Leegin Creative Leather Products, Inc. v. PSKS, Inc.: The Final Blow to the use of Per Se Rules in Judging Vertical Restraints – Why the Court Got it Wrong

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I. INTRODUCTION

In 1911, the Supreme Court held that vertical price restraints were per se illegal in Dr. Miles Medical Co. v. John D. Park & Sons Co. While vertical price restraints were the central restraint at issue in Dr. Miles, the Court subsequently declared vertical nonprice restraints per se illegal as well. Over the course of the last century, the Court has slowly departed

1. 220 U.S. 373 (1911).
2. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 377-78 (1967). The Court relied in part on Dr. Miles in holding all vertical restraints should be per se illegal,
from the *Dr. Miles* rule in a piecemeal fashion, striking down the use of a per se rule against vertical *nonprice* restraints in 1977,\(^3\) and against vertical *maximum* price restraints in 1997.\(^4\) While both cases seriously eroded the use of per se rules in judging vertical restraints, they also reiterated that vertical *minimum* price restraints represented a unique anticompetitive evil and should remain per se illegal.\(^5\)

In 2007, the Court took up the issue of whether vertical minimum price restraints should continue to be held per se illegal, or whether the practice should be subject to the rule of reason just as all other vertical restraints.\(^6\) The Court held 5-4 to overturn *Dr. Miles* and its per se rule of illegality against vertical minimum price fixing, offering the final crushing blow to the use of per se rules in judging vertical restraints.\(^7\) The primary rationale of the Court was that per se rules are only appropriate if a practice will “always or almost always” be found to be anticompetitive if judged under the rule of reason.\(^8\) Thus, as contemporary economic analysis had shown that vertical minimum price restraints may have some procompetitive uses, a per se rule of illegality is no longer appropriate.\(^9\)

This case note will argue that the Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* erred in overturning *Dr. Miles* and the per se rule against vertical minimum price fixing. It will begin by offering a brief overview of antitrust law in the United States and a concise discussion of pivotal Supreme Court cases in the area of vertical restraints, beginning with *Dr. Miles.* Next, the facts and procedural history of the *Leegin* case will be introduced and a detailed discussion of both the majority and dissenting opinions will be offered. Following that, the majority opinion and its shortcomings will be analyzed with an emphasis on the Court’s misguided economic assumptions and its error in failing to give real consideration to *stare decisis* implications. Finally, the practical impact of the Court’s decision both on the market and on antitrust enforcement will be considered.

\(\text{Id. at 277-80.}\)

\(^3\) *Cont'l TV., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18, 59 (1977).


\(^5\) *Khan*, 522 U.S. at 10-11; *Sylvania*, 433 U.S. at 51 n.18.


The rule of reason is a legal rule used by courts in analyzing whether a particular business practice is an unreasonable restraint on trade, and thus should be held illegal. *Sylvania*, 433 U.S. at 49. The rule of reason requires the particular restraint at issue and its competitive effects be judged on a case-by-case basis. *Id.*

\(^7\) *Leegin*, 127 S. Ct. at 2709-10, 2725.

\(^8\) *Id.* at 2717.

\(^9\) *Id.* at 2714-17.
II. HISTORICAL BACKGROUND

A. ANTITRUST LAW IN THE UNITED STATES: AN OVERVIEW

By the late nineteenth century, the distribution of wealth in the United States had undergone a dramatic shift and was largely centralized in the hands of a small number of corporations and powerful individuals.\(^{10}\) It was feared that if economic power was concentrated in the hands of a select few, additional concentration of market power would naturally occur, and would result in trusts that would use their power to "oppress individuals and injure the public."\(^{11}\) In order to preserve competition and ensure that further concentration of wealth or power did not occur, Congress passed the Sherman Antitrust Act in 1890.\(^{12}\)

In passing the Sherman Act,\(^{13}\) Congress did not intend to codify a comprehensive antitrust law which provided judicial mandates that were set in stone.\(^{14}\) Rather, Congress intended to give the courts great power to interpret section 1 of the Sherman Act by utilizing broad language to which the courts could give shape.\(^{15}\) Additionally, the very language "restraint of trade," adopted in Section 1, was intended to invoke the common law tradition of antitrust jurisprudence,\(^{16}\) and not merely to codify a static meaning to which the common law had arrived by 1890.\(^{17}\) In relying on these factors, the Supreme Court has recognized that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act . . . ."\(^{18}\) This reasoning has allowed the Court to alter antitrust

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10. Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).
11. Id. See also United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly . . . .").
12. United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966) (stating that the Sherman Act was passed to "preserve competition among a large number of sellers," by ensuring that powerful business conglomerates did not further restrict the marketplace by driving small companies out of business). It is important to understand that the Sherman Act is primarily concerned with protecting competition and not with the comfort or survival of small businesses, though these two goals may at times overlap. See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (Free Press 1993) (1978).
13. 15 U.S.C. § 1 (2005) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").
15. See id. (citing 21 CONG. REC. 2456 (1890) (statements of Sen. Sherman)).
18. Id.
policy when it feels that the rationale underlying a decision has been dis-
credited, and to do so by giving far less weight to notions of *stare decisis*
than it would in other cases.\textsuperscript{19}

At common law, the central concern of antitrust jurisprudence was
avoiding the development of monopolies in the marketplace.\textsuperscript{20} "A monopo-
list is a seller . . . who can charge the price at which his product will sell in
the market by changing the quantity he sells."\textsuperscript{21} A monopolist takes advan-
tage of the *inelastic demand* for its product in order to achieve a level of
profitability above that which would be allowed by the competitive mar-
ket.\textsuperscript{22} Thus, of primary concern to Congress in passing the Sherman Act
was promoting and protecting consumer welfare by preserving free compet-
tition in the marketplace.\textsuperscript{23}

The rationale for protecting free competition rests on the premise that
unfettered competition will lead to the most efficient allocation of market
resources, thereby promoting low prices, product quality, and the overall
material progress of society.\textsuperscript{24} However, consumer welfare may at times be
injured by unbridled competition; thus, free competition in the realm of
antitrust jurisprudence will only be protected insofar as it does not infringe
on consumer welfare within the market.\textsuperscript{25} This suggests that promoting con-
sumer welfare through increased *efficiency* is the ultimate goal of antitrust
law, and protection of competition a secondary goal, which is often so
nearly aligned with efficiency that it offers courts a reasonable baseline for
analysis.\textsuperscript{26}

While this approach is sound in theory, the problem is that consumer
welfare cannot be simply analyzed in terms of perfect efficiency as con-

\begin{itemize}
\item \textsuperscript{19} See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705,
\item \textsuperscript{20} See Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911) ("[Because] indi-
viduals by the abuse of their right to contract might be able to usurp the power arbitrarily to
enhance prices . . . it came to be that laws were passed relating to [such] offenses.").
\item \textsuperscript{21} RJCHARD A. POSNER, ANTITRUST LAW 9 (2d ed. 2001).
\item \textsuperscript{22} See *id. at 11-12*. Inelastic demand is described as a point along the demand
curve where "a price at which the proportional reduction in the quantity demanded [of a
product] as a result of raising prices slightly would be less than the proportional increase in
price." *Id. at 11.*
\item \textsuperscript{23} BORK, supra note 12, at 61 (noting that the legislative history of the Sherman
Act reveals the "clear and exclusive policy intention of promoting consumer welfare").
\item \textsuperscript{24} N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). *See also Standard Oil
Co., 221 U.S. at 58-59.*
\item \textsuperscript{25} See BORK, supra note 12, at 51.
\item \textsuperscript{26} POSNER, supra note 21, at 29. *See also BORK, supra note 12, at 7* (arguing that
courts have failed to give proper weight to the "crucial concept" of business efficiency in
antitrust analysis, which benefits consumers through lowering the cost of products and in-
creasing the overall value of goods and services produced by society).
\end{itemize}
consumers often have conflicting goals concerning the market.27 If perfectly rational, consumers would seek to maximize market efficiency to achieve low prices, and as a corollary, to increase the value of the market.28 However, consumers do not act rationally and intelligently all the time.29 Rather, consumers have a myriad of wants and needs in the marketplace, which cannot all be provided by a perfectly efficient market.30 So the question ultimately remains: how should the Court appropriately and accurately define consumer welfare? This question is key, as it lies at the base of judicial decisions defining and outlawing "illegal" restraints of trade.31

If read literally, the Sherman Act would make any agreement that restrained trade illegal; however, courts have read the Act as only banning agreements which unreasonably restrain competition.32 This is because every restraint on competition restricts trade, but sometimes even an agreement limiting competition may be beneficial to society in the aggregate.33 Recognizing this fact, the Supreme Court in Standard Oil Co. v. United States proffered that analysis under the Sherman Act required the exercise of judgment in each case and that such judgment should be conducted under the standard of reason, or "rule of reason."34

Under the rule of reason, the fact-finder must analyze all the facts and circumstances surrounding an alleged violation of the Sherman Act in deciding whether the conduct in question is an unreasonable restraint on com-

