

**GUIDING THE LOWER COURTS IN THE AFTERMATH OF
LEEGIN CREATIVE LEATHER PRODUCTS, INC.
V. PSKS, INC.
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I. INTRODUCTION

In the summer of 2007, the Supreme Court overruled a ninety-six year old precedent when it overruled the historical decision of *Dr. Miles*¹ in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*² Relying on economists' views, the majority took a drastic measure and held that the per se illegality standard should no longer be implemented with respect to minimum resale price maintenance, but that the rule of reason should be used.³

Part II examines the cases and legislation that have formed the jurisprudence of antitrust law. Beginning in 1911, *Dr. Miles* established the per se illegality standard⁴ and *Standard Oil Co.* established the rule of reason.⁵ These rules have been the basis of antitrust law and Part II analyzes how these rules have progressed throughout time.

Part III examines *Leegin* itself and analyzes the majority and dissenting opinion. It examines the facts of the case and the case's progression throughout the trial and appellate stages. In Part IV both the majority and the dissenting opinions are analyzed. The majority's opinion consists of three arguments. First, it critiques *Dr. Miles* and explains why

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¹ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

² 127 S. Ct. 2705 (2007).

³ *Id.*; see also BLACK'S LAW DICTIONARY 1332 (8th ed. 2004) (Resale price maintenance is defined as a "form of price-fixing in which a manufacturer forces or persuades several different retailers to sell the manufacturer's product at the same price, thus preventing competition. Resale price maintenance [was] per se illegal under antitrust law. But a manufacturer [was] permitted to suggest a retail price as long as it [did] not compel retailers at that price.").

⁴ *Dr. Miles*, 220 U.S. at 408.

⁵ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 61-62 (1911).

it is no longer practical to follow.⁶ Second, the majority's opinion consists of an economic analysis of resale price maintenance and discusses the pro-competitive and anti-competitive arguments for the use of them.⁷ Third, the majority discusses why *stare decisis* is not a valid argument for adhering to *Dr. Miles*.⁸ The dissenting opinion led by Justice Breyer argues in support of the *per se* rule and explains why the principle of *stare decisis* should be adhered to in this case.⁹ Part IV also consists of an analysis of the strengths and weaknesses of both the majority and dissenting opinions.

In Part V, the significance of the case is analyzed. Because the majority did not set forth a guide for the lower courts to follow, this will adversely affect the court system because inconsistent decisions are likely to result. Thus, workable principles must be introduced to help guide these lower courts. Professors Areeda and Hovenkamp have recommended a structured rule of reason approach for resale price maintenance.¹⁰ When the approach is applied to the facts of *Leegin*, the analysis demonstrates that the approach creates more certainty and is better than the bright-line *per se* illegality rule.¹¹

Part V also examines the impact on public policy issues, such as how the average consumer will suffer in the short-term. This is because large low-price retailers will most likely have to raise prices because whole sectors of the economy (such as large low-price retailers) have come to rely on the *per se* rule.¹²

Although there are many reasons not to allow resale price maintenance agreements, there are many pro-competitive benefits that result from them as well.¹³ When it overruled *Dr. Miles*, the Supreme Court took an innovative approach to help further our economy. The majority was

⁶ *Leegin*, 127 S. Ct. at 2713–14.

⁷ *Id.* at 2714–20.

⁸ *Id.* at 2720–25.

⁹ *Id.* at 2725–37.

¹⁰ 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1633, at 328–29 (2d ed. 2004).

¹¹ *Id.* ¶ 1633e, at 337–39.

¹² *See Leegin*, 127 S. Ct. at 2735.

¹³ *Id.* at 2715–16.

correct in ruling that the *Dr. Miles* rule is inconsistent with a principled framework.

II. BACKGROUND

Antitrust law developed from a series of cases which began as early in 1911 when *Dr. Miles* was decided.¹⁴ These cases established the two dominant rules of law for antitrust violations: per se illegality and the rule of reason approach. Practices are per se illegal when they are “so plainly anticompetitive and so often lack . . . any redeeming virtue that they are conclusively presumed illegal without further examination.”¹⁵ “The . . . rule of reason requires an antitrust plaintiff to show that the challenged conduct has the effect, or at least the potential, of ‘unreasonably’ restricting competition, that is, of being net anticompetitive after all possible pro-competitive effects are taken into account.”¹⁶ These series of cases have shaped the jurisprudence of antitrust law.

A. *Per Se Jurisprudence*

I. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.* the Court established the rule that it is per se illegal under section 1 of the Sherman Act¹⁷ for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer’s goods.¹⁸ In *Dr. Miles*, a manufacturer of proprietary medicines sought to enforce an agreement which set forth minimum prices for all of the sales of its products, both at wholesale and retail.¹⁹ The Court relied on the common-law rule that a “general restraint upon alienation is ordinarily invalid.”²⁰ The Court concluded that price fixing agreements are injurious to the

¹⁴ *Id.*

¹⁵ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7–8 (1979) (internal quotations omitted).

¹⁶ Lino A. Graglia, *Leegin Creative Leather Products, Inc. v. PSKS Inc.: The Strange Career of the Law of Resale Price Maintenance* 1, 23 (Nov. 2007) (unpublished Law and Econ. Research Paper No. 115) (available at <http://ssrn.com/abstract=1028562>).

¹⁷ *Monopolies and Combinations in Restraint of Trade*, 15 U.S.C. §§ 1–38 (2006).

¹⁸ 220 U.S. 373, 408 (1911).

¹⁹ *Id.* at 394.

²⁰ *Id.* at 404.

public because they advantage the distributors, not the manufacturer and are analogous to a combination among competing distributors, which the law has treated as void under 15 U.S.C. § 1.²¹

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”²² Although section 1 could be interpreted to make all contracts illegal, the United States Supreme Court has “not taken a literal approach to this language.”²³ If the language were taken literally, “the entire body of private contract law” would be outlawed.²⁴ Instead, the Supreme Court has repeatedly held that section 1 outlaws only unreasonable restraints.²⁵

2. *White Motor Co. v. United States*

In *White Motor Co. v. United States*,²⁶ the Court specified that the per se rule set forth in *Dr. Miles* should not be applied to vertical non-price restraints.²⁷ The Court refused to adopt a per se rule for a vertical non-price restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a per se rule.²⁸ The Court concluded that they “d[id] not know enough of the economic and business stuff out of which these arrangements emerge to be certain.”²⁹ The Court noted that vertical territorial limitations may be too

²¹ *Id.* at 407–08.

²² 15 U.S.C. § 1.

²³ *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

²⁴ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

²⁵ *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

²⁶ 372 U.S. 253 (1963).

²⁷ *Id.* at 263; see also 58 C.J.S. *Monopolies: Vertical Restraints in General* § 80 (2007) (“A vertical restraint is not illegal per se unless it includes some agreement on price or price levels.”). Vertical restraints are those imposed by persons or firms that are above the restrained person or firm in the chain of distribution (such as manufacturers and retailers attempting to control an item’s resale price). Thus, a vertical non-price restraint does not include an agreement on price or price levels. The distinction between a vertical non-price restraint and a vertical price restriction is an important one. The Supreme Court has made it clear that price restrictions are *per se illegal* while non-price restraints are evaluated under the rule of reason.

²⁸ *White Motor Co.*, 372 U.S. at 263.

²⁹ *Id.*

dangerous to sanction, as they may be the only practicable means a small company has for staying in business and they may be allowable protections against aggressive competitors.³⁰

3. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.

The Supreme Court has specifically identified certain practices that are illegal per se and that can be condemned without “elaborate analysis.”³¹ These certain practices are so “plainly anticompetitive and so often ‘lack . . . any redeeming virtue’ that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.”³² In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Supreme Court noted the decision to apply the per se rule turns on “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”³³

The Court held that the per se rule was not applicable to a blanket license agreement among copyright holders, even though the license fixed the prices to be charged by the horizontal competitors.³⁴ The Court concluded the blanket license was not a naked restraint of trade because its sole purpose was not to stifle competition.³⁵ The Court emphasized that the blanket license was essential to the licensing and policing of the copyrights at issue; was essentially a new product; and was not the exclusive means for licensing copyrights for individual works.³⁶

³⁰ *Id.*

³¹ Tony G. Powers & Kimberly L. Myers, *Relationships Among Competitors*, 1116 PLI/CORP. 149, 156 (1999).

³² *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

³³ *Id.* at 19–20 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

³⁴ *Id.* at 20–24; *see also* *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (stating that an agreement between horizontal competitors to fix the price is a “classic example” of a per se violation of section 1).

³⁵ *See Broad. Music, Inc.*, 441 U.S. at 20 (quoting *White Motor Co.*, 372 U.S. at 263).

