrand competition, allowing a force on the market to limit that power could positively affect interbrand competition, which is pro-competitive.⁹⁹

Finally, the Supreme Court came down with one more decision prior to overruling *Dr. Miles*.¹⁰⁰ In *State Oil Co. v. Khan*,¹⁰¹ the Court held that setting vertical price ceilings or maximum prices between manufacturers and retailers was no longer a *per se* illegal act and would instead be evaluated under the rule of reason.¹⁰² The deci-

apply them. *See id.* (“[Sharp] published a list of suggested minimum retail prices, but its written dealership agreements . . . did not obligate either to observe them, or to charge any other specific price.”). The new retailer, Hartwell, provided superior services to Business Electronics, and thus often charged the suggested retail price to cover the cost of providing those services. *See id.* (showing that Hartwell’s prices were higher than Business Electronics). On a number of occasions, Hartwell complained to Sharp that Business Electronics was undercutting its prices and offering no customer services. *See id.* (“Hartwell complained to [Sharp] on a number of occasions about petitioner’s prices.”). Hartwell threatened to end its contract with Sharp if Sharp did not end its relationship with Business Electronics. *See id.* (“Hartwell gave [Sharp] the ultimatum that Hartwell would terminate his dealership unless [Sharp] ended its relationship with [Business Electronics].”). When Sharp ended its agreement with Business Electronics, the retailer sued under § 1 of the Sherman Act. *See id.* (mentioning that Hartwell alleged that Sharp and Business Electronics engaged in conspiracy in violation of Sherman Act).

99. *See id.* (noting that *per se* illegality of vertical restraints creates incentives for manufacturers to act in ways that could stifle interbrand competition). *But see* Orbach, *supra* note 30, at 261, 274 (asserting that resale price minimums do not eliminate intrabrand competition; “rather, it substitutes intrabrand price competition with intrabrand non-price competition” (citation omitted)).

100. *See State Oil Co. v. Khan*, 522 U.S. 3 (1997) (holding vertical maximum price restrictions are not *per se* illegal under Sherman Act and should be examined under rule of reason analysis). Khan agreed to lease and operate a gas station owned by State Oil. *See id.* at 7-8 (“Khan and his corporation, entered into an agreement with . . . State Oil Company, to lease and operate a gas station and convenience store owned by State Oil.”). The agreement stipulated that Khan would get the gas station’s gasoline from State Oil at a price equal to a suggested retail price, set by State Oil. *See id.* at 8 (“The agreement provided that respondents would obtain the station’s gasoline supply from State Oil at a price equal to a suggested retail price set by State Oil, less a margin of 3.25 cents per gallon.”). Khan had the option of charging consumers any price it chose, but any amount above the suggested retail price was to be rebated to State Oil. *See id.* (“Under the agreement, respondents could charge any amount for gasoline sold to the station’s customers, but if the price charged was higher than State Oil’s suggested retail price, the excess was to be rebated to State Oil.”). After falling behind in its lease, State Oil began eviction proceedings against Khan. *See id.* (explaining that after Khan fell behind on lease payments, “State Oil then gave notice of its intent to terminate the agreement and commenced a state court proceeding to evict respondent.”). Khan sued for illegal price fixing. *See id.* (noting that Khan sued under Sherman Act).

101. 522 U.S. 3 (1997).

102. *See id.* at 22 (declaring vertical maximum price restrictions are subject to rule of reason analysis). This case overruled *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which held that vertical maximum price restraints are *per se* illegal under Sherman Act. *See id.* (stating that it was overruling *Albrecht*).

sion met little public resistance because consumers welcomed the idea of limiting how much they pay for a product.¹⁰³ This rationale effectively equated manufacturers with consumer market goals and set the stage for striking the final *per se* rule on vertical price restraints: minimum price agreements.¹⁰⁴

PART III: UNDERSTANDING *LEEGIN*: THE COURT'S ANALYSIS

A. Factual Overview

Leegin Creative Leather Products, Inc. (“Leegin”) manufactured a high-end line of leather fashion accessories under the name Brighton Products.¹⁰⁵ Leegin sold the Brighton goods to over 5,000 mostly-independent, small boutique retailers.¹⁰⁶ Leegin claimed that such retailers were selected because those locations had superior customer relations.¹⁰⁷ Given that Leegin sold an upscale product, Leegin wished to provide its consumers with a heightened level of service and also wanted retailers to represent its products in a favorable light.¹⁰⁸

To ensure its product image was not cheapened, Leegin not only carefully selected retail locations, but also laid out certain requirements for its selected retailers to follow.¹⁰⁹ Namely, Leegin barred the retailers from selling its products below established

103. *See id.* at 17-19 (noting various concerns presented to discourage Court from overturning *per se* illegality of maximum vertical price restraints). There was some argument that maximum pricing could be used to mask minimum pricing. *See id.* (stating concerns of pricing).

104. *See id.* at 17 (mentioning poor business judgment for manufacturers to work with retailers as manufacturer interest lies more with that of consumer).

105. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (setting out facts of case).

106. *See id.* (describing Leegin’s sales practices).

107. *See id.* at 883 (“We, at Leegin, . . . [sell at] specialty stores . . . that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.”) .

108. *See id.* at 882 (stating company wished to give customers different experience than that available in large retail establishments). The argument for minimum price requirements based upon a manufacturer’s desire to push or keep its product in the luxury goods market has been little explored. *See* Orbach, *supra* note 30, at 261, 279 n.19 (noting that other than article from 1916 and student law review note in 1995, scholars and courts have paid little attention to merits of higher pricing for luxury goods). For a more in-depth analysis of how product image affects consumption and benefits consumers, *see* Barak Y. Orbach, *The Image Theory: RPM and the Allure of High Prices*, ANTITRUST BULL., 1, 6 (2010) (putting forth theory that resale price maintenance was practice created to maintain brand image).

109. *See* Leegin, 551 U.S. at 883 (outlining reasons for Leegin instituting retailer requirements).

prices.¹¹⁰ Leegin adopted this practice in part so retailers would have enough of a pay margin to provide superior customer service.¹¹¹ Leegin also feared, however, that discounting its luxury brand could harm the brand's name and reputation.¹¹²

PSKS, Inc. ("PSKS") operated a small retailer, Kay's Kloset, which was certified to sell Leegin's Brighton line.¹¹³ A year after Leegin instituted its pricing policy, Leegin began its "Heart Store Program."¹¹⁴ Retailers that participated in the program pledged to adhere to Leegin's suggested prices.¹¹⁵ Kay's Kloset became a Heart Store, but after a visiting Leegin employee found the store unattractive, Leegin and Kay's Kloset agreed Kay's would not retain that status past 1998.¹¹⁶

Leegin's Brighton line was Kay's Kloset's most important brand, accounting for forty to sixty percent of the retailer's profits.¹¹⁷ Even after Kay's lost its status as a Heart Store, its Brighton sales continued to increase.¹¹⁸ Then in 2002, Leegin discovered Kay's was discounting Brighton Products by twenty percent.¹¹⁹

110. *See id.* (setting out Leegin price minimum program). The policy did, however, allow an exception for "products not selling well that the retailer did not plan on reordering." *Id.*

111. *See id.* (explaining benefits of price floor).