28. See id.
29. HUGH SCHWARTZ, RATIONALITY GONE AWRY? DECISION MAKING INCONSISTENT WITH ECONOMIC AND FINANCIAL THEORY 4-6 (1998) (arguing based on psychological studies and empirical data that "economic behavior [does] not conform to the rationality that is critical to mainstream economic theory").
30. See, e.g., Burns, supra note 27, at 607-11 (arguing that while most people would agree that they prefer to pay on dollar for an item as opposed to two dollars for the same item, consumers also want, among other things, dealers to be treated fairly); Marla Pleyte, Online Undercover Marketing: A Reminder of the FTC's Unique Position to Combat Deceptive Practices, 6 U.C. Davis Bus. L.J. 55, 68 (stating that consumers may choose to yield to their desire to be viewed as a part of the "in-crowd" over acting rationally in making a particular market decision).
31. See BORK, supra note 12, at 7 (noting that the Supreme Court has introduced a number of competing and conflicting goals in the area of antitrust jurisprudence); see also infra Part II.B.
33. See Chi. Bd. of Trade v. United States, 246 U.S. 231 (1917); see also POSNER, supra note 21, at 29.
34. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). The Court held that the criteria which should be used to ascertain whether the Sherman Act has been violated is the "rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve." Id. at 62.
petition on a case-by-case basis.\textsuperscript{35} Information about the particular business at issue, \textsuperscript{36} "the restraint's history, nature, and effect,"\textsuperscript{37} and whether the business in question has market power,\textsuperscript{38} are all important factors to consider in judging a practice under the rule of reason. Weighing such elements allows a court to distinguish between restraints that have anticompetitive effects and those which stimulate competition and are thus "in the consumer's best interest."\textsuperscript{39}

The rule of reason was adopted to allow courts to carefully analyze a business practice before condemning it; however, it is this goal that has largely made analysis under the rule difficult in practice.\textsuperscript{40} First, rule of reason trials are incredibly costly to litigate,\textsuperscript{41} and while most cases settle

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The true test of illegality 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. 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.

246 U.S. 231, 238 (1917).


37. \textit{Id.}

38. Copperweld Corp. v. Independence Tool Corp., 467 U.S. 752, 768 (1984) (describing the rule of reason as involving "an inquiry into market power and market structure designed to assess the combination's actual effect [on the market]").


40. See Mark Crane, \textit{The Future Direction of Antitrust}, 56 \textit{ANTITRUST L.J.} 3, 14 (1987) (stating that courts need to consider all the consequences of an business practice before finding it illegal in order to render a just decision and that such a requirement results in a complex and costly rule of reason trial).

41. Steven C. Salop & Lawrence J. White, \textit{Economic Analysis of Private Antitrust Litigation}, 74 \textit{GEO. L.J.} 1001, 1016 (1986) (stating that an antitrust case costs a party approximately $200,000 to $250,000 to litigate, which totals approximately $250 million per year for all private antitrust claims filed). \textit{See also} N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (noting that analysis under the rule of reason is often an incredibly complex and prolonged judicial undertaking). Part of what makes antitrust cases so costly to litigate is the significant length of an antitrust trial. \textit{See, e.g.}, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 367 (1967) (stating that the antitrust trial in the case at bar took seventy days to litigate).
before trial, discovery and pretrial expenses in an antitrust suit are significantly high. Such high costs may encourage some defendants simply to abandon a perfectly legal and socially useful business practice due to the risk of losing at trial. Second, the high costs of litigation and possible abandonment of socially useful practices has a cost to society, which must endure a less efficient market and ultimately pay increased prices to absorb litigation costs. Finally, analysis under the rule of reason may lead to varying judicial results based on the same underlying facts, as the appropriate means and standards of analysis under the rule are largely indefinite and unclear. Such divergent opinions may also result from the complexity of the economic data underlying antitrust cases. If most economists disagree about the economics at the base of a case, judges, juries, and lawyers, many of whom only have a basic understanding of economics, cannot be expected to render sound judgments.

There are certain categories of business practices, however, which are conclusively presumed to be unreasonable, and are thus judged to be illegal without a substantial inquiry into their effect or the justification for their use in a particular case. Such conduct is deemed to have such predictable and harmful anticompetitive effects, and such a small likelihood of yielding any

42. Janet L. McDavid, Using Alternative Dispute Resolution in Antitrust Cases, ANTITRUST, Spring 1990, at 25 (stating that at least ninety percent of all antitrust cases settle).

43. Crane, supra note 40, at 16-17 (noting that discovery in an antitrust case often involves expert testimony, analysis of statistical data, and a significant number of documents, which substantially increases the pretrial costs of a case).

44. Douglas H. Ginsburg, Comparing Antitrust Enforcement in the United States and Europe, 1 J. COMPETITION L. & ECON. 427, 435-36 (2005) ("[A]n antitrust suit can entail such high costs, and even a small possibility of paying treble damages can be so daunting that the defendant is rationally induced to settle the matter by abandoning the challenged conduct regardless of whether it was procompetitive or anticompetitive." (citation omitted)). It has also been suggested that antitrust litigation or the threat of filing an antitrust suit may be strategically misused by competitors to control competition. Daniel A. Crane, Rules Versus Standards in Antitrust Adjudication, 64 WASH. & LEE L. REV. 49, 97-98 (2007). Specifically, a less efficient firm could use the threat of filing suit to compel a rival company to stop utilizing a more efficient business practice, or could motivate a more creative firm to stop innovating. Id.

45. See supra notes 23-25, 41-44 and accompanying text.

46. AM. BAR ASS'N SECTION OF ANTITRUST LAW MONOGRAPH 23, THE RULE OF REASON 102-03 (1999) ("[C]ommentators still condemn the [rule of reason] as indefinite and unworkable . . [T]he nebulous nature of the rule can lead to inconsistent results.").


48. AM. BAR ASS'N, supra note 46, at 103 ("Most economists do not agree on the competitive impact and consumer welfare effects of any given restraint. Thus, it is questionable whether different juries would yield consistent answers if presented with identical facts." (citations omitted)).

procompetitive benefit in the vast majority of instances, that they are held to be illegal *per se*.\footnote{State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citing *N. Pac. Ry. Co.*, 356 U.S. at 5).} The fundamental difference between a *per se* rule and analysis under the rule of reason is that in the case of *per se* rules, the Court singles out a few key facts and makes them legally determinative of whether the practice violates the law.\footnote{POSNER, *supra* note 21, at 39.} This is far different from analysis under the rule of reason, which allows for an “open-ended” inquiry of the business practice in question.\footnote{Id.} Per *se* rules offer a narrow exception to the general notion that the conduct at issue in an antitrust suit should be analyzed under the rule of reason.\footnote{See Leegin Creative Leather Prosds., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2718 (2007).}

Applying a per *se* rule of illegality is appropriate only “[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.”\footnote{Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332, 344 (1982). *See also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (stating that per *se* illegality is only reasonable when the practice at issue “would almost always restrict competition and decrease output” (citations omitted)); FTC v. Fed’n of Dentists, 476 U.S. 447, 458-59 (1986) (noting that a per *se* rule of illegality is not appropriate where the economic benefit of a specific practice within a particular market is not immediately obvious to the Court).} The Supreme Court is reluctant to adopt a *per se* rule where the economic impact of a business practice is not immediately obvious.\footnote{Khan, 522 U.S. at 10.} In deciding to adopt a per *se* rule of illegality to address an anticompetitive business practice, the Court may look to the surrounding circumstances of the market,\footnote{See Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 103-04 (1984).} or the nature and effect of the conduct in question.\footnote{See Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 692 (1978).} Mandating the use of a per *se* rule creates a “conclusive presumption” of unreasonableness, which for the sake of business certainty and judicial efficiency, justifies the invalidation of a small number of business practices that may have otherwise proved reasonable had they been judged under the rule of reason.\footnote{Maricopa County Med. Soc’y, 457 U.S. at 344. Thus, if a practice is per *se* illegal, it is completely irrelevant that the conduct at issue would be found legal in a full-blown rule of reason trial. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 609 (1972).} While per *se* rules
may provide administrative benefits, such benefits are not, without more, sufficient to justify the creation or continued adherence to a per se rule.59

In keeping with its common law tradition, the Court has at times recognized that adherence to a per se rule of illegality is no longer sound policy.60 The Court will strike down an earlier decision creating a per se rule if it determines that the economic realities forming the basis for the decision have changed, or if it finds that the Court based an earlier ruling on an inaccurate economic analysis.61 The problem is, in analyzing whether to continue to adhere to a per se rule of illegality, the Court has failed to consistently subscribe to a single underlying policy goal, especially in the area of vertical market restraints.62

This conflict likely developed from the fundamental debate within antitrust law as to what exactly “consumer welfare” means and how it should be protected.63 Legislative history suggests that the only true policy intent of the Sherman Act is to promote consumer welfare by maximizing efficiency and fostering low prices.64 However, analysis of the common law shows that the Supreme Court’s definition of “consumer welfare” stems less from what is the right definition of consumer welfare than it does from the needs of society right now.65 While a number of scholars suggest that the Court may only use the Sherman Act to protect commerce and not “to