³⁶ *See id.* at 24.

The Court held that the per se rule is a “valid and useful tool for antitrust policy and enforcement.”³⁷ Competitor agreements to fix the prices on goods or services are the types of practices that are within the per se category.³⁸ However, the Court emphasized “easy labels do not always supply ready answers.”³⁹ Therefore, the complexities that result from a per se application and the Supreme Court’s “desire to protect practices that create economic efficiency” have caused many courts to “retreat . . . from the strict application of the per se rule.”⁴⁰

4. *Copperweld Corp. v. Independence Tube Corp.*

In *Copperweld Corp. v. Independence Tube Corp.*,⁴¹ the Supreme Court affirmed *Broadcast Music, Inc.* and held that certain agreements, such as horizontal price fixing⁴² and market allocation, are illegal per se because they are thought to be inherently anticompetitive.⁴³ However, the Court also held that “[o]ther combinations, such as mergers, joint ventures, and various vertical agreements, [which] hold the promise of increasing a firm’s efficiency and enable[e] it to compete more effectively” are judged under a rule of reason.⁴⁴ The rule of reason is “an inquiry into market power and market structure [that is] designed to assess the combination’s actual effect. Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.”⁴⁵

5. *Atlantic Richfield Co. v. USA Petroleum Co.*

In *Atlantic Richfield Co. v. USA Petroleum Co.*,⁴⁶ the Court held the purpose of per se analysis is to determine whether a particular restraint is

³⁷ *Id.* at 8.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Powers & Myers, *supra* note 31, at 158.

⁴¹ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

⁴² BLACK’S LAW DICTIONARY 1228 (8th ed. 2004) (Horizontal price fixing is defined as “[p]rice fixing among competitors on the same level, such as retailers throughout an industry.”).

⁴³ *See Copperweld*, 467 U.S. at 768.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 495 U.S. 328 (1990).

unreasonable.⁴⁷ Actions per se unlawful “may nonetheless have *some* pro-competitive effects and private parties may suffer losses [from them].”⁴⁸ However, “[t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant’s behavior.”⁴⁹ The Court concluded that a loss flowing from a per se violation of section 1 does not automatically satisfy the antitrust injury requirement, and that the injury requirement is a separate and distinct matter which must be shown independently.⁵⁰

6. *Texaco Inc. v. Dagher*

In 2006 in *Texaco Inc. v. Dagher*,⁵¹ the Supreme Court held that it is not per se illegal under section 1 of the Sherman Act for certain joint ventures to set the prices at which it offers its products for sale.⁵² In *Texaco Inc.*, petitioners (Texaco Inc. and Shell Oil Co.) collaborated in a joint venture to refine and sell gasoline.⁵³ Respondents, a class of petitioner’s oil service station owners, alleged that petitioners engaged in price fixing when the joint venture set a single price for both Texaco and Shell Oil brand gasoline.⁵⁴

The Court held that the petitioners did not have a horizontal price fixing agreement (which is illegal per se) “because Texaco and Shell Oil did not compete with one another in the relevant market” (sale of gasoline to service stations) but instead participated in that market together through their investments in the joint enterprise.⁵⁵ Thus, because the pricing decisions of a “legitimate joint venture do not fall into the narrow category of activity that is per se unlawful under section 1 of the Sherman Act” their pricing decision is legal.⁵⁶

⁴⁷ *Id.* at 342.

⁴⁸ *Id.* at 342–43.

⁴⁹ *Id.* at 344.

⁵⁰ *Id.* at 342.

⁵¹ 547 U.S. 1 (2006).

⁵² *Id.* at 5–8.

⁵³ *Id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.* at 5–6.

⁵⁶ *Id.* at 8.

B. Rule of Reason Jurisprudence

1. Standard Oil Co. of New Jersey v. United States

The rule of reason was adopted from the common law and prohibits those restraints of trade “deemed undue under the common law in existence at the time of the enactment of the Sherman Act.”⁵⁷ Specifically, “those acts, contracts, agreements, or combinations which prejudice public interest by unduly restricting competition or unduly obstructing the due course of trade, or which injuriously restrain trade, either because of their inherent nature or effect, or because of their evident purpose.”⁵⁸

The rule of reason was first established in *Standard Oil Co. of New Jersey v. United States* when the Supreme Court held that only combinations and contracts *unreasonably* restraining trade are subject to actions under the anti-trust laws and that size and possession of monopoly power were not illegal.⁵⁹ The Court noted that the rule of reason originated:

as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.⁶⁰

⁵⁷ 54 AM. JUR. 2d *Monopolies and Restraints of Trade* § 48 (1996).

⁵⁸ *Id.*

⁵⁹ *Id.* at 58–69.

⁶⁰ *Id.* at 58.

2. Board of Trade v. United States

“In its classic formulation, the rule of reason has had a very broad scope.”⁶¹ In *Board of Trade v. United States*⁶² the court expanded the notion of per se illegality and held that 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.”⁶³

In *Board of Trade*, the United States filed suit against the Board of Trade to enjoin the enforcement of the call rule (which ensured that bids were fixed at the day’s closing bid until the opening of the next session).⁶⁴ The Court concluded the legality of an agreement or regulation cannot be determined by a simple test as whether it restrains competition.⁶⁵ Many other factors are considered.⁶⁶

To determine whether the restraint promotes or suppresses competition, 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. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁶⁷

The Court concluded the restraint imposed by the Board of Trade was valid because every board of trade and organization must impose some restraint on the conduct of its business and the restraints imposed by the

⁶¹ Powers & Myers, *supra* note 31, at 153.

⁶² 246 U.S. 231 (1918).

⁶³ *Id.* at 238.

⁶⁴ *Id.* at 237.

⁶⁵ *Id.* at 238.

⁶⁶ *Id.*

⁶⁷ *Id.*

Board of Trade were not to prohibit competition, but to help the organization conduct its business.⁶⁸

3. United States. v. Colgate & Co.

Just eight years after *Dr. Miles* was decided, the Court in *United States v. Colgate & Co.*⁶⁹ effectively created an exception to the per se doctrine in *Dr. Miles* when it held that a manufacturer can suggest resale prices and refuse to deal with distributors who do not follow them.⁷⁰ In *Colgate & Co.* the defendant, a corporation engaged in manufacturing soap and toilet articles and selling them throughout the United States, refused to allow dealers to resell such products at lower prices.⁷¹

The Court concluded:

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. “The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.”⁷²

Not long after *Colgate*, commentators opined that the scope of the doctrine set forth in *Colgate* was too narrow to be practically useful as

⁶⁸ *Id.* at 241.

⁶⁹ 250 U.S. 300 (1919).

⁷⁰ *Id.* at 307.

⁷¹ *Id.* at 302–03.

⁷² *Id.* at 307.

many of the communications that take place between manufacturer and retailer make application of the doctrine difficult at best.⁷³

4. *Monsanto Co. v. Spray-Rite Service Corp.*

In *Monsanto Co. v. Spray-Rite Service Corp.*,⁷⁴ the Supreme Court expanded the *Colgate* exception when it held that a manufacturer “has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.”⁷⁵ The Court emphasized the distinction between concerted and independent action and noted that the distinction is not always clearly drawn by parties and courts.⁷⁶

The Court concluded that a second important distinction exists between “concerted action to set prices and concerted action on non-price restrictions.”⁷⁷ The former is per se illegal while the latter is judged under the rule of reason, which requires “a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.”⁷⁸

In *Monsanto*, the Court required that antitrust plaintiffs alleging a section 1 price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner.⁷⁹ The Court concluded “that complaints from dealers are part of [a] natural flow of information within a distribution system, and that interference with this flow would create an inefficiency in the market.”⁸⁰

5. *Business Electronics Corp. v. Sharp Electronics Corp.*

In an effort towards rejecting the per se rule, the Court in *Business Electronics Corp. v. Sharp Electronics Corp.*⁸¹ held that a vertical restraint of trade is not per se illegal under section 1 of the Sherman Act unless it

⁷³ Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. INDUS. ORG. 57, 62 (1998).

⁷⁴ 465 U.S. 752 (1984).

⁷⁵ *Id.* at 761.

⁷⁶ *Id.* at 761–62.

⁷⁷ *Id.* at 761.

⁷⁸ *Id.*

⁷⁹ *Id.* at 764.

⁸⁰ Mathewson & Winter, *supra* note 73, at 62.