112. *See id.* (giving support for minimum price requirement). Setting prices too low on certain products can have an adverse effect on sales. For further information and economic support of this practice, see Orbach, *supra* note 30, at 10-12 (providing information on history of economic theory behind why consumers in some cases prefer to pay higher prices for goods they could purchase at lower price).

113. *See Leegin*, 551 U.S. at 882-83 (introducing plaintiff).

114. *See id.* at 883-84 (explaining Leegin's Heart Store marketing scheme). Leegin offered retailers incentives to become "Heart Stores" and in exchange for retailers agreement not to charge below minimum set prices for Leegin's products. *See id.* (illustrating Leegin's incentive plan).

115. *See id.* (laying out rules for Heart Store participation). Because Leegin and the retailers actually agreed to a price minimum, the act counted as a *per se* violation of section 1 of the Sherman Act, but that earlier on, when Leegin simply refused to deal with retailers that did not adhere to certain pricing policies (policies not officially agreed upon), its acts fell within those permitted under the *Colgate* doctrine. *See United States v. Colgate & Co.*, 250 U.S. 300, 305 (holding manufacturer's refusal to deal with retailers that do not adhere with selling requirements is not *per se* illegal under Sherman Act).

116. *See Leegin*, 551 U.S. at 884 (narrating beginnings of conflict between parties). Leegin began its Heart Store program in 1998, meaning Kay's Kloset could not have been a participant for more than a year. *See id.* (setting out timeline for pricing policy).

117. *See id.* at 883 (showing success of Brighton line and line's importance to Kay's Kloset).

118. *See id.* at 884 (indicating alternative draw for Brighton customers beyond store image).

119. *See id.* (outlining negative history between Leegin and Kay's).

Kay's Kloset claimed it instituted these discounts to compete with nearby retailers who were also undercutting Leegin's price floor.¹²⁰ Leegin asked that Kay's cease selling Brighton Products at a discount.¹²¹ When Kay's refused, Leegin stopped selling its products to the retailer.¹²² The loss of revenue from its Brighton sales greatly hurt Kay's, which prompted PSKS to sue on the retailer's behalf.¹²³

B. Procedural Posture Prior to Reaching the Supreme Court

PSKS sued Leegin in the district court, claiming that Leegin had engaged in price fixing, an act that was *per se* illegal under *Dr. Miles*.¹²⁴ The jury ruled for PSKS in the matter, causing Leegin to appeal the trial court's decision in the Court of Appeals for the Fifth Circuit.¹²⁵ The Fifth Circuit affirmed, stating that although some types of vertical price-fixing agreements called for rule of reason analysis, the Supreme Court had never applied rule of reason to vertical minimum price-fixing agreements and thus was bound to apply the *per se* rule.¹²⁶ Further, the *Dr. Miles* precedent had stood for seventy-three years at that point and there was no indication from Congress that anything but a *per se* rule should apply to vertical minimum RPM agreements.¹²⁷ After the Fifth Circuit affirmed the trial court decision, Leegin appealed to the Supreme Court, which granted certiorari on the question of "whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful."¹²⁸

120. *See id.* (giving Kay's justifications for ignoring price floor).

121. *See id.* (showing reason for dispute).

122. *See id.* (showing Leegin's actions).

123. *See id.* (explaining grounds for lawsuit).

124. *See* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 2004 WL 5254322 (E.D. Tex. Aug 17, 2004) (holding Leegin engaged in illegal vertical price fixing). *See* *Dr. Miles Med. Co., v. John D. Park & Sons Co.* 220 U.S. 373, 373 (1911) (setting forth prior Supreme Court precedent on vertical price fixing).

125. *See* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. Appx. 464, 2006-1 Trade Cases P 75, 166 (5th Cir. Mar 20, 2006) (holding district court did not abuse discretion in excluding testimony from Leegin's economic expert).

126. *See id.* at 466 (stating that cases allowing for exceptions to *Dr. Miles* did not create exemption for vertical minimum price-fixing agreements to *per se* rule and that court was thus still bound by *per se* precedent).

127. *See id.* at 467 (noting Congress never enacted legislation to counter *per se* standard set forth in *Dr. Miles*).

128. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

C. The Majority's Analysis

The Court began its analysis with a summary of the current legal position on *per se* illegality as pertains to section 1 of the Sherman Act.¹²⁹ In its introduction, the Court emphasized that it has never “taken a literal approach” to the Sherman Act’s language on contracts in restraint of trade.¹³⁰ The Court interprets section 1’s language to bar only *unreasonable* restraints on trade, not all restraints.¹³¹ This interpretation speaks to the “rule of reason,” the Supreme Court’s preferred analysis in trade restraint cases under the Sherman Act.¹³² This system of analysis requires that the factfinder weigh all circumstances of a case when deciding whether a particular practice is anti-competitive.¹³³ The Court noted that it takes certain factors into account when performing this balancing test, including “specific information about the relevant business [and] the restraint’s history, nature, and effect,” as well as the business in question’s market power.¹³⁴ Summing up its policies, the Court focused on whether a practice is anti-competitive and thus

129. *See id.* at 885 (explaining Court’s summary as to Sherman Act).

130. *Id.* “While § 1 could be interpreted to proscribe all contracts . . . the Court has never ‘taken a literal approach to [its] language.’” *Id.*

131. *See id.* (noting “[T]he Court has repeated time and again that § 1 ‘out-law[s] only unreasonable restraints.’”).

132. *See id.* (expressing that “[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”) (referring to *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006)).

133. *See id.* at 885 (describing that “[u]nder this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36,49 (1977)). When applying rule of reason analysis, the initial burden is on the plaintiff to prove an anticompetitive effect. *See Leegin* at 885-86 (discussing process of rule of reason analysis). Once the plaintiff makes a showing of such an effect, the burden shifts to the defendant to prove any pro-competitive justifications. *See id.* (referring to balancing test required by rule of reason analysis). The court will weigh any procompetitive justifications against any anticompetitive effects in deciding whether an act should be considered a violation of the antitrust laws. *See id.* (noting that factfinders weigh all facts and circumstances before concluding whether act violate Sherman Act).

134. *Id.* at 885-86 (quoting *State Oil Co. v. Khan*, 522 U.S. 3 (1997)) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (2006)).

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Bd. of Trade of Ch. v. United States, 246 U.S. 231, 244 (1918).

harmful to the consumer, or whether a practice stimulates competition and thus benefits the consumer.¹³⁵

Although the general rule is the rule of reason, the Court acknowledged that in particular cases, a *per se* rule applies.¹³⁶ Those are cases in which the courts have had considerable experience and know that the behavior in question “always or almost always tend[s] to restrict competition and decrease output.”¹³⁷ When the results of a particular economic practice are unclear the Court hesitates to apply the *per se* rule as there is no way to show such a decision is anything but purely arbitrary.¹³⁸

Having established its general practices in cases where the economic impact of a practice is in question, the Court turned to its prior precedent on the topic at issue: vertical price fixing in the *Dr. Miles* case.¹³⁹ That case made vertical agreements between a manufacturer and a distributor to set minimum resale prices *per se* illegal.¹⁴⁰ The Court noted that this earlier decision was based upon a common-law rule that banned restraint on “alienation.”¹⁴¹ This common-law rule was based on a treatise published in 1628 which threw little light on the business practices of substantial companies

135. *See id.* at 886 (stating “[i]n its design and function the rule distinguishes between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest”).