60. See, e.g., Khan, 522 U.S. at 18-19, 22 (holding that vertical maximum price fixing was no longer a per se violation of section 1 of the Sherman Act); Sylvania, 433 U.S. at 51 n.18, 59 (holding that vertical non-price restraints should no longer be judged as per se illegal, but should instead be considered under the rule of reason).
61. See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988); see also Khan, 522 U.S. at 18 (overturning the per se rule against vertical maximum price fixing by arguing, inter alia, that contemporary economic theory had undermined prior economic justifications for the rule); Sylvania, 433 U.S. at 54-57 (holding that vertical nonprice restraints were no longer per se legal as economic analysis had showed they had procompetitive uses).
62. See infra Part II.B; supra note 31.
63. See Bork, supra note 12, at 55-56, 61-66. This debate may also have emerged from the conflict between two schools of economic thought which have earned judicial respect in the area of antitrust law, the Chicago School and the Harvard School. See Piraino, supra note 47, at 348-56. The Harvard School promoted consumer welfare by favoring per se rules which ensured and fostered both judicial and business certainty. Piraino, supra note 47, at 349. Conversely, the Chicago School argues that the anticompetitive effects of a business practice should be analyzed on a case-by-case basis, an approach that sacrificed certainty in pursuit of maximum market efficiency. Piraino, supra note 47, at 350.
64. See Bork, supra note 12, at 61.
65. See Bork, supra note 12, at 55 (stating that the Court has at times placed social and political policy objectives ahead of the “proconsumer traditions” of antitrust law); infra Part II.B (explaining differing policy goals which have been pursued by the Court in shaping antitrust policy in the area of vertical restraints).
regulate the good order of society," perhaps the vast majority of the time, to regulate the market and society is to regulate one in the same. Ultimately, the only certainty surrounding consumer welfare is that the tension over its meaning lies at the base of every major Supreme Court antitrust decision and will likely continue to be debated far into the future.

B. A BRIEF HISTORY OF THE SUPREME COURT'S VERTICAL RESTRAINT JURISPRUDENCE

"A restraint—is vertical . . . when a firm operating at one level of an industry places restraints upon rivalry at another level for its own benefit." More simply, a vertical restraint is a restriction placed on a seller by a buyer, or vice versa. Vertical restraints may be either price or non-price in kind, and such restraints tend to be placed on retailers by manufacturers in the vast number of cases. At issue in *Leegin* was a particular type of vertical restraint—vertical resale price maintenance (or vertical resale price fixing). Price fixing, according to antitrust jurisprudence, is any agreement to fix "the range within which purchases or sales will be made."

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66. See Bork, supra note 12, at 61-63. Bork explained that since the Sherman Act was passed by Congress under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, that under the Means/Ends test outlined in *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Act could only be used to control "commercial" acts and not to create social policy. Bork, supra note 12, at 61-63.

67. See supra note 65.

68. Bork, supra note 12, at 288.


71. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (dealing with the use of vertical minimum price fixing by a manufacturer on select retail outlets participating in a unique retail sales program); *Sylvania*, 433 U.S. 36 (concerning the use of territory restriction by a manufacturer against its independent retail sales outlets); White Motor Co. v. United States, 372 U.S. 253, 255 (1963) (involving the use of territory restrictions by a car manufacturer against its retail outlets); *Dr. Miles*, 220 U.S. 373 (dealing with the use of vertical minimum price restraints by a manufacturer against independent retailers).

72. *Leegin*, 127 S. Ct. at 2710.

73. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940). The Court in *United States v. Socony-Vacuum Oil Co.* described the full scope of price fixing, noting that prices are fixed "if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market price," and they are agreed upon. *Id.* Thus, the key concept is that there must be an agreement to fix prices and some action must be taken that expressly or indirectly controls the market price. See id.
Since 1911, such agreements have been held to be per se illegal,\(^{74}\) the rationale being that any agreement to fix prices, by its very nature, works to eliminate competition and control the market by forcing consumers to pay arbitrary and unreasonable prices.\(^{75}\) During the past one hundred years, however, the Supreme Court has completely retreated from its view that resale price maintenance should be per se illegal by systematically eroding its bans on each and every type of vertical restraint,\(^{76}\) the final blow being provided by the Court in *Leegin*.\(^{77}\) The following discussion will highlight pivotal Supreme Court cases dealing with vertical restraints in order to shed light on the reasoning underlying the Court’s recent shift away from per se rules of illegality in the area. As will become evident, the cause of the Court’s shift stems largely from two key factors: a lack of consensus as to the economic effects of vertical restraints and conflicting policy goals of the Sherman Act.\(^{78}\)

The per se rule of illegality for vertical price restraints was first declared by the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*\(^{79}\) In *Dr. Miles*, the complainant, a manufacturer of medicines,\(^{80}\) sought to control retail prices by requiring that its retail agents contractually agree to sell its goods at a fixed price.\(^{81}\) Dr. Miles argued that the reason for the policy was to protect the company’s goodwill and to ensure the realization of a fair profit on its manufactured goods.\(^{82}\) The *Dr. Miles* majority first noted that the agreement at issue eliminated all competition among wholesalers and retailers and, in effect, fixed the prices consumers would

\(^{74}\) Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911).

\(^{75}\) See e.g., United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); Brief for the American Antitrust Institute as Amicus Curiae Supporting Respondents at 13-14, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480) (stating that the very function of resale price maintenance is to raise the price paid by consumers and that resale price maintenance has such an effect is not in dispute).

\(^{76}\) *Leegin*, 127 S. Ct. at 2725 (overturning the per se rule against vertical minimum price maintenance); State Oil Co. v. Khan, 522 U.S. 3, 18-19, 22 (1997) (striking down the per se rule against vertical maximum resale price maintenance); *Sylvania*, 433 U.S. at 51 n.18, 59 (overruling the per se rule against vertical nonprice restraints).

\(^{77}\) *Leegin*, 127 S. Ct. at 2725 (overturning the per se rule against vertical minimum price maintenance).

\(^{78}\) See discussion infra Part II.B.

\(^{79}\) 220 U.S. 373, 408 (1911).

\(^{80}\) Id. at 374.

\(^{81}\) Id. at 375-81.

\(^{82}\) Id. at 375. Dr. Miles Medical Company argued that department stores and other discount retailers had created a "cut-rate" system which hurt the company's reputation and profitability. Id. The discount retailers would sell the medicines at prices far below what smaller retailers could manage. Id. This injured Dr. Miles as smaller retailers would stop carrying their medicines, reducing the overall sales volume and profitability of the company. Id. Dr. Miles also argued that the advertisement of its goods at discounted rates made them appear inferior to the public. Id.
ultimately pay. However, Dr. Miles argued that such a restraint was lawful as "a manufacturer is entitled to control the prices on all sales of his own products." In rejecting this contention and holding vertical price fixing to be per se illegal, the Court relied on two distinct premises.

First, the Court argued that the right of alienation is an essential right implicit in the ownership of property. Just because a manufacturer makes a product, does not mean that he may affix conditions as to the use or disposition of the item by a purchaser who obtains full title without offending public policy. Second, the majority recognized that contracts in restraint of trade are illegal if the restraint is unreasonable under the particular circumstances involved in the case at bar. Finally, the Court found the agreements created by Dr. Miles to be per se illegal by analogizing them to horizontal price fixing agreements. The majority argued that such agreements are void, as their sole purpose is to fix prices and harm competition, thus any restraint fixing prices must ultimately have the same effect on competition and should be held unlawful.

The scope of the Dr. Miles decision was first tested six years later in United States v. Colgate & Co. The United States alleged that Colgate had engaged in a system of resale price fixing by compelling adherence to

83. Dr. Miles, 220 U.S. at 399. The Court stated that the fact that the agreements at issue in Dr. Miles restrained trade "is obvious." Id. at 400. The means by which competition was restrained was set forth in detail:

[E]ach such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by [Dr. Miles], and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible.

Id. (emphasis added).

84. Id. at 400.
85. Id. at 408.
86. Id. at 404.
87. See id. at 404-05 (stating that if a party has no possibility of reverter, he has no right to restrict how the property may be used or disposed of). The notion that an agency relationship may allow the principal to set the price charged by his agent was reaffirmed fifteen years later in United States v. Gen. Elec. Co., 272 U.S. 476, 484-85, 487-88 (1926).
88. See Dr. Miles, 220 U.S. at 406-07. The Court stated that to be reasonable, a restraint must be fair both in reference to the interests of the parties concerned, and fair in reference to the public welfare. Id. at 407. The primary emphasis must always remain on the public welfare and the interests of the parties should not be considered unless the public interest is not implicated by the restraint in question. See id. at 406.
89. Id. at 408. Horizontal price fixing occurs when "competing companies . . . agree on the price at which the companies will sell their products or services [in the market]." THOMAS V. VAKERICS, ANTITRUST BASICS § 4.02 (2006). Horizontal price fixing is illegal per se. Id.
90. Dr. Miles, 220 U.S. at 408.
91. 250 U.S. 300 (1919).
retail prices by threatening that no further sales of goods would be made to any reseller who failed to follow its established prices. The Court held that a manufacturer may decline to make further sales to a retailer who fails to adhere to a retail price set by the manufacturer; the rationale being that without an agreement to fix prices, the Sherman Act is not offended. The Court cited Dr. Miles and distinguished it on the grounds that Dr. Miles Company had sought to prevent its retailers from freely exercising their right to sell via a contractual agreement. Thus, the fact that Colgate had not made any specific agreement requiring its retailers bind themselves to set prices was dispositive to the majority.