⁸¹ 485 U.S. 717 (1988).

includes some agreement on price or price levels.⁸² The Court emphasized that economic analysis supports this view and no precedent opposes it.⁸³ The Court concluded that per se rules are only appropriate for conduct that is anticompetitive, which is conduct that “would always or almost always tend to restrict competition and decrease output.”⁸⁴

The Court held that the per se rule treats categories of restraints as necessarily illegal and eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.⁸⁵ The Court noted that although vertical agreements on resale prices have been illegal per se since *Dr. Miles*, the scope of per se illegality should be narrow in the context of vertical restraints.⁸⁶

Business Electronics Corp. “[f]urther weakened the conditions for finding a combination in restraint of trade necessary for a violation of the *Sherman Act* in the context of resale price maintenance.”⁸⁷ The decision in *Business Electronics Corp.*, by narrowing the class of restraints covered by *Dr. Miles*, expanded the class of non-price restraints covered by *Continental T. V., Inc. v. GTE Sylvania Inc.*⁸⁸

6. *Continental T. V., Inc. v. GTE Sylvania Inc.*

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court held the rule of reason is the prevailing standard of analysis for vertical restraints.⁸⁹ Under this rule, in deciding whether a restrictive practice should be prohibited, the factfinder is charged with examining the totality of the interactions between the relevant players.⁹⁰ The Court refused to extend per se illegality to vertical non-price restraints, specifically to a manufacturer’s termination of one dealer pursuant to an exclusive territory

⁸² *Id.* at 735–36; see also Graglia, *supra* note 16, at 28.

⁸³ *Bus. Elecs.*, 485 U.S. at 735.

⁸⁴ *Id.* at 723 (quoting *Nw. Wholesale Stationers v. Pac. Stationery & Printing*, 472 U.S. 284, 289–90 (1985)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 724.

⁸⁷ Mathewson & Winter, *supra* note 73, at 62.

⁸⁸ *Id.* at 63. The full cite for *GTE Sylvania* is *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

⁸⁹ *GTE Sylvania*, 433 U.S. at 59.

⁹⁰ *Id.* at 49.

agreement with another.⁹¹ The Court concluded in the vertical restraint context that there is very little evidence supporting the idea that vertical restrictions have or are likely to have a harmful effect on competition or that they “lack . . . any redeeming virtue.”⁹² The Court also noted that the “[d]eparture from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing.”⁹³

7. *State Oil Co. v. Khan*

In 1997, the Supreme Court continued to move away from a per se rule for vertical restraints in *State Oil Co. v. Khan*.⁹⁴ This decision overruled *Albrecht v. Herald Co.*,⁹⁵ which had extended the per se rule set forth in *Dr. Miles* to vertical maximum price fixing.⁹⁶ The Court found it difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their per se invalidation.⁹⁷ The Court noted that *Albrecht*'s theoretical justifications for its per se rule that vertical maximum price fixing could interfere with channel distribution through large or specially advantaged dealers, dealer freedom, or disguise minimum price fixing schemes have been abundantly criticized and can be “appropriately recognized and punished under the rule of reason.”⁹⁸

The Court emphasized that other courts and antitrust scholars have noted that the per se rule could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers.⁹⁹ For these reasons, and because *Albrecht* is irrelevant to ongoing Sherman Act enforcement, and there are apparently no cases in which enforcement efforts have been directed solely against the conduct condemned in *Albrecht*, there is “insufficient economic justification” for the per se rule.¹⁰⁰

⁹¹ *Id.* at 40, 57.

⁹² *Id.* at 58.

⁹³ *Id.* at 58–59.

⁹⁴ 522 U.S. 3, 15 (1997).

⁹⁵ 390 U.S. 145 (1968), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

⁹⁶ *Id.* at 152–53; *see also* Graglia, *supra* note 16, at 29.

⁹⁷ *Kahn*, 522 U.S. at 14–15.

⁹⁸ *Id.* at 17.

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.* at 18–19.

“Although the Sherman Act, by its terms, prohibits every agreement ‘in restraint of trade,’ this Court has long recognized that Congress intended to outlaw only unreasonable restraints.”¹⁰¹

8. National Society of Professional Engineers v. United States

The Court expanded the definition of the rule of reason when it held in *National Society of Professional Engineers v. United States*¹⁰² that the rule of reason does not simply permit “any argument in favor of a challenged restraint that may fall within the realm of reason. . . . [i]nstead it focuses directly on the challenged restraint’s impact on competitive conditions.”¹⁰³ The rule of reason rejects defenses “based on the assumption that competition itself is unreasonable.”¹⁰⁴

In *National Society of Professional Engineers*, the United States brought a civil antitrust suit against the petitioner alleging that the petitioner’s canon of ethics that prohibited its members from submitting competitive bids for engineering services suppressed competition and thus violated section 1 of the Sherman Act.¹⁰⁵ The Court held that “[t]he Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition.”¹⁰⁶ Unreasonableness is determined by “analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”¹⁰⁷

9. Illinois Tool Works Inc. v. Independent Ink, Inc.

In rejecting the application of a per se rule that all tying arrangements constitute antitrust violations, the United States Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*,¹⁰⁸ held that, “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”¹⁰⁹ The Court equated the rule of

¹⁰¹ *Id.* at 10 (citing *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 342–43 (1982)).

¹⁰² 435 U.S. 679 (1978).

¹⁰³ *Id.* at 688.

¹⁰⁴ *Id.* at 696.

¹⁰⁵ *Id.* at 681.

¹⁰⁶ *Id.* at 694–95.

¹⁰⁷ *Id.* at 692.

¹⁰⁸ 547 U.S. 28 (2006).

¹⁰⁹ *Id.* at 46.

reason with “an inquiry into market power and market structure designed to assess [a restraint’s] actual effect.”¹¹⁰ The Court explained that it has condemned tying arrangements when the seller has some special ability (usually called “market power”) to force a purchaser to do something that he would not do in a competitive market.¹¹¹ Per se condemnation (condemnation without inquiry into actual market conditions) focuses on the probability of anticompetitive consequences and is only appropriate if the existence of forcing is probable.¹¹²

III. DISCUSSION

A. *Facts of Leegin*

As a result of its policy of refusing to sell to retailers that discount its goods below suggested prices, petitioner (Leegin) stopped selling to respondent’s (PSKS) store.¹¹³ PSKS filed suit, alleging that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices.¹¹⁴

The District Court excluded expert testimony about Leegin’s pricing policy’s procompetitive effects on the ground that *Dr. Miles* makes it per se illegal under section 1 of the Sherman Act for a manufacturer and its distributor to agree on the minimum price the distributor can charge for the manufacturer’s goods.¹¹⁵ At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under section 1.¹¹⁶ The jury found for PSKS.¹¹⁷

B. *Fifth Circuit Appeal*

On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin’s vertical price-fixing agreements and affirmed, finding that *Dr.*

¹¹⁰ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

¹¹¹ *Ill. Tool Works*, 547 U.S. at 42–43.

¹¹² *Id.*

¹¹³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2711 (2007).

¹¹⁴ *Id.* at 2712.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Miles' per se rule rendered irrelevant any procompetitive justifications for Leegin's policy.¹¹⁸

C. *Majority Opinion of the Supreme Court*

The opinion of the Supreme Court was split into a majority and dissenting position.¹¹⁹ The Court overruled the ninety-six year old decision of *Dr. Miles* and abandoned the rule of per se illegality for other vertical restraints a manufacturer imposes on its distributors.¹²⁰ The majority concluded that vertical price restraints can have procompetitive effects.¹²¹ Thus, the Court held that vertical price restraints are to be judged by the rule of reason.¹²²

D. *The Dissent*

Justice Breyer joined by Justice Stevens, Souter and Ginsburg would have upheld the per se standard set forth by *Dr. Miles*.¹²³ Although the dissent did recognize procompetitive effects that can arise from agreements setting forth minimum resale prices (resale price maintenance agreements), the dissent nevertheless felt that *Dr. Miles* should not be overruled because the majority had not met the heavy burden of proof needed to overturn a well-established legal precedent.¹²⁴

IV. ANALYSIS

A. *Arguments of the Majority*

1. *Critique of Dr. Miles*

The Court held that *Dr. Miles* should not be followed because “[t]he reasoning of the Court’s more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based.”¹²⁵ The majority noted that the Court in *Dr. Miles* relied on “the common-law against restraints on alienation and . . . justified its decision based on ‘formalistic’ legal doctrine

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2710.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2726 (Breyer, J., dissenting).

¹²⁴ *Id.* at 2731.