136. *See id.* (noting that “[t]he rule of reason does not govern all restraints. Some types ‘are deemed unlawful *per se*’”) (quoting *Khan*).

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

138. *See id.* at 887 (explaining that “we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious”) (quoting *Khan* at 10).

139. *See id.* at 887 (presenting *Dr. Miles*). *See supra* notes 73-89 and ensuing discussion for further information on *Dr. Miles*.

140. *See Dr. Miles Med. Co., v. John D. Park & Sons Co.*, 220 U.S. 373, 408-9 (1911) (holding that vertical price fixing agreements were illegal under Sherman Act).

141. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (discussing holding in *Dr. Miles*). “Alienable” property is that to which a person has the right to exclusive disposal. *See Cheryl I. Harris, Whiteness as Property*, 106 HARV. L. REV. 1709, 1731-34 (explaining concept of alienation). Harris refers to John Stewart Mill for the more classic understanding of alienation. *See JOHN STEWART MILL, PRINCIPLES OF POLITICAL ECONOMY* 224 (Great Mind Series, Prometheus Books 2004) (1848):

The institution of property, when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force, or fraud, from those who produced it.

Id.

in 1911, and much less in 2007.¹⁴² The Court did agree that a common law methodology applies in Sherman Act interpretation, but cautioned against applying old and often irrelevant doctrine.¹⁴³

In *Dr. Miles*, the Court treated vertical price agreements as *per se* illegal, but at the time of its 1911 decision, the Court did not have a grasp on modern economic analysis.¹⁴⁴ In particular, *Dr. Miles* treated vertical price fixing agreements as having the same economic effect as horizontal price fixing agreements, a belief modern economists fell is incorrect.¹⁴⁵ The current belief is that resale price maintenance may actually promote interbrand competition and thus benefit consumers in several ways.¹⁴⁶

Interbrand competition, the Court noted, is good for the consumer and for that reason should be protected, not barred by anti-trust laws.¹⁴⁷ The idea is that price floors allow manufacturers to remove price competition from the retailer mix and thereby forces retailers to compete on other grounds (like services).¹⁴⁸ Theoretically, this stability among retailer prices encourages retailers to resort to more beneficial non-price competition that ultimately benefits consumers.¹⁴⁹ If a manufacturer eliminates price competi-

142. See *Leegin*, 551 U.S. at 888 (stating that “[t]he Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints”).

143. See *id.* at 899-900 (discussing how Supreme Court has generally recognized that Sherman Act, although Congressional statute, is distinct from other statutes because at the time of its institution neither Congress nor Court understood enough economics to properly institute concepts set out by the Act). As a result, the Court has taken a common law approach to interpreting the statute—setting forth precedent early on that it later overruled with the dawn of modern economic analysis. See *id.* (stating that Sherman Act is common law statute meant to “evolve to meet the dynamics of present economic conditions”).

144. See *id.* at 888 (noting that *Dr. Miles* decision equated vertical price fixing with horizontal price fixing without first performing proper analysis).

145. See *id.* (discussing that “[o]ur recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider”).

146. See *id.* (citing current economic consensus on vertical price fixing).

147. See *id.* at 890 (explaining purpose of antitrust laws and dispelling association between vertical and horizontal price fixing) (citing *State Oil Co. v. Khan*, 522 U.S. 3 (1997)). Setting the price of one product between retailers, theoretically allows for greater competition among manufacturers, ultimately benefitting consumers either by pushing prices closer to their marginal cost or by allowing for manufacturers to furnish clients with better services. See *id.* at 890-91 (discussing economic effects of manufacturer vertical price fixing).

148. See *Leegin*, 551 U.S. at 890 (explaining how interbrand competition benefits consumers).

149. See *id.* (setting out mechanics of interbrand and intrabrand competition). Also, resale price maintenance can increase interbrand competition by lowering the barriers to market entry. New manufacturers entering the market can

tion between retailers with a retail price floor, retailers will instead compete by offering better or varied services to attract customers interested in similar products.¹⁵⁰ This allows for a greater spectrum of products on the market and thus means producers meet the needs of more consumers.¹⁵¹ Further, economists argue that this is the most economically efficient way for a manufacturer to expand its market share.¹⁵²

The Court, of course, recognized that not all vertical price fixing has a pro-competitive effect.¹⁵³ Resale price maintenance can cause a free rider effect, allowing some manufacturers to undercut their competitors and still benefit from the market-wide service improvements.¹⁵⁴ More disconcerting, vertical price fixing can facilitate monopoly profits by encouraging manufacturer cartels to form that then (after undercutting each other and creating a procompetitive effect) could potentially create actual or tacit price-fixing agreements harmful to consumers.¹⁵⁵ If they were to compel a manufacturer to aid them in an unlawful price fixing arrangement,

use the price floor to induce retailers to invest in promoting the new brand. *See id.* at 891 (pointing out further benefits).

150. *See id.* at 890-91 (demonstrating non-price incentives retailers use to attract customers). Some examples of services may include superior showrooms, product demonstrations, or particularly knowledgeable employees. *See id.* at 891 (giving examples of improved services).

151. *See id.* (showing how differentiation of products can appeal to a broader market). For example, one manufacturer can offer a cheaper, low-end product while another can offer a high-end version accompanied by all sorts of retailer services. *See id.* (giving examples of varied retailer services). The first consumer benefits because she is able to afford an otherwise unattainable product; the second consumer gleans status, peace of mind or perhaps inclusive repairs or other services for their increased expenditure. *See id.* (presenting different benefits consumer receives from producers competing on variety of price and non-price product elements).

152. *See id.* at 892.

[I]t may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share

Id.

153. *See id.* (admitting setting minimum prices can have anti-competitive effects in some cases).

154. *See id.* at 891 (describing free rider effect). Nevertheless, free riding can still occur absent minimum RPM. *See id.* (discussing how free riding can manifest itself in product market). Also, minimum RPM is aimed at combating free riding at the retail level. *See id.* (stating "[m]inimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider.").