White Motor Company v. United States involved a challenge to the per se rule against vertical restraints as applied to nonprice vertical restraints. The Court rejected the use of a per se rule of illegality in analyzing exclusive territory restraints, citing that per se rules are only appropriate once it has been shown that the restraint has a "pernicious effect on competition and lack[s] any redeeming virtue." Thus, as the economic effects of such nonprice restraints were not obvious to the Court, a per se rule was inap-

92. Id. at 303.
93. See id. at 305.
94. See id. at 307.
95. Id. at 307-08. The Colgate doctrine drawn from this case, which allows manufacturers to decline to make further sales to a discounting retailer so long as the parties do not make an actual agreement to fix prices, has been recognized as difficult and risky for manufacturers to apply and thus of limited commercial use. Brief of PING, Inc. as Amicus Curiae Supporting Petitioner at 9-15, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480); Bork, supra note 12, at 280-81.
96. Colgate, 250 U.S. at 305. The Court emphasized that retailers were not contractually limited in disposition, explaining that:

The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do.

Id. at 305-06. The Sherman Act is designed to preserve free trade by prohibiting contracts that interfere with competition; however, the Act cannot be viewed as restricting the right of a trader to decide with whom he will deal, or the right to announce in advance the circumstances under which he will refuse to deal. Id. at 305-07 (noting that a trader who carries on a private business is free to sell to whoever he pleases—this includes the "unquestioned right" to stop dealing with any party that the trader thinks is acting unfairly or otherwise trying to undermine his business (citations omitted)).
97. 372 U.S. 253, 255 (1963). White Motor was accused of violating the Sherman Act by granting exclusive territories to its dealers and restricting the classes of persons to whom a dealer could sell. Id. at 255-57.
98. Id. at 263.
99. Id. (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).
propriate.\textsuperscript{100} Further, the Court declined to apply a per se rule of illegality by analogizing the vertical restraint to a horizontal restraint (as was done in \textit{Dr. Miles}), recognizing that in many cases, the effects of such restraints are not the same.\textsuperscript{101} Thus, \textit{White Motor} evidenced the Court’s hesitation both to impose per se rules, and to judge a business practice by analogy.\textsuperscript{102}

Seven years later, the Court again visited the subject of vertical territorial restrictions, returning them to a per se rule of illegality in \textit{United States v. Arnold, Schwinn & Co.}.\textsuperscript{103} In applying the per se rule, the Court ignored the reasoning in \textit{White Motor}, giving no real consideration to the economic effects of vertical territory restrictions,\textsuperscript{104} and instead, citing \textit{Dr. Miles}, placed dispositive weight on principles of alienation and title.\textsuperscript{105} The Court distinguished \textit{White Motor}, suggesting that the rule of reason as applied to vertical restraints was appropriate in that case as the vertical restraints were used to assist a new or failing firm.\textsuperscript{106} The dissent chastised the majority for ignoring \textit{White Motor} and suggested that protecting small businesses and

\begin{itemize}
  \item \textsuperscript{100}See \textit{id.} (explaining that without knowing the actual impact of these arrangements, it cannot be held that they have “such a pernicious effect on competition and lack any redeeming virtue” so as to be held per se illegal (quoting \textit{N. Pac. Ry. Co.}, 356 U.S. at 5)).
  \item \textsuperscript{101}See \textit{id.} The Court cited that the economic effects of the practice should be judged under the rule of reason as provided in \textit{Chicago Board of Trade} quoted in note 35, supra. \textit{White Motor}, 372 U.S. at 263.
  \item \textsuperscript{102}See \textit{id.} It is also important to note Justice White’s dissent in this case, specifically, his comment on resale price maintenance. Justice White noted: “Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.” \textit{id.} at 268 (White, J., dissenting). This quote and the comments by the majority about resale price maintenance, though not at issue in this case, evidences some of the early divided views within the Court on the subject of vertical minimum resale price maintenance. See \textit{id.} at 260 (majority opinion), 268 (White, J., dissenting).
  \item \textsuperscript{103}See \textit{id.} United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967). The next year, the Court re-affirmed \textit{Dr. Miles} and the use of a per se rule against vertical price fixing in \textit{Albrecht v. Herald Co.}, 390 U.S. 145, 152-53 (1968), relying largely on a retailer’s right to alienation and a concern for intrabrand competition.
  \item \textsuperscript{104}See \textit{id.} \textit{Schwinn}, 388 U.S. at 374-78. The Court relied more on formalistic line drawing by distinguishing \textit{White Motor}, considering Schwinn’s purpose for the program, relying on title and alienation theories, and completely failing to consider the economic effects of the Schwinn program. See \textit{id.} See also supra notes 99-100 and accompanying text.
  \item \textsuperscript{105}See \textit{id.} \textit{Schwinn}, 388 U.S. at 377-79. “If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of resale.” \textit{id.} at 379. Additionally, the Court made clear that this per se proscription was limited to situations where a manufacturer \textit{sells} its product to another, as to go beyond that would subject economically beneficial franchise and distribution systems to per se illegality. \textit{id.} at 380. When the seller is an agent or consignee of the manufacturer, the manufacturer may impose vertical restraints so long as they do not “unreasonably” restrict trade under the rule of reason. \textit{id.} at 380-81.
  \item \textsuperscript{106}See \textit{id.} at 374. This suggested that an otherwise unreasonable restraint may be saved if protecting a new or failing firm. See \textit{id.}
intramarket competition should be considerations of the Court in shaping antitrust policy.\footnote{107} In 	extit{Continental T.V., Inc., v. GTE Sylvania, Inc.,} the Court overruled its decision in 	extit{Schwinn} and sounded the Court's first major retreat from 	extit{Dr. Miles} by holding that all nonprice vertical restraints should be analyzed under the rule of reason.\footnote{109} The Court began by recognizing 	extit{Schwinn}'s error, both in failing to consider the competitive effects of the applicable vertical restraints and in ignoring 	extit{White Motor}'s instruction that per se rules are only appropriate when the effects of a practice have been shown to have a "pernicious effect on competition and lack . . . any redeeming virtue."\footnote{110} In judging the effects of nonprice vertical restraints, the majority first rejected the notion that alienation and the transfer of title should be considered in judging the applicability of per se rules.\footnote{111} The Court went on to consider the economic effects of vertical nonprice restraints, considering both the interbrand and intrabrand effects of such restraints,\footnote{112} but ultimately seemed to give more credence to the efficiency benefits vertical restraints could offer interbrand competition.\footnote{113} Interestingly, the majority seemed to agree with 	extit{Schwinn} insofar as protecting small business was a goal of protecting small business was later criticized by economic theorists as inefficient. \textit{Antitrust objectives and the objectives of small businesspeople are incompatible at a very fundamental level. The only kind of antitrust policy that would benefit small business would be one that sought to prevent large firms from underpricing less efficient small firms by sharing their lower costs with consumers in the form of lower prices." }\textit{Posner, supra} note 21, at 26.\footnote{107. \textit{Schwinn}, 388 U.S. at 385-88 (Stewart, J., concurring in part and dissenting in part). The goal of protecting small business was later criticized by economic theorists as inefficient. "Antitrust objectives and the objectives of small businesspeople are incompatible at a very fundamental level. The only kind of antitrust policy that would benefit small business would be one that sought to prevent large firms from underpricing less efficient small firms by sharing their lower costs with consumers in the form of lower prices."

\textit{Posner, supra} note 21, at 26.

\footnote{108. 433 U.S. 36 (1977).}

\footnote{109. \textit{Cont'l T.V., Inc. v. GTE Sylvania, Inc.}, 433 U.S. 36, 52 n.18, 57-59 (1977). The majority also reaffirmed the per se rule against vertical minimum price fixing and the fact that Congress had supported this view by repealing the Fair Trade Laws, a view that was later denied by the \textit{Leegin} majority. \textit{Id.} at 52 n.18. \textit{See also} \textit{Leegin Creative Leather Prods., Inc. v. PSKS, Inc.}, 127 S. Ct. 2705, 2724 (2007).


\footnote{111. \textit{Id.} at 52-54, 54 nn.20-21. The Court argued that considering the rule of alienation in antitrust analysis had long been criticized by commentators as "both a misreading of legal history and a perversion of antitrust analysis." \textit{Id.} The Court criticized reliance on the transfer of title and agency relationships as inaccurate as there had been no showing that such a relationship had any actual effect on competition. \textit{Id.} at 52-54.