¹²⁵ *Id.* at 2714.

rather than ‘demonstrable economic effect.’”¹²⁶ At the time *Dr. Miles* was decided “[t]he general restraint on alienation . . . tended to evoke policy concerns extraneous to the question that controls [the case in *Leegin*].”¹²⁷ Thus, the majority noted “[t]he Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance.”¹²⁸ The Court reaffirmed that “the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.”¹²⁹

Furthermore, the majority noted that *Dr. Miles* “treated vertical agreements [that] a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors.”¹³⁰ However, in later cases, the Court rejected the approach of reliance on rules that made horizontal restraints analogous to vertical ones.¹³¹ The recent cases also “formulate antitrust principles in accordance with the differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* court failed to consider.”¹³² Thus, the majority determined that the foundations of the policy set forth in *Dr. Miles* could no longer support a per se rule.¹³³

2. Economic Analysis of Vertical Agreements to Set Prices

While seeking to shed light on future scenarios where a per se rule might be appropriate, the majority analyzed the justifications for the use of resale price maintenance agreements and the arguments against the use of them.¹³⁴

¹²⁶ *Id.* (citations omitted).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977)).

¹³⁰ *Id.*; see also *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407–08 (1911).

¹³¹ See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (notion of equivalence between the scope of horizontal *per se illegality* and that of vertical per se illegality is explicitly rejected).

¹³² *Leegin*, 127 S. Ct. at 2714.

¹³³ *Id.*

¹³⁴ *Id.*

a. Procompetitive Arguments for the use of Resale Price Maintenance Agreements

In economics literature there is a widespread consensus that there are procompetitive justifications for a manufacturer's use of resale price maintenance.¹³⁵

The majority observed that minimum resale price maintenance can stimulate interbrand competition even absent free riding by facilitating market entry for new manufacturers and brands.¹³⁶ "The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'"¹³⁷ Minimum price maintenance, "[b]y assuring retailers that later intrabrand price competition will not occur, . . . might prompt manufacturers and retailers to make investments in new products or services that might otherwise not be made . . ."¹³⁸ It might also "allow a manufacturer to increase its market share by inducing retailers to perform based upon a guaranteed margin."¹³⁹

¹³⁵ *Id.* at 2714–15 (citing ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance economic efficiency than for anticompetitive purposes."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 184–91 (2005)).

¹³⁶ *Id.* at 2715 ("Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand.").

¹³⁷ *Id.* (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 15 (1997)).

¹³⁸ Willkie Farr & Gallagher LLP, *Supreme Court Overturns Longstanding Precedent and Rules that Minimum Resale Price Restraints are Subject to the Rule of Reason 2*, July 16, 2007, http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C2464%5CSupreme_Court_Overturns_Longstanding_Precedent.pdf; see also *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 55 ("[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."); Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 349 (noting that reliance on a retailers' reputation "will decline as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device or new entrants").

¹³⁹ Willkie Farr & Gallagher LLP, *supra* note 138, at 2.

The Court held that “[o]ffering the retailer a guaranteed margin . . . may be the most efficient way to expand the manufacturer’s market share by inducing the retailer’s performance and allowing the retailer to use its own initiative and experience in providing valuable services.”¹⁴⁰ The majority emphasized that “[n]ew products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.”¹⁴¹

The majority also concluded that “[r]esale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.”¹⁴²

If vertical price restraints were not present, the majority noted that “the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate.”¹⁴³

However, if resale price maintenance agreements were present, it “could enhance economic efficiency . . . [by] creat[ing] the incentive for [retailers] to compete by providing services and [to] maintain quality, eliminating free-riding by discounters.”¹⁴⁴ This might actually benefit customers because the retailers would now provide services that they

¹⁴⁰ *Leegin*, 127 S. Ct. at 2716; see also Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q.J. ECON., 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer’s goods in the face of uncertain consumer demand); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. L. & ECON. 265, 295 (1988) (noting that vertical restraints often adopted voluntarily by parties because it increases efficiency); Mathewson & Winter, *supra* note 73, at 74 (1998) (“One means of achieving the optimal level of retailer servicing is through direct contractual specification of the servicing together with periodic monitoring of the service levels and termination of those dealers who are found to be violating the contract by providing inadequate service.”).

¹⁴¹ *Leegin*, 127 S. Ct. at 2716.

¹⁴² *Id.* at 2715.

¹⁴³ *Id.* (quoting *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977)).

¹⁴⁴ Haresh Gurnani & Yi Xu, *Resale Price Maintenance Contracts with Retail Sales Effort: Effect of Flexibility and Competition*, 53 NAVAL RES. LOGISTICS 448, 449–50 (2006).

otherwise would not if retail price competition were aggressive.¹⁴⁵ Without resale price maintenance, the “market for such services could be destroyed by discount retailers who lure away customers who have been informed or had benefited from services provided by full service-retailers.”¹⁴⁶

b. Anticompetitive Effects of Resale Price Maintenance Agreements

While there are numerous procompetitive justifications for vertical pricing agreements, there are also scenarios where they have significant anticompetitive effects. “[U]nlawful price fixing, [which] is designed solely to obtain monopoly profits, is also a present temptation.”¹⁴⁷ For example, “[r]esale price maintenance may . . . facilitate a manufacturer cartel.”¹⁴⁸ The Court noted that an “unlawful cartel will seek to discover if some manufacturers are undercutting the cartel’s fixed prices.”¹⁴⁹ Resale price maintenance can enhance cartel stability by eliminating the retail price variation (which could cause “cartel stability to suffer because members would have difficulty distinguishing changes in retail prices that were caused by cost changes from cheating on the cartel”).¹⁵⁰ Thus, cartels garner significant stability through the power of their resale price maintenance.¹⁵¹ Furthermore, resale price maintenance could discourage a manufacturer from cutting prices to retailers with the simultaneous benefit of cheaper prices to consumers.¹⁵²

The Court also observed that vertical price restraints “might be used to organize cartels at the retailer level.”¹⁵³ A group of “traditional retailers

¹⁴⁵ *Id.* at 450.

¹⁴⁶ *Id.*

¹⁴⁷ *Leegin*, 127 S. Ct. at 2716.

¹⁴⁸ *Id.* (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725 (1988)); *see also* Mathewson & Winter, *supra* note 73, at 66 (resale price maintenance has been explained in some cases as a device to facilitate cartel pricing at the manufacturer’s level).

¹⁴⁹ *Leegin*, 127 S. Ct. at 2716.

¹⁵⁰ Mathewson & Winter, *supra* note 73, at 65.

¹⁵¹ *Id.*

¹⁵² *See* THOMAS R. OVERSTREET, JR., *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* 13–19 (1983).

¹⁵³ *Bus. Elecs. Corp.*, 485 U.S. at 725–26; *see also* Mathewson & Winter, *supra* note 73, at 65 (“[RPM] practice is a manifestation of retailers’ monopsony power, supporting a cartel at the retail level . . .”).

[might] use manufacturers to coordinate the cartel prices at the retail level.”¹⁵⁴ If the cartelization is successful, it would delay or block the entry by discount stores.¹⁵⁵ Thus, resale price maintenance serves the retail cartel as an entry against low-price, large-volume outlets.¹⁵⁶

Furthermore, the majority noted that “resale price maintenance . . . can be abused by a powerful manufacturer or retailer.”¹⁵⁷ For example, “[a] dominant retailer . . . might request resale price maintenance to forestall innovation in distribution that decreases costs.”¹⁵⁸ A manufacturer may feel that it needs to have access to a retailer’s distribution network and thus feel pressured to accommodate that retailer’s demand to participate in the vertical price restraint.¹⁵⁹ However, a manufacturer which has market power “might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants.”¹⁶⁰

However, “[n]otwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance ‘always or almost always tend[s] to restrict competition and decrease output.’”¹⁶¹ The Court concluded that “although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical.”¹⁶² The use of resale price maintenance agreements have a significant amount of procompetitive effects that would be proscribed under a rule of per se illegality. And the anti-competitive effects are nonetheless ill suited for the rule.¹⁶³

¹⁵⁴ Mathewson & Winter, *supra* note 73, at 65.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 65–66.

¹⁵⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; see also AREEDA & HOVENKAMP, *supra* note 10, ¶ 1604d2, at 47; OVERSTREET, *supra* note 152, at 31.

¹⁶⁰ *Leegin*, 127 S. Ct. at 2717; see also Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & ECON. 363, 366–68 (1985).

¹⁶¹ *Leegin*, 127 S. Ct. at 2717 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

¹⁶² *Id.*; see also OVERSTREET, *supra* note 152, at 170.