155. *See id.* at 892 (explaining possible monopoly effects of vertical price maintenance). In *U.S. v. Socony-Vacuum Oil Co.* the court held that naked price-fixing agreements were illegal *per se* under the Sherman Act and that the court

retailers could also use the price floors to create cartels.¹⁵⁶ In all these unfortunate instances, retailers and manufacturers would essentially be using vertical price maintenance as a means of instituting horizontal price fixing, a practice that the Supreme Court maintains is *per se* illegal under *Socony*.¹⁵⁷

Even though the Court recognized that vertical price maintenance could present opportunities for abuse and have anti-competitive effects, the Court also noted that the behavior could also ultimately benefit the consumer.¹⁵⁸ Because vertical price fixing could be pro-competitive, the Court refused to label vertical price maintenance as *per se* illegal.¹⁵⁹ The Court also emphasized that *per se* illegality was not to be the “rule” in antitrust law.¹⁶⁰ Instead, the rule of reason is the default rule in antitrust cases, unless a showing that the challenged practice is known from experience to be always, or almost always anticompetitive.¹⁶¹

Applying this rule to the facts of the case, the Court pointed out that for manufacturers, there is no incentive to needlessly inflate product prices because the retailers, not the manufacturers, would benefit.¹⁶² Further, a simple increase in prices should not automatically lead one to believe a manufacturer is engaging in anti-competitive activity.¹⁶³ Analyzing market impact, the Court

would not entertain any pro-competitive justifications for such acts. *See* 310 U.S. 150, 218 (1940).

Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition . . . and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act.

Id.

156. *See Leegin*, 551 U.S. at 893 (stating how manufacturers would not get any increased service as all profit would go to retailer cartels).

157. *See id.* at 893 (citing *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006)) (stating legal consensus on horizontal price fixing).

158. *See id.* (hesitating to label price maintenance as *per se* anti-competitive).

159. *See id.* at 894-95 (arguing *per se* rule cannot apply when there are pro-competitive possibilities).

160. *See id.* (showing argument that *per se* illegality has administrative advantages suggests *per se* illegality is the rule not the exception—an inaccurate reading of antitrust law).

161. *See id.* at 898 (promoting rule of reason as proper standard).

162. *See id.* at 896 (“A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumer will ‘substitute a different brand of the same product.’”)

163. *See id.* at 896-97 (looking at facts of case and analyzing what would amount to anti-competitive behavior). The Court gave the example of price in-

noted that a single manufacturer setting a price floor in a competitive market would cause some consumers to purchase a cheaper equivalent product, thus diverting any gains from price increase to other manufacturers.¹⁶⁴ Generally, the Court found that unless a player had significant market power, setting a vertical price minimum was unlikely to have an anti-competitive effect on the market.¹⁶⁵

Having considered the issue of vertical price floors as an original issue, the Court had to decide whether to keep the *Dr. Miles* precedent.¹⁶⁶ The Court held that despite being a century-old precedent, *Dr. Miles* could still be overturned.¹⁶⁷ First, the Court had treated the Sherman Act as a common-law statute, which gave the Court authority to set the law in this instance.¹⁶⁸ Second, the Court said *stare decisis* does not require adherence to incorrect precedent.¹⁶⁹ Finally, the Court noted that other recent Supreme Court decisions had limited the *Dr. Miles* decision, essentially allowing manufacturers to set minimum resale prices in other ways.¹⁷⁰

As a last step, the Court looked at statutory precedent that may have stood in conflict to a judicial decision allowing vertical maximum price agreements.¹⁷¹ The Court looked closely at the Consumer Goods Pricing Act, which PSKS claimed codified the rule set forth in *Dr. Miles*.¹⁷² Ultimately, the Court found this not to be the case, stating that the rule of reason did not conflict with the Act as

creases from advertising or improved product quality and equated these changes with better retailer services. *Id.*

164. *See id.* at 897 (commenting on price maintenance amongst small number of players and likelihood of abuse).

165. *See id.* at 898 (analyzing facts to calculate market impact).

166. *See id.* at 899 (noting *Dr. Miles's* long-standing precedent).

167. *See id.* at 907 (overruling *Dr. Miles*).

168. *See id.* at 899 (“From the beginning the Court has treated the Sherman Act as a common-law statute.”) (referencing *National Soc. Of Professional Engineers v. United States*, 435 U.S. 679, 688).

169. *See id.* at 900 (“[R]espected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have precompetitive effects.”) (citation omitted).

170. *See id.* at 900-01 (“[W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings.”) (citation omitted).

171. *See id.* at 904-05 (summarizing congressional action regarding vertical price restraints).

172. *See id.* at 905 (explaining content of Consumer Goods Pricing Act). The Consumer Goods Pricing Act repealed the Miller-Tydings Fair Trade Act and the McGuire Act. *See* Miller-Tydings Fair Trade Act, 50 Stat. 693 (1937) (making vertical price restraints legal if allowed under fair trade law). *See* McGuire Act, 66 Stat. 632 (1975) (allowing vertical price-fixing agreements between manufacturers and distributors to be enforced against distributors not involved in the agreement). *See* Consumer Goods Pricing Act, Publ. L. No. 94-145, 89 Stat. 801 (1975).

the Act itself did not consider vertical price restraints as *per se* illegal.¹⁷³ Congress created the legislation so states could protect small retailers from large discounters, thus protecting more vulnerable businesses.¹⁷⁴ The Court was careful to point out that the Sherman Act, unlike other legislation, was designed to protect competition and not competitors themselves.¹⁷⁵ Having established that it was not bound under any theory to follow *Dr. Miles*, the Court overturned the decision and held that vertical price restraints from that point on were to be judged using a rule of reason analysis.¹⁷⁶

PART IV: THE DISCOUNT PRICING CONSUMER PROTECTION ACT

Four months after the Supreme Court's decision in *Leegin*, Senator Herb Kohl introduced a bill to the Senate Judiciary proposing to enact legislation overriding the Supreme Court's decision.¹⁷⁷ Specifically, the bill proposed that Congress amend section 1 of the Sherman Antitrust Act by adding a statutory *per se* ban on minimum RPM.¹⁷⁸ The idea was to rewind antitrust law back to its pre-*Leegin*

173. See *Leegin*, 551 U.S. at 905 (“Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* illegal.”).

174. See *id.* at 905-906 (stating goals of Consumer Goods Pricing Act).

175. See *id.* at 906 (“The purpose of the antitrust laws . . . is ‘the protection of competition, not competitors.’”).

176. See *id.* at 907 (holding *Dr. Miles* no longer valid and rule of reason analysis to be standard).

177. See *Kohl Introduces Measure to Restore Per Se Illegality Rule for Minimum RPM*, 93 ANTITRUST & TRADE REG. REP., 561 (Nov. 2, 2007) (reporting that Senator Kohl introduced bill to overturn *Leegin* on October 30, 2007). Senators Hillary Clinton, Joe Biden and Sheldon Whitehouse cosponsored the bill when it was introduced. S. 2261, 110th Cong. (2007). Pamela Jones Harbour, former commissioner of the Federal Trade Commission, contradicted the FTC's position on RPM agreements and put her support behind Senator Kohl. See *Pamela Jones Harbour - Partner*, FULBRIGHT & JAWORSKI L.L.P., <http://www.fulbright.com/pharbour> (last visited Mar. 10, 2011). See Pamela Jones Harbour, *An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour*, FEDERAL TRADE COMMISSION (Feb. 26, 2007), <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf> (last visited Mar. 10, 2011) (asking Supreme Court to declare minimum RPM agreements *per se* illegal). Ms. Harbour also wrote a paper arguing to reinstate the RPM ban and gave testimony before the Supreme Court during the *Leegin* deliberations and before the Senate Judiciary Committee while it deliberated Senator Kohl's bill. See *id.* (noting desire to reinstate RPM ban); Pamela Jones Harbour, *Testimony Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights* (July 31, 2010) (testifying before Subcommittee); Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 Loyola Consumer L. Rev. 32 (2008) (arguing Court decided wrongly in *Leegin*).