\footnote{112. \textit{Sylvania,} 433 U.S. at 51-57. \textit{Intrabrand} competition is defined as "competition between the distributors -- wholesale or retail -- of the product of a particular manufacturer." \textit{Id.} at 52 n.19. In contrast, \textit{interbrand} competition is defined as "competition among manufacturers of the same generic product." \textit{Id.}

\footnote{113. \textit{Id.} at 52-54; \textit{Bork, supra} note 12, at 287. The Court also recognized the "free-rider" effect for the first time and argued it may be controlled with vertical restraints. \textit{Sylvania,} 433 U.S. at 55. "Free-riding" occurs when "discounting retailers . . . free ride on retailers who furnish services [by] capturing some of the increased demand those services generate" without providing the services themselves. \textit{Leegin,} 127 S. Ct. at 2715.}
concern of the Court, though, they ultimately argued that small businesses may actually be harmed by per se rules against vertical restraints.\textsuperscript{114} Thus, in the end, the majority simply could not justify a finding that vertical non-price restraints should be subject to a per se rule of illegality.\textsuperscript{115}

Following Sylvania, Business Electronics Corp. v. Sharp Electronics Corp.\textsuperscript{116} and Monsanto Co. v. Spray-Rite Service Corp. were decided by the Court.\textsuperscript{117} Both cases significantly impacted contemporary vertical restraint analysis, though neither altered the use of the per se rule for vertical price restraints or the rule of reason for vertical nonprice restraints. Monsanto, while largely dealing with the scope of the Colgate rule,\textsuperscript{118} seemed to inch the Court closer to overturning the per se rule against vertical price fixing by noting that the economic effects of both vertical price and vertical non-price restraints are, “in many, but not all, cases similar or identical.”\textsuperscript{119} Such a finding largely undermined the use of different tests for vertical price and vertical nonprice restraints. Business Electronics moved the Court even closer to striking down the per se rule against vertical price fixing by stating that, “interbrand competition is the primary concern of the antitrust laws.”\textsuperscript{120} As vertical price restraints have the largest negative impact on intrabrand competition,\textsuperscript{121} this rationale would allow the Court to overlook many of the “anticompetitive” effects of vertical price restraints.\textsuperscript{122}

The final major blow to the per se rule against vertical restraints prior to the Leegin decision came in State Oil Co. v. Khan,\textsuperscript{123} where the Court held that vertical maximum price fixing was no longer to be subject to a rule of per se illegality.\textsuperscript{124} The case overruled Albrecht v. Herald Co., which had held vertical maximum price fixing was per se illegal by largely equating

\begin{itemize}
  \item \textsuperscript{114} Sylvania, 433 U.S. at 56-57, 57 n.26.
  \item \textsuperscript{115} Id. at 57-59.
  \item \textsuperscript{116} 485 U.S. 717 (1988).
  \item \textsuperscript{117} 465 U.S. 752 (1984).
  \item \textsuperscript{118} See supra notes 91-96 and accompanying text for a discussion of Colgate.
  \item \textsuperscript{119} Monsanto, 465 U.S. at 762. The majority stated in a footnote that amici in the case had argued that the economic effects of vertical price and nonprice restraints are a “little different,” and while the majority noted that such a question was not at issue in the case, it nevertheless noted in the opinion the similar effects of both restraints. Id. at 761 n.7, 762.
  \item \textsuperscript{120} Bus. Elecs., 485 U.S. at 726. The majority argued that intrabrand competition need not be protected because interbrand competition would achieve the same beneficial ends. Id. at 725. Further, it was argued that intrabrand competition may actually be bad for small businesses as it may provide manufacturers with an incentive to vertically integrate into the retail sphere. Id. This decision again shows the Court’s consistent concern with the impact of antitrust doctrine on small businesses.
  \item \textsuperscript{121} See infra Part IV.B.1.
  \item \textsuperscript{122} See infra Part IV.B.1.
  \item \textsuperscript{123} 522 U.S. 3 (1997).
  \item \textsuperscript{124} Id. at 22.
\end{itemize}
vertical minimum price fixing with vertical maximum price fixing. In striking down that precedent, the Khan Court principally relied on the rationale that antitrust law is primarily concerned with interbrand competition, and that low prices benefit consumers and are "the very essence of competition." Thus, the Court was quick to recognize the most obvious use of vertical maximum price fixing was beneficial to consumers: keeping retail prices low and competitive. It is also worth noting that in undermining one of the justifications for a per se rule, that manufacturers may set retail prices too low, the Court for the first time seemed to imply that the interests of manufacturers and consumers were actually in line with each other. This rationale would later be used to argue that all vertical restraints (which are set by manufacturers) are not likely to be anticompetitive as manufacturers and consumers have the same market goals. Thus, the stage was set for the Court's final blow to the per se rule of illegality against vertical restraints—a retreat from the century old per se rule against vertical minimum price fixing.

### III. FACTS: LEEGIN CREATIVE LEATHER PRODUCTS, INC. V. PSKS, INC.

#### A. FACTUAL BACKGROUND

Leegin Creative Leather Products is a small, family-owned, women's fashion accessory company, which manufactures, distributes, and sells leather goods and accessories. In 1991, Leegin began operating under the brand name "Brighton," which now sells a variety of fashion accessories in over 5000 retail stores across the United States. Brighton's retail strategy

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126. Khan, 522 U.S. at 15.
127. Id. at 15-16.
128. See id. at 17.
129. See infra Parts IV.A-B.1.
is based on product differentiation; by offering its goods at small independently owned boutiques, Brighton is able to provide a level of service and personal attention to each customer which is unavailable at large discount and department stores.\textsuperscript{133}

PSKS, Inc., does business as Kay’s Kloset and operates a single women’s apparel store in Lewisville, Texas.\textsuperscript{134} Kay’s Kloset sells products from over seventy-five manufacturers, and at one time sold the Brighton line.\textsuperscript{135} In 1995, Kay’s Kloset began purchasing products and accessories from Brighton.\textsuperscript{136} To promote the new line, PSKS invested heavily in advertising and held “Brighton days” in its store.\textsuperscript{137} Kay’s Kloset became the top Brighton retailer in its area, with Brighton product sales accounting for nearly half of its annual profits.\textsuperscript{138}

In 1997, Brighton introduced its “Brighton Retail Pricing and Promotion Policy,” which announced that the company would no longer sell to any retailer that discounted Brighton products below suggested retail prices.\textsuperscript{139} Brighton instituted this policy to promote an “everyday fair price” retail approach in order to protect the Brighton image and to keep customers who bought “at the wrong moment” from feeling cheated when items went on sale.\textsuperscript{140} Additionally, Brighton adopted the policy to give retailers incentives to provide extra attention and care to the Brighton line.\textsuperscript{141} It reasoned that in order to encourage retailers to provide such service, it would need to ensure that retailers were rewarded with sufficient profit margins.\textsuperscript{142}

In 1998, Brighton introduced another marketing strategy called the “Heart Store Program.”\textsuperscript{143} Heart Stores were provided special incentives for promoting the Brighton brand in a special section of their store and promising to “follow the Brighton Suggested Pricing Policy at all times.”\textsuperscript{144} Kay’s

\begin{itemize}
  \item \textsuperscript{133} Brief for Petitioner at 2-3, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480).
  \item \textsuperscript{134} \textit{Leegin}, 127 S. Ct. at 2711.
  \item \textsuperscript{135} \textit{Id}.
  \item \textsuperscript{136} PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. App’x 464, 465 (5th Cir. 2006).
  \item \textsuperscript{137} \textit{Leegin}, 127 S. Ct. at 2711.
  \item \textsuperscript{138} \textit{Id}.
  \item \textsuperscript{139} \textit{Id}. The policy did contain an exception that allowed retailers to discount products the retailer did not intend to reorder from Brighton. \textit{Id}.
  \item \textsuperscript{140} Brief for Petitioner at 3, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480). Brighton believed that sales “degrade[] a manufacturer’s brand,” and thus adopted its pricing policy to avoid them altogether. \textit{Id}.
  \item \textsuperscript{141} \textit{Id}.
  \item \textsuperscript{142} \textit{Leegin}, 127 S. Ct. at 2711. Avoiding discounts was a way to ensure that profit margins for participating retailers were protected. \textit{Id}.
  \item \textsuperscript{143} \textit{Id}.
  \item \textsuperscript{144} PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. App’x 464, 465 (5th Cir. 2006).
\end{itemize}
Kloset became a Heart Store; however, Leegin revoked Kay's Kloset's status as a Heart Store later that year, though it allowed the company to continue selling Brighton products. 145

In 2002, Leegin discovered that Kay's Kloset had been discounting its entire Brighton line by twenty percent. 146 Leegin confronted Kay's Kloset about the discounts and was told that Kay's was discounting Brighton products in order to compete with another nearby Brighton dealer who was also selling Brighton products below suggested prices. 147 Leegin requested that Kay's discontinue its discounting of Brighton products, and when Kay's Kloset refused, Leegin halted all sales to the retailer. 148 The loss of Brighton was a significant blow to Kay's Kloset, whose profits and sales declined sharply from the loss of the line. 149