¹⁶³ *Leegin*, 127 S. Ct. at 2718.

c. Analysis of Why the Per Se Rule Is Not Justified

The Court then addressed the respondent's arguments (PSKS) about why vertical restraints should be per se unlawful.¹⁶⁴ The respondent claimed that the per se rule should be upheld because of the "administrative convenience of per se rules."¹⁶⁵ The majority noted that although "per se rules may decrease administrative costs, . . . that is only part of the equation" and per se rules can be counterproductive.¹⁶⁶ Per se rules have several negative results such as, prohibiting conduct the antitrust laws should encourage, and increasing litigation costs by promoting frivolous suits against legitimate practices.¹⁶⁷ The Court concluded that any possible reduction in administrative costs "cannot alone justify the *Dr. Miles* rule."¹⁶⁸

The respondent countered with the argument that the per se rule is justified because a vertical price restraint may promote higher prices for the manufactured goods.¹⁶⁹ However, the Court emphasized that the respondent was mistaken because he relied solely on pricing effects and not a further showing of anticompetitive conduct.¹⁷⁰ Furthermore, the respondent "overlook[ed] that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins."¹⁷¹ As a general matter, a single manufacturer will only desire to set minimum resale prices if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price."¹⁷²

The Court did recognize that resale price maintenance does have economic dangers.¹⁷³ Thus, the Court emphasized that "[i]f the rule of reason were to apply to vertical price restraints, courts would have to be

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Mathewson & Winter, *supra* note 73, at 67.

¹⁷³ *Leegin*, 127 S. Ct. at 2719.

diligent in eliminating their anticompetitive uses from the market.”¹⁷⁴ The majority felt that this is a realistic objective.¹⁷⁵

“The rule of reason is designed and used to eliminate anticompetitive transactions from the market.”¹⁷⁶ The rule of reason principle applies to vertical price restraints and “[a] party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation.”¹⁷⁷ The Court did not set forth any set “structure” for lower courts to follow and concluded that “[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”¹⁷⁸ The majority noted that “[c]ourts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”¹⁷⁹ Thus, the Supreme Court left little guidance for the lower courts when implementing the rule of reason.

3. *Stare Decisis Argument*

Stare decisis is not as significant in this case because the issue before the Court was not within the scope of the Sherman Act.¹⁸⁰ The Court has always treated the Sherman Act as a common-law statute.¹⁸¹ This common-law approach is implemented by the rule of reason, which contemplates case-by-case adjudication.¹⁸² Thus, the Court concluded that stare decisis “does not compel [the] continued adherence to the per se rule

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2720.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *State Oil Co. v. Kahn*, 522 U.S. 3, 20–21 (1997), (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act . . .”).

¹⁸¹ See, e.g., *id.*; *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1977).

¹⁸² *Leegin*, 127 S. Ct. at 2720.

against vertical price restraints.”¹⁸³ The Court emphasized that respected economists “suggest the per se rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects.”¹⁸⁴ Additionally, the two enforcement agencies of the Sherman Act that have the ability to assess the long-term effects of RPM, i.e., the Department of Justice and the Federal Trade Commission, suggested to the Court that it should judge RPMs under the rule of reason.¹⁸⁵

Furthermore, the *Dr. Miles* rule is difficult to reconcile with other vertical-restraint jurisprudence which had contrary holdings; this makes for an unprincipled judicial framework.¹⁸⁶ If the Court had decided that the positive effects of RPMs were insufficient to justify overruling *Dr. Miles*, then it would have put contrary holdings, such as *Colgate* and *Sylvania*, on shaky ground.¹⁸⁷ In sum, the Court concluded “it is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.”¹⁸⁸

The majority also observed that congressional action shows that the *Dr. Miles* rule was not meant to be permanent.¹⁸⁹ “The text of the Consumer Goods Pricing Act did not codify the rule of per se illegality for vertical price restraints. It rescinded statutory provisions that made them per se legal.”¹⁹⁰ “Congress could have set the *Dr. Miles* rule in stone,” but it “placed these restraints within the ambit of section 1 of the Sherman Act.”¹⁹¹

B. Strengths and Weaknesses of the Majority

The majority puts forth an excellent analysis of why *Dr. Miles* should not be followed today. The majority contrasts our current economy with

¹⁸³ *Id.* at 2721.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 2722.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2723.

¹⁸⁹ *See id.* at 2723–24.

¹⁹⁰ *Id.* at 2724.

¹⁹¹ *Id.*

the past. The economy that existed when *Dr. Miles* was decided is radically different from today.¹⁹² Today, vertical restraints can actually benefit our economy.¹⁹³

The majority shows the positive effects that vertical price restraints can have on our economy.¹⁹⁴ It promotes interbrand competition and it facilitates market entry for new firms and brands.¹⁹⁵ It encourages retailer services that would not be provided even absent free riding.¹⁹⁶ The majority also addresses what adverse effects vertical price restraints can have on our economy.¹⁹⁷ They address this by showing that the rule of reason would require courts “to be diligent in eliminating their anticompetitive uses from the market.”¹⁹⁸

However, there are some weaknesses in the majority’s argument. The majority addresses why *stare decisis* does not apply, but their analysis is not as thorough as the dissenting opinion. The majority did not feel this issue was as important as the dissent did.¹⁹⁹ Additionally, *stare decisis* does not give the court enough guidance on how to apply the rule of reason, which and allowed the Court to decide the question at bar.

The majority does say that as the courts make decisions, they will gain experience in applying the rule of reason, and can thus establish a litigation structure to ensure the rule operates to eliminate anticompetitive restraints and to provide guidance to businesses.²⁰⁰ However, the majority does not provide any *real* guidance to help the courts implement the rule of reason now.

C. Justice Breyer’s Dissent

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg issued a dissenting opinion. Although the majority’s arguments were valid, the

¹⁹² *Id.* at 2714.

¹⁹³ *Id.* at 2715–16.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 2716.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2716–17.

¹⁹⁸ *Id.* at 2719.

¹⁹⁹ *See id.*

²⁰⁰ *Id.* at 2720.

dissent held that it does not warrant the Court's overturning of such a well-established a legal precedent.²⁰¹

1. Arguments Against the Per Se Rule

Justice Breyer recognized that sometimes resale price maintenance can prove harmful and that sometimes it can bring benefits.²⁰² However, before announcing his ultimate conclusion, that courts should indeed apply a rule of reason, he noted several questions that should be asked such as: "how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?"²⁰³

Justice Breyer noted that economic studies can help provide answers to these questions and, in doing so, should inform antitrust law.²⁰⁴ However, antitrust law should not replicate economists' views, which are sometimes conflicting.²⁰⁵ Furthermore, "law, unlike economics, is an administrative system . . . [that] depend[s] upon the content of rules and precedents only as they are applied by judges and juries in courts."²⁰⁶ Courts cannot easily identify instances where the benefits are likely to outweigh potential harms because it is difficult to identify whether the producer or the dealer is "the moving force behind any given resale price maintenance agreement."²⁰⁷ Justice Breyer acknowledged that scholars of antitrust law created checklists and question-sets to help courts separate the good effects from the bad effects, but ultimately dismissed the idea on the observation that they are easier in theory than in fact.²⁰⁸

2. Why Stare Decisis Should Be Adhered To

Justice Breyer emphasized that there is no change in circumstances in the past several decades that help the majority's position.²⁰⁹ In his dissent he noted that there has been "one important change" that actually argues

²⁰¹ *Id.* at 2726 (Breyer, J., dissenting).

²⁰² *Id.* at 2727–28.

²⁰³ *Id.* at 2729.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2730.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2731.

“strongly to the contrary.”²¹⁰ When Congress repealed the McGuire and Miller-Tydings Acts in 1975²¹¹ it “consciously *extended Dr. Miles’ per se* rule.”²¹² “Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful.”²¹³

Although Congress did not prohibit the Court from reconsidering the *per se* rule, by enacting major legislation premised upon the existence of that rule it demonstrated important public reliance upon that rule. That constitutes an even more compelling reason why the court should keep the rule.²¹⁴

Justice Breyer pointed out that relevant changes in the American economy do not necessarily support the majority’s position; noting, however, that no one had “argued that concentration among manufacturers that might use resale price maintenance has diminished significantly.”²¹⁵ And Justice Breyer felt that it has not.²¹⁶

The dissent then analyzed the factors that past case law indicates are relevant when courts consider overruling an earlier case.²¹⁷ “First, the Court applies *stare decisis* more ‘rigidly’ in statutory than in constitutional cases.”²¹⁸ “Second, the Court . . . sometimes overrules cases that it decided wrongly only a reasonably short time ago.”²¹⁹ The dissent referenced Justice Scalia who stated, “[o]verruling a *constitutional* case decided just a few years earlier is far from unprecedented.”²²⁰ Justice Breyer noted that *Dr. Miles* was decided a hundred years ago and overruling it would also “overrule the cases that reaffirmed its *per se* rule in the intervening years.”²²¹

²¹⁰ *Id.*

²¹¹ See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1976).

²¹² *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting).

²¹³ *Id.* at 2732.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 2734–37.