178. The bill proposed that Congress add the following after the first sentence of section 1 of the Sherman Act: “Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.” S. 148 § 3, 111th Cong. (2009).

state.¹⁷⁹ If passed into law, the bill would eclipse the *Leegin* decision, and could potentially result in an even broader ban than what was in effect under *Dr. Miles*.¹⁸⁰

Senator Kohl champions the bill as the protector of consumer access to discount products.¹⁸¹ He claims that absent congressional action, consumers will suffer from uniform high prices and see the end of discount pricing options.¹⁸² Further, Kohl claims that businesses, especially small discount businesses, will suffer because *Leegin* makes it impossible for companies to compete on price when RPM agreements are in effect.¹⁸³

179. See S. 148, 111th Cong. (2009) (stating that purpose of bill was to “re-store” ban on RPM agreements). See Press Release, Senator Herb Kohl, Kohl Examines the Legality of Manufacturers Barring Discount Prices (May 19, 2010), available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2696 (last visited Mar. 10, 2011) (announcing that Senator Kohl’s goal is to set law back to its pre-*Leegin* state).

180. Because the “contract, combination, conspiracy, or agreement” language is almost identical to the beginning of section 1, it is likely that the court will have to apply higher scrutiny to the relationships between manufacturers and retailers than it did under *Dr. Miles*. See 15 U.S.C. § 1 (2004) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”); S. 148, 111th Cong. (2009) (“Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.”). This means that under this new amendment, options like the *Colgate* doctrine or perhaps other exceptions to an RPM ban may not apply. See Silberman, *supra* note 63, at 575 (explaining how to apply *Colgate* and explaining its importance in states who have passed laws banning minimum RPM agreements post *Leegin*).

181. See Press Release, Senator Herb Kohl, Kohl Examines the Legality of Manufacturers Barring Discount Prices, (May 19, 2010), available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2696 (last visited Mar. 10, 2011) (“Kohl introduced the ‘Discount Pricing Consumer Protection Act’ to ensure that consumers will be able to continue discount shopping despite the Supreme Court’s decision to overturn the ban on vertical price fixing.”) [Hereinafter May 19, 2009 Kohl Statement]; see The Discount Pricing Consumer Protection Act: Hearing on S. 138 Before the Senate Subcomm. on Antitrust Competition Policy and Consumer Rights of the S. Judiciary Comm., 111th Cong. (2009) (statement of the Honorable Herb Kohl), available at http://www.vote.smart.org/speech_detail.php?sc_id=462996 (declaring evils of manufacturers allowed to set minimum RPM agreements and end of discount product era) [hereinafter Discount Pricing Consumer Protection Act].

182. See May 19, 2009 Kohl Statement, *supra* note 181 (“The Court’s decision in . . . *Leegin* . . . allows manufacturers to set a minimum price below which a retailer cannot sell the manufacturer’s product, threatening the existence of discounting and discount stores and leading to higher prices for consumers.”).

183. See The Discount Pricing Consumer Protection Act, *supra* note 181 (stating established retailers will take advantage of vertical price fixing and push smaller retailers out of business by forcing manufacturers to create such agreements). If retailers were to force manufacturers to fix prices for the purpose or with the effect of pushing smaller retailers out of business, the act would independently violate section 1 of the Sherman Act. See *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 614 (1914).

While all these arguments may be appealing to the public, who hears that the last thing consumers need in hard economic times are fewer discount options, Senator Kohl's statements do not exactly line up with reality.¹⁸⁴ First, the popular media has grossly misinterpreted the *Leegin* decision, putting forth the notion that RPM agreements are now always legal.¹⁸⁵ This is unfortunate, because the Court was very careful to specify that rule of reason analysis is not a license for manufacturers to freely make RPM agreements.¹⁸⁶ If challenged with anticompetitive accusations, manufacturers setting RPM agreements must still show that such agreements have a pro-competitive effect.¹⁸⁷ Thus, manufacturers are likely to be very cautious before setting such agreements.¹⁸⁸

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition . . . he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress . . .

Id.

184. See May 19, 2009 Kohl Statement, *supra* note 181.

Our experience since the *Leegin* decision is giving credence to [fears that minimum RPM agreements would threaten discount shopping], and it comes at exactly the wrong time—just as millions of consumer [sic] face a serious recession and depend on bargain shopping more than ever to balance the family budget. That is why I have introduced legislation to overturn this misguided Supreme Court ruling.

Id.

185. See Himowitz, *supra* note 5 at 7D (forecasting all electronics companies will institute vertical price agreements and uniformly raise consumer prices); Pereira, *supra* note 1, at A1 (giving mainly one-sided account of possible negative effects of minimum RPM agreements); Steve Chapman, *Leave it to the Invisible Hand*, BALT. SUN, Apr. 2, 2007, at 11A (declaring Court's *Leegin* decision places stricter rules on businesses); Robert Barnes, *Handbag Case May Hit Pocketbooks*, CHARLOTTE OBSERVER, Mar. 27, 2007, at 1D (depicting *Dr. Miles* as patron saint of shoppers because allowed for more discounted products).

186. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 892-94 (stating regardless of any permission to set minimum prices, anticompetitive behavior without any more powerful procompetitive effect remains illegal under the Sherman Act).

187. See Beth L. Fancsali & Paul Olszowka, *How Wide Did the Supreme Court Open the Door to Minimum Resale Pricing?*, 15 ANDREWS LITIG. REP., Sept. 2007, at 1, 4 (explaining manufacturer must still be able to show setting a minimum resale price will benefit consumers to avoid liability under the antitrust laws).

188. See *id.* (advising “companies and their counsel should proceed cautiously, carefully consider the purpose of the arrangements, and document the specific benefits to consumers and interbrand competition of any program they implement”); Jen Haberkorn, *Law Urged Against Price Floors*, WASH. TIMES, Aug. 1, 2007, available at 2007 WLNR 14836652 (quoting Janet L. McDavid, antitrust lawyer at Hogan & Hartson in D.C.) (“Companies aren’t jumping at the opportunity [to fix prices]. They’re thinking very carefully about how any action they take would be subject to the ‘rule of reason.’”).