B. DISTRICT COURT DECISION

PSKS sued Leegin in Federal Court, alleging that Leegin violated the Sherman Act by "entering into agreements with retailers to charge only those prices fixed by Leegin." 150 The jury found for PSKS on the grounds that Leegin had agreed to fix retail prices of Brighton products and that PSKS suffered an injury as a result of said price fixing. 151 Following this ruling, Leegin made a motion for a new trial and renewed a prior motion for judgment as a matter of law. 152

In the motion, Leegin's primary argument was that the court erred when it refused to admit the testimony of Leegin's economic expert at trial who would have testified that Leegin's price fixing scheme was not anti-competitive. 153 The court rejected Leegin's motion on the grounds that excluding the expert's testimony was correct as a matter of law. 154 The court cited Dr. Miles in holding that vertical minimum price fixing is illegal per se under the Sherman Act. 155 Admitting Leegin's economic expert was thus not in error, because to allow such testimony would be to sanction an indi-

145. Leegin, 127 S. Ct. at 2711.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 2712.
153. Id. Leegin also appealed on the grounds that the damage model used to calculate PSKS's damages was "impermissibly speculative." Id. This issue is of no concern to the arguments set forth in this note.
154. Id.
155. Id.
rect challenge to the per se status of vertical minimum price restraints and "[w]hether the per se classification of such agreements is wise [was] not for [the district] court to decide." Additionally, the court rejected the contention by Leegin that the court could find an exception to the per se rule under the facts of the case at bar.

C. UNITED STATES CIRCUIT COURT OF APPEALS DECISION

Leegin appealed the decision of the district court to apply a per se rule of illegality to its pricing policy, but did not deny that it entered into price fixing agreements with retailers. Leegin made three arguments as to why the rule of reason, as opposed to a per se rule, should be applied in its case. The circuit court rejected each of the three claims made by Leegin in upholding the district court's decision.

First, Leegin argued that the Supreme Court has applied the per se rule of illegality inconsistently in the area of vertical price fixing. The court rejected that argument citing that in the area of vertical minimum resale price maintenance, the Supreme Court had consistently applied the per se rule of illegality established by Dr. Miles. Second, Leegin argued that its pricing policy benefited competition, and therefore should be given an exception to the per se rule. The court again rejected this contention on the

156. Id.  
157. Leegin, 2004 WL 5254322, at *1. Leegin relied on United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (holding that a business practice that is a per se violation of the Sherman Act must still be analyzed to discern whether it is "plainly anti-competitive," and thus falling within the reach of per se illegality), in making its argument for an exception to the per se rule under the circumstances. Leegin, 2004 WL 5254322, at *1.  
158. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. App’x 464, 466 (5th Cir. 2006).  
159. Id.  
160. Id.  
162. Id. at 466-67.  
163. Id. at 467. Leegin cited Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1 (1979) (holding that a “blanket license” that literally created a price fixing arrangement was not per se illegal as it was the license and pricing policy that created the competitive market for the goods and thus offered a competitive benefit to both consumers and producers), Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981) (holding that an agreement to divide the market was not per se illegal because it was a vertical nonprice restraint as opposed to a horizontal one), and United States v. Realty Multi-List,
grounds that no such exception has ever been recognized by the Supreme Court in the area of vertical minimum price fixing.\textsuperscript{164} Finally, Leegin challenged the exclusion of its economic expert, arguing that the expert would have opined as to the procompetitive benefits of Leegin's pricing policy, justifying the applicability of the rule of reason.\textsuperscript{165} The court again affirmed the district court, holding that the testimony of an economic expert is irrelevant when a competitive practice is held to be per se illegal.\textsuperscript{166} In such cases, the necessity of any economic analysis is avoided by the presumption of unreasonableness established by a per se rule.\textsuperscript{167}

IV. ANALYSIS: 

A. DECISION AND RATIONALE OF THE SUPREME COURT IN LEEGIN

The United States Supreme Court granted certiorari to Leegin, framing the question presented as "whether the Court should overrule the per se rule and allow resale price maintenance agreements to be judged by the rule of reason."\textsuperscript{168} In so framing the issue, the Court took direct aim at the wisdom and precedential value of \textit{Dr. Miles},\textsuperscript{169} which had sustained the per se illegality of vertical minimum price restraints for almost a century.\textsuperscript{170} In a 5-4 decision,\textsuperscript{171} the majority overruled \textit{Dr. Miles},\textsuperscript{172} and held that vertical price restraints were no longer subject to per se illegality, but should instead be analyzed under the "rule of reason."\textsuperscript{173}

The Court first attacked \textit{Dr. Miles}, arguing the case had been based not on the actual economic effects of vertical minimum price maintenance, but instead upon formalistic line drawing.\textsuperscript{174} It criticized the \textit{Dr. Miles}
Court for relying on the ancient common law,\textsuperscript{175} for relying on the concept of alienation,\textsuperscript{176} and for analogizing vertical restraints to horizontal restraints.\textsuperscript{177} Thus, the Court argued that \textit{Dr. Miles} never justified the imposition of a \textit{per se} rule of illegality for vertical price restraints in the first place, and so the question of whether or not a \textit{per se} rule should be applied to vertical minimum price restraints was, to some extent, examined in \textit{Leegin} for the first time.\textsuperscript{178}

The majority based the crux of its opinion on the rationale that contemporary economic analysis has shown that vertical minimum price restraints may have many procompetitive implications.\textsuperscript{179} The Court argued that modern economic study has shown not only that vertical minimum price maintenance may be procompetitive, but also that such practices are unlikely to be harmful to competition in a number of markets.\textsuperscript{180} Specifically, vertical minimum price restraints benefit the market by reducing intrabrand competition and, as a result, stimulate interbrand competition.\textsuperscript{181} Protecting interbrand competition has been cited as "the primary purpose of the antitrust laws."\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{175} \textit{Id.} (explaining that the state of the common law in years past is wholly irrelevant in evaluating the economic impact a certain practice has on today's American economy).
\item \textsuperscript{176} \textit{Leegin}, 127 S. Ct. at 2714 (arguing that concerns about restrictions on alienation applied not to chattels, but to land and the need of society to ensure that real property was not kept out of the stream of commerce, and so is irrelevant here).
\item \textsuperscript{177} \textit{Id.} In support of this contention, the Court cited \textit{Business Electronics Corp. v. Sharp Electronics Corp.}, 485 U.S. 717, 734 (1988), and \textit{Arizona v. Maricopa County Medical Society}, 457 U.S. 332, 348 (1982), which both recognized a fundamental difference between horizontal and vertical restraints. \textit{Id.}
\item \textsuperscript{178} \textit{Leegin}, 127 S. Ct. at 2714.
\item \textsuperscript{179} \textit{Id.} at 2710. Per \textit{se} rules are only appropriate when a given restraint "would always or almost always tend to restrict competition and decrease output," and when courts can predict with confidence that such a practice would be struck down under the rule of reason in almost all cases. \textit{Id.} at 2713 (quoting \textit{Business Electronics}, 485 U.S. at 723). Per \textit{se} rules must be based on actual economic effects and not "formalistic line drawing;" thus, if the economic effects of a business practice are not immediately obvious, the rule of reason should apply. \textit{Id.} (quoting Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977)).
\item \textsuperscript{180} \textit{Id.} at 2714-15. The Court also stated that even critics of vertical minimum resale price maintenance have recognized that the practice may have procompetitive justifications. \textit{Id.} at 2715.
\item \textsuperscript{181} \textit{Leegin}, 127 S. Ct. at 2714-15. See \textit{supra} note 112 for the definitions of interbrand and intrabrand competition. Interestingly, the Court proffered this contention by analogizing vertical price restraints to vertical nonprice restraints in much the same fashion as the \textit{Dr. Miles} Court analogized horizontal and vertical price fixing. \textit{Compare Leegin}, 127 S. Ct. at 2715, \textit{with Dr. Miles Med. Co. v. John D. Park & Sons Co.}, 220 U.S. 373, 408 (1911).
\item \textsuperscript{182} \textit{Leegin}, 127 S. Ct. at 2715 (quoting State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)).
\end{itemize}
The Court reasoned that the elimination of intrabrand competition was beneficial to the market on the grounds that curbing intrabrand competition encourages retailers to invest in services and promotional efforts. Such promotions and services may increase competition among rival manufacturers and also provide customers with the opportunity to choose between "low-price, low-service brands [and] high-price, high-service brands." Allowing manufacturers to fix minimum prices helps ensure that retailers providing such services are able to reap the benefit of the increased demand the services create and do not lose sales to discounting retailers who refuse to offer such services. Thus, the manufacturer is supposedly benefited as retailers compete over services that consumers prefer, and not over price. Additionally, the Court argued that manufacturers may use resale price maintenance to protect new firms and brands, to encourage "retailers to stock adequate inventories in the face of uncertain demand," and as a more efficient mechanism to encourage retailers to provide value-added services.