²¹⁸ *Id.* at 2734 (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962)).

²¹⁹ *Id.*

²²⁰ *Wis. Right to Life v. United States*, 127 S. Ct. 2652, 2685 (2007).

²²¹ *Leegin*, 127 S. Ct. at 2734 (Breyer, J., dissenting).

Third, if a decision creates an “unworkable” legal regime, it would argue in favor of overruling the precedent.²²² Even with the exception of *Colgate*, implementation of the per se rule, has proved practical over the course of the last century.²²³ Justice Breyer observed that “[n]o one has shown how moving from the *Dr. Miles* regime to the ‘rule of reason’ analysis would make the legal regime governing minimum re-sale price maintenance more ‘administrable’²²⁴ particularly since *Colgate* would remain good law with respect to *unreasonable* price maintenance.”²²⁵

“Fourth, the fact that a decision ‘unsettles’ the law may argue in favor of overruling.”²²⁶ However, “[t]he per se rule is well-settled law.”²²⁷ Thus, the majority’s change will unsettle the law.²²⁸ Fifth, if a case involves property rights or contract rights and reliance interests are involved, it argues against overruling.²²⁹ Justice Breyer concluded the case does involve “contract rights and perhaps property rights (consider shopping malls). . . . [a]nd there has been considerable reliance upon the per se rule.”²³⁰ Additionally, “Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire.”²³¹ Furthermore, much of the economy has come to rely upon the continued application of the per se rule. “A factory outlet store tells the Court that the rule ‘form[s] an essential part of the regulatory background against which [that firm] and many other discount retailers have financed, structured, and operated their businesses.’”²³²

²²² *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

²²³ *Id.*

²²⁴ See *Wis. Right to Life*, at 2685.

²²⁵ *Leegin*, 127 S. Ct. at 2734–35 (Breyer, J., dissenting).

²²⁶ *Id.* at 2735 (citing *Wis. Right to Life*, 127 S. Ct. at 2685–86; *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1976)).

²²⁷ *Id.* (citing *GTE Sylvania Inc.*, 433 U.S. at 51).

²²⁸ *Id.*

²²⁹ *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* (quoting Brief for Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* in Support of Respondent at 5, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2006 WL 621854).

Sixth, if “a rule of law has become ‘embedded’ in our ‘national culture’ [it] argues strongly against overruling.”²³³ “The per se rule forbidding minimum resale price maintenance agreements has long been ‘embedded’ in the law of antitrust. . . . [and i]t involves price, the economy’s ‘central nervous system.’”²³⁴ The per se rule assumes that consumers prefer a lower price to more service, offers consumers that choice, and creates a bright line that is well understood in the business and legal community and thus is easy to administer and enforce.²³⁵

In conclusion, Justice Breyer noted that “every *stare decisis* concern this Court has ever mentioned counsels against overruling [*Dr. Miles*].”²³⁶ Thus, because of the *stare decisis* concerns, the dissent does not feel that the majority is justified in overruling a decision of such longstanding.²³⁷

D. Dissent Strengths and Weaknesses

The dissent’s *stare decisis* analysis is extremely thorough. It brings to light a lot of the weaknesses of the majority’s arguments. Through its analysis, the dissent shows that every argument for adhering to *stare decisis* that the Court has ever mentioned leans in favor of upholding *Dr. Miles*.²³⁸ The dissent also emphasizes that there is no clear standard of how the lower courts are to apply the rule of reason.²³⁹

There are some weaknesses of the dissent’s argument. They do not address the vast differences between *Dr. Miles* time and our current period. There has been an tremendous number of economic developments since *Dr. Miles* was decided and the majority recognizes this. The majority’s opinion is forward thinking, while the dissent’s opinion is fearful of change.

²³³ *Id.* at 2736 (citing *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000)).

²³⁴ *Id.* (quoting *Nat’l Soc. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1977)).

²³⁵ *Id.*

²³⁶ *Id.* at 2737.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.*

V. SIGNIFICANCE

A. How the Rule of Reason Should be Applied: What Workable Principles Should the Lower Courts Follow

The majority enumerated some of the important factors relevant to the rule of reason analysis. First, “market power could be a threshold requirement” for a resale price maintenance (RPM) claim.²⁴⁰ Second, the majority explained that RPM “should receive more scrutiny if competing manufacturers adopt the practice.”²⁴¹ Competition in the relevant market is not likely to be harmed if RPM is not widespread.²⁴² “Third, vertical restraints driven by retailers are much more likely to be harmful to competition than restraints for which the manufacturer was the impetus.”²⁴³

These factors are merely guideposts and the Court was not explicit in detailing how a rule of RPM case should proceed. Instead lower courts should “establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”²⁴⁴ The Court emphasized that lower courts could “devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote pro-competitive ones.”²⁴⁵ Therefore, there may be inconsistent decisions because of the lack of guidance with regards to how the rule of reason should be implemented.

²⁴⁰ Marie L. Fiala & Scott A. Westrich, *Leegin Creative Leather Products: What Does the New Rule of Reason Standard Mean for Resale Price Maintenance Claims*, ANTITRUST SOURCE, Aug. 2007, at 1, 3, available at <http://www.antitrustsource.com>; see also *Leegin*, 127 S. Ct. at 2720 (dominant manufacturers and retailers abusing RPM is not a serious concern unless that entity has market power).

²⁴¹ Fiala & Westrich, *supra* note 240, at 3; see also *Leegin*, 127 S. Ct. at 2719 (if the practice is widespread, RPM should be scrutinized more closely).

²⁴² Fiala & Westrich, *supra* note 240, at 3; *Leegin*, 127 S. Ct. at 2719 (if only adopted by a few manufacturers or retailers, there is only a small likelihood that it is facilitating a cartel).

²⁴³ Fiala & Westrich, *supra* note 240, at 3–4; *Leegin*, 127 S. Ct. at 2719 (“If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer.”).

²⁴⁴ *Leegin*, 127 S. Ct. at 2720.

²⁴⁵ *Id.*

Although the majority did set forth some guidelines for lower courts to follow to determine whether the RPM was anticompetitive, the guidelines are not workable. As Justice Breyer states in the dissenting opinion, “[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.”²⁴⁶

At a minimum, workable legal principles for implementation must “(1) provide clear direction to facilitate voluntary compliance and effective enforcement, and (2) prevent the arbitrary and retroactive imposition of liability.”²⁴⁷ Therefore,

The federal courts must restrict Sherman Act liability to cartels and integrations to gain monopoly power, the original targets of the Act and the only practices condemned by a consensus of lawyers, scholars, and judges. They must also employ a decision methodology that juries can apply to reach correct results.²⁴⁸

The typical rule of reason is open-ended.²⁴⁹ It is a “form of presumptive legality in the sense that the defendant prevails unless the plaintiff offers some proof of harmful effects or tendencies.”²⁵⁰ A “typical plaintiff must show that the challenged conduct limits competition . . . significantly.”²⁵¹ The plaintiff is usually required “to define a relevant product and geographic market and to show that the defendants occupy a significant portion of it.”²⁵² The defendant can “rebut that prima facie case [set forth by the plaintiff] by disproving any of the plaintiff’s proofs or by introducing credible evidence that the restraint serves a legitimate business purpose.”²⁵³ The plaintiff may then “rebut

²⁴⁶ *Id.* at 2730 (Breyer, J., dissenting).

²⁴⁷ Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 339–40 (2000–2001).

²⁴⁸ *Id.* at 374.

²⁴⁹ AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633b, at 329.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

those contentions . . . or attempt to show that the restraint . . . fails to serve that purpose or does so no better than less restrictive alternatives.”²⁵⁴

However, the open-ended rule of reason approach to RPM creates “great uncertainty.”²⁵⁵ Not only “would the parties and the court be in doubt about what they were looking for, but the result would certainly be far more vertical price fixing than we have today.”²⁵⁶ Thus, a more structured approach is needed.

1. The Working Principles that Lower Courts Should Use

Long before *Leegin* was decided, “Professors Areeda and Hovenkamp recommended a structured rule of reason approach for RPM.”²⁵⁷ This approach creates more certainty and is better than the bright-line per se illegality rule. If the per se illegality rule were used, all of the procompetitive effects of RPM would be eliminated by the bright-line rule.²⁵⁸ However, the approach proposed by Areeda and Hovenkamp allows the defendant to rebut the existence of the anticompetitive factor or, if this is impossible, prove that the restraint serves a legitimate function.²⁵⁹ Thus, there is a possibility that price-maintenance agreements will be allowed. Therefore, procompetitive effects are not completely eliminated.²⁶⁰

The structured approach consists of an attempt to allocate fairly between the plaintiff and the defendant the burden of making the case.²⁶¹ The proposed approach begins with the plaintiff “showing the presence of at least one of the [following] adverse factors” to prove the prima facie case.²⁶² These factors are consistent with the analysis and the guidepost factors set forth by the *Leegin* majority.²⁶³ However, these factors are much

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 330.