Therefore, manufacturers will unlikely start increasing prices uniformly.¹⁸⁹

Senator Kohl is correct that consumers may see higher prices on certain products.¹⁹⁰ Nevertheless, this hardly spells the doom of discount pricing as not *all* manufacturers of a particular type of product are likely to set across-the-board minimum prices.¹⁹¹ First, if one manufacturer decides to set a minimum resale price, consumers who are not interested in paying higher set price will be likely to divert their business to another manufacturer's brand of that product.¹⁹² Second, consumers that remain loyal to the product will then get something extra for the added cost.¹⁹³ In addition, the products that may see increased prices will likely be branded products—things that are nice to have, but not necessary.¹⁹⁴

189. A group of manufacturers, with market power, could not band together and uniformly raise the price on a product without violating the Sherman Act. See BORK, *supra* note 23, at 101-04 (spelling out what constitutes oligopoly behavior, practices illegal under section 1 of Sherman Act).

190. The whole point of setting RPM agreements is to prevent retailers from lowering prices, so any product that falls under such an agreement will naturally be more expensive. See Transcript of Oral Argument at 15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (statement of Justice Scalia), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx (noting consumer welfare does not always translate to lower prices and that purpose of minimum RPM is to prevent discounting).

191. In order to kill discount pricing, manufacturers of similar products would have to make agreements among themselves to set prices, eliminating any market incentive for competition. This would qualify as a horizontal price-fixing agreement and would be *per se* illegal under the Sherman Act. See POSNER, *supra* note 41 at 159 (explaining that price-fixing agreements are *per se* illegal). Note that such an agreement would only be possible in a market with concentrated power in only a few manufacturers—getting a large number of manufacturers to agree to such an arrangement would be near impossible. See Bork, *supra* note 23, at 101-04 (explaining oligopolistic market and the incentive for members to “cheat”). Further, if a number of manufacturers did succeed in formulating such a conspiracy by setting uniform vertical agreements, the temptation for one or more manufacturers to undercut the others and reap extra profits would probably be too much and end up collapsing or at least revealing the plot. See *id.* at 104 (“[T]here will always be a temptation to ‘cheat,’ to pick up a very profitable piece of extra business with a small price cut.”).

192. See *Law of Demand*, INVESTOPEDIA, <http://www.investopedia.com/terms/l/lawofdemand.asp> (last visited Mar. 10, 2011) (stating as price of goods or services increases, consumer demand decreases).

193. Added product cost can mean consumers get more services accompanying the base product. See Orbach, *supra* note 30, at 273 (explaining possible benefits for consumers of higher prices). For example, consumers may get added repairs, point of sales services or improved customer support. See *id.* at 273 (discussing relationship between added cost and increase in services). Increased price can also amount to a luxury premium—a signal of product quality or associated status. See *id.* at 282 (stating consumers are sometimes willing to pay more to have image benefits of particular brand).

194. See Orbach, *supra* note 30, at 6 (showing how RPM first emerged to protect product branding). Making it harder for manufacturers to distinguish their

Also of note is that antitrust arguments are economic in nature, not popular.¹⁹⁵ Oftentimes consumer welfare translates as lower prices, but this is not always the case.¹⁹⁶ Consumers can benefit from more than just price reductions, and in some cases, those added benefits outweigh a lower price.¹⁹⁷ In this case, if a manufacturer decides to set prices to heighten its brand image or add services, customers may be convinced that the price hike is warranted; otherwise, the manufacturer may push itself out of business.¹⁹⁸

Senator Kohl argues that RPM agreements also hurt small businesses, making it hard for them to compete on the basis of price.¹⁹⁹ In actuality, large internet discounters are positively harmed when a manufacturer sets minimum resale prices because they lose their competitive advantage over other sellers—low prices in lieu of point of sales services among other things.²⁰⁰ Usually, these businesses can sell products at a deep discount because they do not have the same costs as non-internet sellers—like small businesses.²⁰¹ A non-discounting store would presumably provide the consumer

products in the market makes a statement (perhaps unknowingly) on consumers' right to pursue status by eliminating those distinctions. *See id.* at 21 (“[A]ssuming Congress ever wishes to address the pursuit of status, a ban on RPM that intends to promote a brand image is unlikely to alter preferences for luxury or to reduce the quantities or prices of status goods on the market.”).

195. *See generally* BORK *supra* note 23 (arguing antitrust does not follow same public policy pursuits as rest of legal world; antitrust is an economic pursuit for efficiency).

196. *See* Transcript of Oral Argument at 15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx (asserting while lower prices can benefit consumer welfare, other product qualities may outweigh allure of lower prices for consumers).

197. *See* Orbach, *supra* note 30, at 8-12 (presenting non-price-based motives consumers may have for purchasing product).

198. *See* Cole & McDonald, *supra* note 4, at 3 (noting most manufacturers cannot afford to raise prices because they will lose too many customers).

199. *See* May 19, 2009 Kohl Statement, *supra* note 181 (stating large retailers can push smaller retailers out of market by forcing manufacturer to establish minimum RPM agreements).

200. *See* Erich M. Fabricius, Comment, *The Death of Discount Online Retailing? Resale Price Maintenance After Leegin v. PSKS*, 9 N.C. J. L. & TECH. 87, 106 (2007) (concluding retailers competing solely on price, including online retailers, could be disadvantaged by minimum RPM agreements); *see also* Cole & McDonald, *supra* note 4, at 4 (recognizing minimum RPM agreements on some products could foreclose discount retailers, or specifically online retailers).

201. *See* Michael Diamond, *We All Add to Cost-Cutting Measures*, POST-CRESCENT, Apr. 10, 2008, at C01, *available at* 2008 WLNR 26876596 (emphasizing internet sellers cut costs by providing customers fewer services). Ebay, a supporter of Senator Kohl's bill, is notorious for its poor customer service. *See About Half of eBay Users Reported Dealing With Deception*, WASH. INTERNET DAILY, July 5, 2007, *available at* 2007 WLNR 12991252 (reporting forty percent of eBay customers rate its customer service as poor); *see* Brian Dipert, *Cyber-Sleaze*, EDN COMMENT, Apr. 17, 2003, *available*

with better services—services a manufacturer would want the consumer to associate with its product.²⁰² Discounters free ride on retailers that provide services, which is a problem when considering whether retailers can continue to afford such services.²⁰³ Usually, small businesses are the retailers providing services, they are not providing the deep discounts that larger internet sellers are more equipped to provide.²⁰⁴

Proponents of the bill have also argued that allowing RPM agreements has already had a negative effect on prices.²⁰⁵ In particular, proponents cite the increased number of complaints alleging abuse as indicative that manufacturers are behaving badly.²⁰⁶ This negative price effect also does not necessarily prove that minimum RPM agreements are always or almost always anticompetitive.²⁰⁷ Because *Leegin* is new law, it is normal that the courts see an influx of new cases, as everyone is unsure of how rule of reason applies to such agreements.²⁰⁸ The number of cases will probably decrease as the circuits determine how to handle the new law.²⁰⁹

One must remember that when manufacturers set minimum resale prices it does not necessarily mean that manufacturers make

at 2003 WLNR 17091340 (attributing eBay's high earnings to its deficiencies in customer service and corporate responsibility).

202. See Brief of PING, Inc. as Amicus Curiae Supporting Petitioner at 9-15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), available at http://www.abanet.org/antitrust/at-conversation/pdf/Leegin_PING_Amicus.pdf (justifying golfing goods company PING's minimum RPM agreements by saying minimum prices allow PING to provide its customers with superior services and distinguish its brand in competitive market).

203. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1631c (3d ed., 2006) (discussing economic effects of free-riding).

204. See Fabricius, *supra* note 200, at 109 (distinguishing large discounters like Wal-Mart from more common smaller retailer that would benefit from minimum RPM agreement).

205. See May 19, 2009 Kohl Statement, *supra* note 181 (“We have already begun to see manufacturers set minimum retail prices resulting in higher prices for consumers.”). Senator Kohl also cited an eighteen to twenty-seven percent higher price margin in fair trade law states in 2007. See *to Restore Per Se Illegality Rule for Minimum RPM*, *supra* note 177 (discussing fair trade law states).

206. See Newsroom Senator Kohl, *supra* note 6 (claiming small and large retailers across the country have been suffering from manufacturers putting bans on discounting).

207. See Cole & McDonald, *supra* note 4, at 4 (detailing requirements for *per se* illegal standard in antitrust cases).

208. See Fancsali & Olszowka, *supra* note 187, at 1, 5 (“[M]any believe that there will be more litigation—not less—in the short term while courts sort out the contours of the rule-of-reason analysis.”).

209. See *id.* (examining whether manufacturers will start adopting minimum RPM agreements on large scale following *Leegin* and whether those agreements risk being abusive).

more direct profits.²¹⁰ Retailers get the increased revenue, not manufacturers.²¹¹ At least initially, manufacturers may not see an increase in revenue as the added margin for retailers is competed away in some form (i.e. advertising or point of sales services).²¹² Thus, unless there is some sort of retailer-manufacturer collusion to fix prices whereby a band of *retailers* force manufacturers to set a minimum price, manufacturer will be unlikely to act outside the consumer's interest.²¹³

PART V: THE MUSIC INDUSTRY

By overturning the Leegin decision the Discount Pricing Consumer Protection Act of 2009 could potentially harm consumers in the music industry.²¹⁴ Large record labels, retail chains and online digitized music vendors are the main controllers in the music industry.²¹⁵ Because of the nature of the business, these sellers try to create a product that targets the largest possible audience (pop music) and using the lowest cost possible, relying on the sheer mass of sales to turn a profit.²¹⁶ This model works for artists who create

210. See Julie M. Olszweski, Comment, *Overruling a Nearly Century-Old Precedent: Why Leegin Got it Right*, 94 IOWA L. R. 375, 400 (2008) (presenting idea that minimum restraints could encourage manufacturers to enter market by using extra price margin to persuade retailers to carry its products)

211. See *id.* (showing minimum pricing could also entice new retailers to invest in new market because of padded profits they can receive).

212. See *id.* (noting that increase in price does not lead to higher manufacturer profits per unit of product sold).

213. See Orbach, *supra* note 30, at 267-77 (presenting different theories on whether minimum RPM agreements have a negative effect on consumer welfare).

214. See Christman I, *supra* note 12 at 14 (arguing that setting minimum RPM could benefit small artists). See S. 148 § 3, 111th Cong. (2009) (proposing language be added to Sherman Act to overturn Supreme Court's decision in *Leegin*).

215. See *Dominating the Music Industry*, BBC WORLD SERVICE, http://www.bbc.co.uk/worldservice/specials/1042_globalmusic/page3.shtml (last visited Mar. 9, 2011) (noting ninety percent of global music market concentrated in five large labels). See Chris Foresman, *Music Industry Still Not Thrilled With iTunes Control*, ARS TECHNICA.COM (Feb. 2, 2009, 3:16PM) <http://arstechnica.com/apple/news/2009/02/music-industry-still-not-thrilled-with-itunes-control.ars> (discussing how apple has been gradually gaining control of music markets). See Tiago Moura, *Wal-Mart's CD Markdowns Worry Music Industry*, PASET MAGAZINE.COM, (Mar. 5, 2008, 10:55AM) (reporting on Wal-Mart's increase control of album prices).

216. See Diane Rapaport, *How Record Companies Make Money*, BMUSIC.COM.AU, <http://www.bmusic.com.au/links/industry/archives/ararchiv/recomp.html> (last visited Mar. 9, 2011) (explaining how record companies make profit on CDs). Because of the lower cost and lower transactions costs associate with digitized music options, record labels have had a hard time making the large profits they used to on CD sales. See *Album Sales Plunge*, *supra* note 19 (noting how digital sales are rapidly taking over CD sales); Peter Tschmuck, *The Recession in the Music Industry – A Cause Analysis*, MUSIC BUS. RESEARCH (Mar. 29, 2010) (looking at the historical progression of music industry and noting that record labels concentrate on con-

albums that prompt short-lived boom sales, but does not work well for more particularized music markets (i.e. classical or jazz music).²¹⁷

By setting a minimum price for particularized artists' music, record labels could help fund those artists.²¹⁸ Labels have difficulty sponsoring new musicians specializing in these genres because they must suppress their prices to compete with the pop album prices set by large retailers and low-cost download sellers.²¹⁹ While normally competing sellers outside the market is good for the consumer, creating lower prices or superior services, here there is a negative effect, restricting variety within the market.²²⁰

In the case of jazz and classical music, the particular interpretation of a piece of music or the recording quality can make all the difference.²²¹ Classical music, which often requires a large number of musicians for any given piece, the fixed production costs greatly exceed that of any garage musician or even any pop singer.²²² These fixed costs automatically limit the number of albums on the market, which is not necessarily a negative.²²³ The problem arises

centrated big hits markets rather than vast array of smaller specialized music markets).

217. See Leon Botstein, *The Unsung Success of Live Classical Music*, WALL ST. J., Oct. 3, 2008, at W1, available at http://online.wsj.com/article/SB122299103207600279.html?mod=special_page_campaign2008_mostpop (discussing particular nature of classical music and need for different approach to its propagation than that employed by mainstream musicians).

218. See Christman I, *supra* note 12, at 14 (discussing possible positive effects of music industry setting minimum RMPs).

219. See Botstein, *supra* note 217, at W1 (noting now-broad availability of low cost classical music albums because of comparably low music prices but also remarking that market attracts different type of audience than that of mainstream pop).

220. See Kostas Axaroglou, *New Products Market Competition*, 10 INT'L ADVANCES IN ECON. RESEARCH 226 (2004) (finding increased variety in product markets increases competition and decreases overall prices).

221. See Botstein, *supra* note 217, at W1 (exploring different means of enjoying classical music).

222. See Kyle Macmillan, *Hanging by a String: Classical Music Hits Hard Times*, DENVER POST (Dec. 19, 2010) (explaining high fixed costs inherent in classical music industry). Aside from the increased cost of paying multiple musicians (which may or may not have an impact on the fixed costs when one takes the large salary of pop musicians into account), classical music also requires specialized recording equipment and much larger recording venues, which contribute to both the increased actual and transaction costs of producing such music. See Bruce Bartlett, *Stereo Recording Procedures*, DELTAMEDIA.COM, http://www.deltamedia.com/resource/stereo_recording_procedures.html, (last visited Mar. 8, 2011) (detailing procedure for classical music recording).