The Court next recognized that vertical minimum price maintenance may also have anticompetitive effects. First, any price fixing arrangement may be designed solely to obtain illegal monopoly profits and vertical resale price maintenance may be used to mask such a scheme. Second, vertical price restraints may be used to organize cartels at both the retail and

183. *Id.*
184. *Id.*
185. *Id.* This condition is known as the “free-rider effect.” See, e.g., *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977) (finding that although all retailers may benefit if each provided the additional services requested by the manufacturer, in a competitive market, some retailers may choose not to provide them); Bork, *supra* note 12, at 290 (“Customers will be able to go to the retailer who offers a display of the full line, explanation of the product, and so forth, and then purchase from the retailer who offers none of these things but gives a lower price. The result will be a diminution in the amount of sales and service effort by all retailers. When this is to the manufacturers disadvantage, he may wish to employ . . . resale price maintenance.”).
186. *Leegin*, 127 S. Ct. at 2716.
187. *Id.* “[Resale price maintenance can be used] 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.” (quoting *Sylvania*, 433 U.S. at 55). Recall that this justification for an exception for the per se rule against vertical non-price restraints was offered in *Schwinn*. See *supra* note 106 and accompanying text.
189. *Id.* The Court argued that using resale price maintenance and threatening termination of the business relationship may be a more efficient means of encouraging retailers to provide extra services as opposed to requiring that a manufacturer contract with each and every retailer as to what services the retailer must perform. *Id.*
190. *Id.*
191. *Id.*
manufacturer level, both of which are horizontal restraints and per se illegal.\textsuperscript{192} Finally, vertical price maintenance may be used by powerful retailers to “forestall innovation in distribution that decreases costs” or by powerful manufacturers to provide retailers an incentive not to sell a rival’s products.\textsuperscript{193} Based on the above economic factors, the Court concluded that vertical minimum price maintenance does not “always or almost always tend[] to restrict competition and decrease output,”\textsuperscript{194} and thus a rule of per se illegality is not appropriate.\textsuperscript{195}

The majority next went on to reject the main contentions set forth by the Respondent as to why Dr. Miles should be upheld. First, the Court argued that the administrative convenience of per se rules is not an adequate reason for their continued adherence.\textsuperscript{196} Second, the mere fact that vertical minimum price maintenance may lead to higher prices is not alone sufficient grounds to find the practice to be anticompetitive.\textsuperscript{197} Arguably, many decisions made by a manufacturer raise the ultimate prices of its goods and do not violate the Sherman Act—if done for the same reason, neither should vertical minimum price maintenance.\textsuperscript{198}

The Court concluded that the rule of reason and the market itself can adequately protect consumers from anticompetitive uses of vertical minimum price maintenance.\textsuperscript{199} Vertical price restraints instituted by a manufacturer are unlikely to be used to reap monopolistic retail profit margins since the interests of manufacturers and consumers in regards to retail profit margins are generally in line with each other.\textsuperscript{200} Additionally, vertical minimum

\textsuperscript{192.} Id. at 2716-17. “A cartel is an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or unfair competition and to allocate markets, and perhaps also to exchange scientific or technical knowledge or patent rights and to standardize products, with competition regulated but not eliminated by substituting competition in quality, efficiency, and service for price-cutting.” 54 AM. JUR. 2D Monopolies and Restraints of Trade § 20 (2007).

\textsuperscript{193.} Leegin, 127 S. Ct. at 2717.


\textsuperscript{195.} Id. at 2718.

\textsuperscript{196.} Id. (explaining that such reasoning would imply that per se rules are the norm rather than the exception). While per se rules may decrease administrative costs, they may also increase the total cost of production to society by prohibiting procompetitive conduct. Id.

\textsuperscript{197.} Id. (arguing that it is error to rely on pricing effects alone without a further showing that such pricing policies are anticompetitive).

\textsuperscript{198.} Leegin, 127 S. Ct. at 2719 (explaining that, inter alia, purchasing higher quality inputs and advertising increases the ultimate cost to consumers but are perfectly legal practices as they are designed to increase consumer demand).

\textsuperscript{199.} Id.

\textsuperscript{200.} Id. at 2718. The Court argued that retail profit margins are part of the manufacturer’s cost of distribution, which manufacturers desire to minimize in order to maximize the total volume of products it may sell. See id. at 2718-19. Additionally, if the price of a good is too high, consumers will substitute a rival good, further depressing the quantity of goods
price maintenance only poses a real threat to consumers when a large number of rival manufacturers adopt the practice. 201 Finally, vertical minimum price fixing can be abused by a manufacturer or retailer if and when they possess significant market power, making anticompetitive price fixing schemes less likely to occur and easier to police. 202

Finally, the Court held that *stare decisis* did not alone require continued adherence to *Dr. Miles*’ rule of per se illegality for vertical minimum price maintenance. 203 The majority recognized that while *stare decisis* concerns are highest in the area of statutory interpretation, its considerations are not as important in the case of the Sherman Act, which has long been treated as a common law statute. 204 Thus, rather than engage in a replete *stare decisis* analysis, the Court simply concluded that the rational underpinnings of *Dr. Miles* had been eroded and that the decision was inconsistent with contemporary antitrust jurisprudence in the area of vertical restraints. 205 The Court feared that if *Dr. Miles* was not overruled, other cases that have recently struck down per se rules banning other types of vertical restraints would come under attack. 206 Finally, the majority argued that since Congress had not taken direct action to ratify the *Dr. Miles* rule, the

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201. *Leegin*, 127 S. Ct. at 2719 (explaining that if only a small number of rival manufacturers imposed vertical price restraints to take advantage of monopolistic profits, interbrand competition would divert consumers to lower-cost substitutes).

202. See *id.* at 2720.

203. *Id.* ("[S]tare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997))).

204. *Id.* See *supra* notes 13-19 and accompanying text discussing the common law nature of the Sherman Act.

205. *Leegin*, 127 S. Ct. at 2721-22. The Court argued that economic analysis has shown the procompetitive impact vertical minimum price fixing may have on the market. *Id.* at 2720. Additionally, the majority noted that recent decisions have continually tempered the use of per se rules in the area of vertical restraints. *Id.*

206. *Id.* at 2722. The Court specifically argued that *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (allowing manufacturers to set suggested retail prices and to refuse to deal with retailers who ignore them), and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (imposing the rule of reason to judge vertical *nonprice* restraints), would be called into question. The Court argued that these cases allow manufacturers to take advantage of vertical price restraints, though they are less efficient than adopting an express vertical price restraint. *Leegin*, 127 S. Ct. at 2722. Specifically, the majority justified the comparison between *Dr. Miles* and other vertical price maintenance cases (most notably *Colgate*) by arguing that the economic effects of vertical restraints were the same. *Id.*
deference to which the Court must usually afford congressional action was not present. 207

Four Justices dissented, questioning both the economic and administrative underpinnings of the majority’s decision and taking particular issue with its *stare decisis* analysis. 208 The dissent argued that the fundamental problem with applying per se rules is weighing the arguments for and against such rules, which often point in different and conflicting directions. 209 First, the dissent noted the anticompetitive harms setting minimum resale prices poses. 210 Specifically, it cited that if used to induce retailers to provide intangible services, such practices may wastefully attract too many resources to an industry and inhibit the development of new and more efficient styles of retailing. 211 Additionally, vertical minimum price maintenance may provide a legitimate front for tacit collusion among manufacturers. 212 Conversely, the dissent noted three oft cited benefits that minimum resale price maintenance may bring: it may facilitate the entry of new firms and products into the market, curb “free-riding,” and may be used to help manufacturer’s stimulate demand for their products. 213

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207. *Id.* at 2724. In making this argument, the Respondent cited that Congress had passed the Miller-Tydings Fair Trade Act, Pub. L. No. 75-314, 50 Stat. 693 (1937), and the McGuire Act, Pub. L. 82-542, 66 Stat. 631 (1942), which authorized each State the option of passing a fair trade law legalizing intrastate vertical price restraints. The Respondent argued that when Congress repealed these Acts via the Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975), it ratified its view that vertical minimum price fixing should be per se illegal. *Leegin*, 127 S. Ct. at 2723-24. The Court argued that Congress did not ratify its view that vertical minimum price fixing should be per se illegal in passing the Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975), but rather it ratified its view that vertical minimum price fixing should not be per se legal. *Leegin*, 127 S. Ct. at 2724.

208. *Id.* at 2725-37 (Breyer, J., dissenting).

209. *Id.* at 2726. The dissent cited the three sets of conflicting considerations that must be weighed in an antitrust case: “(1) potential anticompetitive effects, (2) potential benefits, and (3) administration [of the law].” *Id.*

210. *Id.* at 2727-28.

211. *Id.* at 2727.