²⁵⁶ *Id.*

²⁵⁷ Fiala & Westrich, *supra* note 240, at 7.

²⁵⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722 (2007).

²⁵⁹ AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633e2-3, at 337–38.

²⁶⁰ *Id.* ¶ 1633e3, at 339.

²⁶¹ *Id.* ¶ 1633d2, at 337.

²⁶² *Id.* ¶ 1633e1, at 337.

²⁶³ Fiala & Westrich, *supra* note 240, at 7; *see also* AREEDA & HOVENKAMP, *supra* note 10, ¶¶ 1633c1, 1633e, at 330–32.

more specific than the three “guidepost” factors. Therefore, they provide more certainty. The list of factors includes:

- Manufacturer concentration;
- Widespread market coverage;
- Dealer concentration;
- The RPM was initiated by a dealer or group of dealers;
- The RPM covers a powerful brand;
- The RPM was requested by a powerful dealer that a manufacturer could not readily replace;
- RPM is used only in select markets (suggesting dealer power in those markets accounts for the restraint); or
- The RPM is used for a homogeneous product (suggesting that there could be no free rider or enhanced service justification for the restraint).²⁶⁴

Manufacturer concentration occurs when “the market share of brands [is] . . . controlled by manufacturers through vertical integration, through vertical agreements, or through informal arrangements having a similar effect (such as terminating price cutting dealers . . . [because] they are price cutters or tacitly announcing that one will cease to supply dealers selling for less than a specified price).”²⁶⁵ “[M]arket coverage is deemed widespread if it exceeds [fifty] percent.”²⁶⁶

Dealer concentration occurs when there is “a danger that horizontal coordination among dealers could be aided by [RPM].”²⁶⁷ Widespread market coverage occurs when RPM covers a large portion of the retail market.²⁶⁸ “In that event, the restraint reduces interbrand competition.”²⁶⁹ Thus, dealers “have an incentive to seek the vertical restraint, and

²⁶⁴ Falia & Westrich, *supra* note 240, at 7; *see also* AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633c, at 330.

²⁶⁵ AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633c, at 330–31.

²⁶⁶ *Id.* at 331.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

consumers are left with few unrestrained alternatives.”²⁷⁰ Furthermore, when “multibrand dealers are typical, . . . widespread coverage within the manufacturers’ market may also mean that the manufacturers use the restraint to induce dealer recommendations that deceive consumers.”²⁷¹

Dealer initiatives and “[d]ealer power’ may also be indicated by a restraint that was adopted or enforced after request or demand by dealers acting collectively or adopted after request by a ‘dominant’ dealer.”²⁷² If the resale price maintenance covers a powerful brand then “[d]ealers have the incentive to restrain intrabrand competition.”²⁷³ “A [thirty] percent market share is a moderate to weak indicator of such brand power.”²⁷⁴

A powerful dealer “may be difficult for the manufacturer to replace without some loss of market momentum and perhaps other tangible costs as well and thus may have some ‘power’ over the manufacturer.”²⁷⁵ Selective coverage occurs when the restraint is used in only one or a few of a manufacturer’s local markets.²⁷⁶ If resale price maintenance is used for a homogenous product then there could be no free rider or enhanced service justification for the restraint.²⁷⁷

The list above is not comprehensive and the presence of only one of these factors is most likely not sufficient to establish that there is a danger of competitive harm and satisfy the plaintiff’s prima facie case.²⁷⁸ “Nevertheless, the list provides a good starting point for courts to use in determining whether the plaintiff has shown that the RPM is likely to harm competition by ‘perpetuating inefficient distribution, suppressing competition . . . to enhance dealer profits, facilitating manufacturer coordination, or promoting some other anticompetitive interests.’”²⁷⁹

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 331–32.

²⁷⁸ *Id.* ¶ 1633c1, at 332.

²⁷⁹ Falia & Westrich, *supra* note 240, at 7 (quoting AREEDA & HOVENKAMP, *supra* note 10, ¶ 1632, at 316).

The burden then shifts to the defendant to rebut the anticompetitive factors.²⁸⁰ The defendant's standard of proof (e.g., preponderance of the evidence, substantial, etc.) could vary depending on the type of anticompetitive factors at issue.²⁸¹ The standard of proof is varied because some facts are harder to prove than others and in other cases the easily accessible facts (that could be proved with clear and convincing evidence) should have no bearing on the outcome of the case.²⁸² For example, the court should not generally consider evidence that:

economic performance is satisfactory, that market circumstances substantially prevent tacit coordination, that resale price maintenance does not significantly reinforce any coordination that does exist, that dealers do not in fact make deceptive recommendations to consumers, or that many consumers are not actually deprived of any significant choices they desire . . . because evidence about them is so likely to be inconclusive.²⁸³

If the defendant cannot rebut the existence of one of the anticompetitive factors, then the burden is on the defendant to prove that the restraint serves a legitimate function.²⁸⁴ The standard of proof also could depend the type of factors at issue.²⁸⁵ For example, “[w]ith respect to anticompetitive factors other than dealer power, the defendant should be deemed to have met its burden only:

if the manufacturer shows it more likely than not that it has a legitimate business problem, that it is significant in the sense of being nontrivial, that the restraint is reasonably connected to its solution, and that any less restrictive alternative suggested by the challenger is significantly less effective or significantly more costly.²⁸⁶

²⁸⁰ AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633c3, at 333.

²⁸¹ *Id.* ¶ 1633e2, at 338.

²⁸² *Id.*

²⁸³ *Id.* at 337–38.

²⁸⁴ *Id.* ¶ 1633e3, at 338.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

2. *Applying the New Workable Principles*

The clarity of the new approach proposed by Professors Areeda and Hovenkamp is illustrated when the facts of *Leegin* are applied. To prevail on its prima facie case, PSKS, Inc. would have to show at least one of the anticompetitive factors.²⁸⁷ PSKS could show that Leegin would become a concentrated manufacturer with undue market power.²⁸⁸ If Leegin and another manufacturer competed with the same type of product and the other manufacturer did not have resale price maintenance, Leegin's retailers would begin to offer more and more services with Leegin's product because that is the only way that Leegin's retailers could compete with one another for customers (since they can't lower prices to compete). Then consumers would have two options, either pay a higher price for a Leegin product offered with incredible services or a lower price for a similar product.²⁸⁹ Eventually, consumers would prefer the Leegin product because the Leegin products' services would outweigh the difference in price between the Leegin product and the competitor's product. Thus, Leegin would have undue market power.

Also, PSKS could show that the resale price maintenance is likely to harm competition by perpetuating inefficient distribution because only retailers that will adhere to the resale price maintenance will be able to sell Brighton goods. For example, when PSKS discounted Brighton's entire line by twenty percent, Leegin stopped selling the Brighton product to the store.²⁹⁰ Thus, PSKS could prove its prima facie case.

The burden would then shift to Leegin to rebut the anticompetitive factors. Leegin's justification for the resale price maintenance agreement was to limit the product to be sold at specialty stores so it could "offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis."²⁹¹ "Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy."²⁹² Thus, Leegin would try to rebut the anticompetitive factor by showing that many

²⁸⁷ *Id.* ¶ 1633e1, at 337.

²⁸⁸ *Id.* ¶ 1633c, at 330.

²⁸⁹ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2715 (2007).

²⁹⁰ *Id.* at 2711.

²⁹¹ *Id.*

²⁹² *Id.*

consumers are not actually deprived of any significant choices they desire.²⁹³ Because the evidence would likely be inconclusive about proving that consumers are not actually deprived of the choices they desire, Leegin would have to satisfy a clear and convincing standard of proof.²⁹⁴ This standard is very difficult to prove and because Leegin is not likely to be able to offer any evidence, it will not prevail on its rebuttal.²⁹⁵

Because Leegin likely will not rebut the showing of lack of consumer choice, they would then need to demonstrate a legitimate business interest.²⁹⁶ Because the danger is not dealer power, Leegin would have to show the restraint is justified because “it is more likely than not that it has a legitimate business problem, that it is significant in the sense of being nontrivial, that the restraint is reasonably connected to its solution, and that any less restrictive alternative suggested by the challenger is significantly less effective or significantly more costly.”²⁹⁷ Leegin stated that “discounting harmed Brighton’s brand image and reputation.”²⁹⁸ By implementing its pricing policy, Leegin would give customers better quality merchandise and better service.²⁹⁹ Therefore, by increasing its reputation and brand image, Leegin would show that its pricing policy is more likely than not to solve a legitimate business problem.