223. See *Does Classical Music Have a Place in the Rapidly Evolving Digital Recorded Music Sales Sector?*, MUSIC & COPYRIGHT'S BLOG (Jan. 4, 2010, 11:26AM), <http://musicandcopyright.wordpress.com/2010/01/04/does-classical-music-have-a-place->

when classical music albums must compete with the lower fixed costs and volatile sales of pop albums.²²⁴ Because retailers price normally non-competing genres of music against each other, they exclude some artist from the market by incorrectly calculating price ratios.²²⁵

A solution to this problem could be for labels to create minimum resale prices within particularized music markets.²²⁶ This would allow those markets with high demand but lower than appropriate selection to expand, creating a broader array of choices for the consumer within a particular music genre.²²⁷ Labels would be able not only to better support these particularized markets as they stand, but would also be able to subsidize new artists and projects within those markets.²²⁸ In the CD retail market, this would mean better support for small, specialized music dealers who could then promote particular artists; in the digital market, RPM would subsidize the benefits that the consumer would get from a broader digitized market (increasingly broad digital library, online album promotion, vendor recommendations etc.).²²⁹ Further, consumers and retailers would both get the benefit of capturing a “long-tail” market with these particularized musical areas.²³⁰

in-the-rapidly-evolving-digital-recorded-music-sales-sector/ (mentioning high fixed costs of classical music production that bar many smaller labels from taking on classical music projects).

224. *See id.* (commenting on higher production costs of classical music recordings). *See* Diane Rapaport, *How Record Companies Make Money*, BMUSIC.COM.AU, <http://www.bmusic.com.au/links/industry/archives/ararchiv/recomp.html> (last visited Mar. 9, 2011) (noting baseline average production costs for single recording artist and noting significantly lowered costs for garage band artists).

225. *See* Tschmuck, *supra* note 216 (noting record companies try to restrict selection so as to create larger grossing individual artists rather than array of small, individualized markets).

226. *See* Christman I, *supra* note 12, at 14 (presenting possible positive effects of particularized music markets setting minimum RPMs).

227. *See* *Does Classical Music Have a Place in the Rapidly Evolving Digital Recorded Music Sales Sector?*, MUSIC & COPYRIGHT'S BLOG (Jan. 4, 2010, 11:26AM), <http://musicandcopyright.wordpress.com/2010/01/04/does-classical-music-have-a-place-in-the-rapidly-evolving-digital-recorded-music-sales-sector/> (noting only “low-margin, core classical music” is widely available in market despite existence of classical music market). *See* Botstein, *supra* note 217, at W1 (illustrating vibrancy and interest of classical music market despite claims of reduced interest in genre).

228. *See* Christman I, *supra* note 12, at 14 (outlining how particularized music market sellers could apply the funds they would receive from instituting minimum RPMs to improving market selection).

229. *See id.* (noting possible distribution options and effects on consumer services in particularized music markets).

230. *See* Chris Anderson, *The Long Tail*, WIRED (Oct. 2004) <http://www.wired.com/wired/archive/12.10/tail.html> (explaining the “long-tail” market theory). Long-tail is a statistical theory that posits that a larger share of the population lies in the tail of a probability distribution than observed under a normal population

PART VI: CONCLUSION

The Discount Pricing Consumer Protection Act was on the Senate Legislative Calendar and was reported by committee in the House and awaited Congressional decision at the end of 2010.²³¹ Although the bill has appeared to be yet another bill set to pass with little attention from the press or the public, the recent change in Congressional representation seems to have put the legislation on hold.²³²

Dr. Miles was the norm for many years, but that does not make the holding good precedent nor any less disappointing that Congress is proposing a bill so clearly adverse to the common consumer's interests.²³³ The US legal system has already been systematically restricting big business, pushing possible economic growth out of the United States.²³⁴ *Leegin* has been a breath of fresh air for some businesses—another element that made doing business in the United States more attractive.²³⁵ Luckily, at least for now, the *Leegin* decision is set to remain intact and we can finally see how these new economic options for businesses will play out.²³⁶

distribution. *See id.* (describing long-tail theory). The implication is that while there may be one larger market where a pool of people participate, the aggregate of smaller markets actually amounts to more than the total big market. *See id.* (looking at specific small markets and how they can be swept up). By appealing to the small markets and using modern technology (i.e. amazon or itunes suggestion tools), the larger pool of diversified consumers benefits. *See id.* (giving example of book that gained mass popularity years after its publication because of using smaller market channels).

231. *See* S. 148, 111th Cong. (2009) (awaiting vote by entire senate); H.R. 3190, 111th Cong. (2009) (acting as parallel legislation to house bill, ordered to be reported by voice vote). More information on the bill is available at <http://thomas.loc.gov>.

232. *See* Richard Simon, *Hundreds of Bills on the Back Burner 'Scramble' to Finish Lowering Volume on TV Ads a Front-Runner*, SEATTLE TIMES, Oct. 19, 2010, at A4 (painting picture of all bills presented to Congress each year, and practice of omnibus bundling representatives enage in to pass legislation).

233. *See* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899-901 (2007) (asserting long-standing precedent does not necessarily mean good or correct precedent).

234. *See* Howard H. Chang & David S. Evans, *Has the Pendulum Swung Too Far?*, REG. 48, 49 (2008), available at www.cato.org/pubs/regulation/regv30n4/v30n4-5.pdf (stating increasing restrictions on business through judicial and prosecutorial systems is reducing valuable risk-taking behavior in business and pushing entrepreneurs into foreign markets).

235. *See* Cole & McDonald, *supra* note 4, at 5 (stating net result of Supreme Court cases over last decade shows strong favoritism toward business).

236. *See* S. 148: *Discount Pricing Consumer Protection Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-148> (last visited Mar. 9, 2011) (following progression of Discount Pricing Consumer Protection Act of 2009 and stating that bill was never enacted into law and that bills on books over two years are removed from books).

Since Senator Kohl is ever dedicated to overturning *Leegin* this may not be the last we see of this issue.²³⁷

Ariana E. Gillies*

237. One of Senator Kohl's bylines for the bill is that "in these economic times" consumers cannot be deprived of discount shopping. See May 19, 2009 Kohl Statement, *supra* note 181 (explaining Discount Pricing Consumer Protection Act "comes just at the wrong time"). The question is: does that mean Congress would remove the provision in an economic upturn? It is unlikely given the sell points to the public on the bill. The political repercussions for a representative to propose removing a provision that supposedly protects every man's right to a cheaper digital camera would certainly be less than favorable. See James Madison, Federalist No. 10, available at <http://www.constitution.org/fed/federal10.htm> (last visited Feb. 9, 2011) (discussing dangers of faction and how Constitution aims to create federal government that can prevent any one passion from overpowering legislature). Our bicameral system is meant to prevent the legislature from making sudden, rash decisions thus not only making it difficult to pass laws, but also difficult to repeal. See *id.*

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community.

Id.

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