Leegin would also be able to show that the pricing policy is significant in the sense of being nontrivial. Brand reputation and image are critical to businesses. If the customer does not believe that it is getting a quality good it will not purchase the product. However, by implementing its pricing policy, Leegin ensures that its customers will get quality merchandise and service.³⁰⁰ Thus, the pricing policy is significant because it ensures that Leegin will have an excellent brand reputation.³⁰¹

Leegin can also show that the restraint is reasonably connected to its solution. Leegin is concerned with ensuring quality customer service and

²⁹³ See AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633c3, at 334.

²⁹⁴ *Id.* at 338.

²⁹⁵ *See id.*

²⁹⁶ *See supra* text accompanying note 284.

²⁹⁷ AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633e3, at 338.

²⁹⁸ *Leegin*, 127 S. Ct. at 2711.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

quality brands.³⁰² By implementing its pricing policy, retailers will receive sufficient margins to provide customers quality service.³⁰³ Thus, it is more likely than not that there is a reasonable connection between the pricing policy and ensuring quality goods and services.

Finally, Leegin would have to show that any less restrictive alternative suggested by the challenger is significantly less effective or significantly more costly.³⁰⁴ PSKS would most likely suggest that the alternative is to not implement resale price maintenance.³⁰⁵ This alternative is significantly less effective because if there were no pricing agreement, the retailers would not receive sufficient margins.³⁰⁶ As a result, the retailers would not be able to provide all of the services needed to ensure the quality customer service that Leegin desires of its product.³⁰⁷ Thus, Leegin could prove more likely than not that the alternative is significantly less effective than its pricing policy.

Because Leegin would be able to satisfy its burden of proof (i.e., that it more likely than not has a legitimate business problem, the business problem is significant, the restraint is reasonably connected to its solution, and the less restrictive alternative is significantly less effective), Leegin will prevail on its argument to uphold the RPM. Thus, PSKS will not prevail on its claim.

3. *Why the Principles Should Be Adopted*

These principles are consistent with the majority opinion in *Leegin* because it would require courts to be “diligent in eliminating [resale price maintenance] anticompetitive uses from the market.”³⁰⁸ It would encourage more plaintiffs to bring cases because the plaintiff only has to prove at least one anticompetitive factor.³⁰⁹ The structured approach also ensures that procompetitive effects of RPM will not be eliminated because the defendant is allowed to rebut the existence of the anticompetitive

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633e3, at 339.

³⁰⁵ *Leegin*, 127 S. Ct. at 2712.

³⁰⁶ *Id.* at 2711.

³⁰⁷ *Id.* at 2710–11.

³⁰⁸ *Id.* at 2719.

³⁰⁹ *See supra* text accompanying notes 262–77.

factors and to prove that the restraint serves a legitimate function.³¹⁰ However, it also ensures that courts will be diligent in eliminating the anticompetitive effects of resale price maintenance because it places the burden on the defendant to prove these procompetitive effects.

These factors are also workable principles because the factors provide a clear direction and are not vague like the “guideposts” set forth by the majority. For example, as Justice Breyer emphasized in the dissent, the majority’s guiding factor of “‘market power’ . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets”³¹¹ because the factor is so vague. While the other factors set forth by the majority are similar to the factors set forth by Professors Areeda and Hovenkamp, the factors set forth by the Professors are much more unambiguous.

B. Public Policy Issue: Effect on the Average Consumer and the Retail Market

Resale price maintenance will also have an adverse effect on the average consumer. As the dissent stated, “whole sectors of the economy have come to rely upon the *per se* rule,”³¹² such as large low-price retailers. This impacts businesses such as Wal-Mart and could cause Wal-Mart to completely change how it does business and as a result be forced to raise their low prices.³¹³ The newer distributors, including internet distributors, which have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans, will also be adversely affected if they must adhere to vertical price restraints.³¹⁴

With oil prices skyrocketing,³¹⁵ gasoline prices rapidly increasing,³¹⁶ and the foreclosure rates³¹⁷ at record highs, the average consumer has come

³¹⁰ See AREEDA & HOVENKAMP, *supra* note 10, ¶ 1633e3, at 339.

³¹¹ *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting).

³¹² *Id.* at 2735.

³¹³ Brief for Consumer Federation of America as *Amicus Curiae* Supporting Respondents at 5, 7–9, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) (discussing comments by Wal-Mart’s founder twenty-five years ago that relaxation of the *per se* ban on minimum RPM would be a “great danger” to Wal-Mart as a new business).

³¹⁴ *Id.* at 9.

³¹⁵ Steve Hargreaves & Keisha Lamothe, *What \$100 Oil Would Cost You*, CNNMONEY.COM, Jan. 2, 2008, http://money.cnn.com/2007/11/21/news/economy/oil_

(continued)

to rely on lower prices by businesses such as Wal-Mart to survive. Wendy Liebmann, chief executive of WSL Strategic Retail, stated that “Americans cannot control the big things such as oil prices, falling home values, mortgage costs and rising property taxes, so they want to control the small things [and] . . . are watching what they spend on everything.”³¹⁸ Thus, if large, low-priced retailers are forced to increase prices, this will adversely affect average consumers who are already decreasing their spending because of the current state of the economy.

Large low retailers have in turn come to rely on being able to provide consumers with lower prices. If businesses such as Wal-Mart are forced to raise their prices, this will not only adversely affect the average consumer, but retailers as well. With the economy already in a poor state for the retail sector, *Leegin* will have a negative effect on retailers. For example, this past holiday season “[i]ndustry sales fell 2.2 percent . . . , the biggest decline since at least 1970.”³¹⁹ Analysts suggest that given the gloomy economic climate, consumers won’t be easily lured to splurge significantly post-Christmas.³²⁰ While this past “November and December were tough, people at least had a reason to shop in those months. Retailing analysts say the next couple of months may prove to be even more difficult.”³²¹ Thus, the outlook is bleak for retailers as well as the average consumer.

pay/index.htm (“Oil hit \$100 a barrel Wednesday and gasoline prices could soon top their all-time record from last May of \$3.22 a gallon.”).

³¹⁶ *Id.*

³¹⁷ Dina ElBoghdady & Nancy Trejos, *Foreclosure Rate Hits Historic High*, WASH. POST, June 15, 2007, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/14/AR2007061400513.html?referrer=email> (“The percentage of mortgages entering foreclosure in the first three months of the year was the highest in more than [fifty] years, according to the Mortgage Bankers Association.”).

³¹⁸ Martinne Geller, *Retail in a State of “Anarchy” as Consumers Retreat*, REUTERS, Jan. 13, 2008, <http://www.reuters.com/article/ousiv/idUSN1336265420080113>.

³¹⁹ Stephanie Rosenbloom, *After Weak Holiday Sales, Retailers Provide for Even Worse*, N.Y. TIMES, Jan. 8, 2009, available at http://www.nytimes.com/2009/01/09/business/economy/09shop.html?pagewanted=1&_r=1&hp%20.

³²⁰ *Id.*

³²¹ *Id.*

VI. CONCLUSION

Although resale price maintenance could have an adverse effect on the average consumer and retailers, there are also benefits. The Supreme Court took a forward approach when it overruled *Dr. Miles*. The majority was correct in ruling that the *Dr. Miles* rule is inconsistent with a principled framework since it makes little economic sense when analyzed with other past cases on vertical restraints such as *Colgate* and *GTE Sylvania*. Our economy today is also very different from when it was ninety-eight years ago, when *Dr. Miles* was decided.

Although the current state of the economy shows that the average consumer will be adversely affected if prices increase at large low-price retailers, the procompetitive benefits of resale price agreements outweigh the anticompetitive effects.³²² Vertical price restraints promote interbrand competition and in turn also have the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands and brands that fall in between.³²³ Therefore, although the average consumers may be hurt in the short-term by an increase in prices, they will benefit in the long-run by enhanced options.³²⁴ Furthermore, as the majority concluded that the per se rule is a “flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.”³²⁵

Although the rule of reason should be adopted, it is critical that it be implemented properly so that the burdens on the average consumer and on the retail sector do not become too great.³²⁶ Therefore, the Court should implement more guidance for the rule of reason test.³²⁷ However, in the meantime, lower courts should utilize the workable principles set forth by Professors Areeda and Hovenkamp to implement the rule of reason test.³²⁸

³²² See *supra* Part V.

³²³ See *supra* Part IV.

³²⁴ See *supra* Part IV.

³²⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007).

³²⁶ See *supra* Part V.

³²⁷ See *supra* Part V.

³²⁸ See *supra* Part V.