212. *Leegin*, 127 S. Ct. at 2724 (Breyer, J., dissenting). The dissent argued that manufacturers could use vertical minimum price maintenance to tacitly collude, “i.e., observe each other’s pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all.” *Id.* Vertical minimum resale price maintenance will make it easier for rival firms to discover when a manufacturer has lowered its retail prices, triggering price competition. *Id.* Thus, vertical minimum price fixing agreements, “tend to prevent price competition from breaking out; and . . . will thereby tend to stabilize producer prices,” as manufacturers would rather keep the status quo and retain higher profits. *Id.*

213. *Id.* at 2728. See *supra* notes 185-87 and accompanying text for a discussion of “free-riding” and how vertical price restraints may help the market entry of new firms and products. The dissent argued that vertical price restraints may be used to stimulate demand by producers if they have some special reason for wanting to stabilize prices (i.e. curbing free-riders or facilitating market entry). *Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting).
The dissent argued that the per se rule against vertical minimum price fixing should prevail, not because of the particular harms vertical minimum price maintenance may pose, but rather due to administrative concerns as to whether courts can accurately and consistently police vertical price restraints. \(^{214}\) It argued that "antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views ... because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedent only as they are applied by judges and juries in courts."\(^{215}\) It noted that economists have discovered a number of harms posed by vertical minimum price maintenance, but then took particular issue with the supposed benefits vertical minimum price restraints may offer, arguing that economists have failed to show with any certainty that the benefits offered by vertical price maintenance are needed in the market.\(^{216}\) Analyzing vertical minimum price maintenance under the rule of reason would invite lengthy trials involving competing experts who would present highly technical data that judges and juries cannot fairly be expected to understand and apply.\(^{217}\) Thus, if judges and juries cannot easily identify the instances in which the benefits of vertical minimum price maintenance outweigh the harms and if the actual benefits of vertical minimum price maintenance are themselves unclear, the administrative need for a per se rule should prevail.\(^{218}\)

Finally, the dissent took issue with the majority’s *stare decisis* analysis, arguing that the Court erred in failing to consider the ordinary criteria for overturning an earlier case.\(^{219}\) First, it argued that the question of

As producers usually benefit from price competition among their retailers and would only benefit from vertical price fixing if needed for a special reason, vertical minimum price maintenance programs instituted by manufacturers carry a presumption of legitimacy. \(^{214}\) \(^{215}\) \(^{216}\) \(^{217}\) \(^{218}\) \(^{219}\)
whether or not to overrule *Dr. Miles* is a question of statutory construction where principles of *stare decisis* should apply more "rigidly." Second, the dissent noted that *stare decisis* should apply with special weight in the *Leegin* case because of the long reliance on the *Dr. Miles* rule. Third, *Dr. Miles* has not made the legal regime "unworkable," but rather has proved practical and has simplified the complex analysis that would stem from analyzing vertical minimum price restraints under the rule of reason. Fourth, *Dr. Miles* does not "unsettle" the law. Fifth, the dissent argued that *Dr. Miles* should not be overruled as its rule involves property and contract rights, where significant public reliance interests are involved. Sixth, the *Dr. Miles* rule has become "embedded in our national culture" as consumers prefer low prices and creates a bright line rule easily understood by businesses, consumers, and the judicial system alike and thus should be upheld. The dissent argued that the only contrary *stare decisis* factor the majority points to is that "from the beginning . . . [the Court] has treated the Sherman Act as a common law statute." The dissent discredits this claim by stating that Congress has expressed its approval for a per se rule against vertical minimum price fixing, and that the common law does not allow the outright overruling of precedent.

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220. *Leegin*, 127 S. Ct. at 2734 (Breyer, J., dissenting). In the area of statutory construction, *stare decisis* should weigh heavily as Congress is free to change the Court's interpretation of the law. *Id.* The dissent wholly disagrees that *stare decisis* should be any less important in the area of the Sherman Act merely because the Act is designed to be shaped as the common law. *See id.*

221. *Id.* (noting that *Dr. Miles* has been deemed good law for almost one-hundred years).

222. *Id.* at 2734-35.

223. *Id.* at 2735. The dissent argued that overruling *Dr. Miles* is the act that would unsettle the law. *Id.*

224. *Leegin*, 127 S. Ct. at 2735 (Breyer, J., dissenting). The dissent explained that many discount retailers (and internet retailers) have "financed, structured, and operated their businesses" in reliance on *Dr. Miles* by investing "time, money, and labor in an effort to bring . . . lower cost goods to Americans." *Id.* Allowing manufacturers to limit price competition presents a barrier to entry for such "low-price innovators" and threatens their business model. *Id.* The dissent also argued that the general public has relied on *Dr. Miles* and discount retailers by investing in shopping malls where discounters are the anchor store, by deciding to purchase homes near discount retailers, and by choosing to shop at discount retailers. *Id.*

225. *Id.* at 2736.

226. *Id.*

227. *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting). *See supra* note 207 and accompanying text (discussing how congressional approval of the per se rule for vertical minimum price fixing may be discerned).

228. *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting). The dissent argued that the scope and effect of such a rule must be gradually eroded over time until the courts may finally put it to rest. *Id.*
B. WHY THE LEEGIN MAJORITY GOT IT ALL WRONG

1. The Court's Underlying Economic Assumptions are Misguided

Underlying the Court's holding in Leegin was the rationale that per se rules are only appropriate when a particular competitive practice has been shown to "always or almost always tend to restrict competition and decrease output." As per se rules are not appropriate where the economic impact of a business practice is not immediately obvious, the fact that economic experts largely disagree as to the market impact of a particular business practice may be sufficient to allow the Court to find that a per se rule is not appropriate. However, to find that a practice "always or almost always" results in harm to the market, other factors must also be considered, such as to what extent the market may even allow for the beneficial use of a particular business practice. The majority ignored this key point of analysis, arguing instead that because contemporary economic analysis has shown some competitive uses for vertical price maintenance, it should be analyzed under the rule of reason. This reasoning misses the point, since it indicates nothing about whether those procompetitive uses are far more likely to be the aim of vertical minimum price maintenance schemes than anticompetitive practices.

The Court's failure to consider how and to what degree vertical minimum price maintenance may be applied in the market shows, among other things, the majority's error in relying on economic theory as opposed to economic analysis.

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230. See id.
232. See, e.g., Leegin, 127 S. Ct. at 2730 (Breyer, J., dissenting) (noting that when considering whether a practice is anticompetitive it is not solely the possible benefits and potential harms of the practice which must be weighed, but also how often the market may give rise to situations allowing for the beneficial use of the practice; if the market will rarely allow for the beneficial use of a practice, it will "almost always" tend to be anticompetitive in practice). In dissent, Justice Breyer asked such a question about "free riding," and stated, "the ultimate question is not whether, but how much, free riding [that may be combated with vertical price maintenance] takes place. And, after reading the briefs, I must answer that question with an uncertain 'sometimes.'" Id.
233. Id. at 2714-15.
234. Id. at 2730 (Breyer, J., dissenting). This rationale is evidenced by that fact that economists have even argued that horizontal price fixing, which is illegal per se and largely viewed as lacking any socially useful benefits, may have procompetitive uses if the scheme is adopted ancillary to a procompetitive activity. John Kern, Comment, Price Manipulations in the Commodity Futures Markets: A Reexamination of the Justifications for Simultaneous Causes of Action Under the CEA and the Sherman Act, 34 UCLA L. REV. 1305, 1324-25 (1987).
empirical data. Rather, the Court relied solely on theory drawn from economic models to reach its conclusion in \textit{Leegin}. The problem with relying solely on economic models is that models, as opposed to quantitative data, base their conclusions on \textit{assumptions} about the market that may or may not prove accurate. Such market assumptions are often themselves hotly contested by economists—principle evidenced by the recent shift within antitrust jurisprudence from analysis under the Harvard School of economic thought to analysis under the Chicago School. Further, a number of key assumptions underlying the Chicago School, especially those assumptions having a major impact in the area of vertical price restraints, have recently come under fire. With the factual assumptions upon which

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\item[236.] Ill. Brick Co. v. Illinois, 431 U.S. 720, 742-43 (1977) (noting that the “drastic simplifications” made by economic theory must be abandoned in considering antitrust policy and that the “sound laws of economics” only add difficulty and uncertainty into antitrust analysis). \textit{See also} James C. Cooper, Luke M. Froeb, Dan O’Brien & Michael G. Vita, \textit{Vertical Antitrust Policy as a Problem of Inference}, 23 Int’l J. Indus. Org. 639 (2005). There is a severe lack of quantitative data showing the effects of resale price maintenance; however, two articles were located which analyze such data. \textit{See supra} note 243 for an overview and brief critique of their findings. Though not utilized by the majority in \textit{Leegin}, the use of empirical data in the area of antitrust law has “increased substantially over the past decade” through the use of Econometrics, which combines economic theory and the statistical study of market data to form its conclusions. Gregory J. Werden, \textit{A Perspective on the Use of Econometrics in Merger Investigations and Litigation}, 16 Antitrust 55, 55 (Spring 2002).
\item[237.] \textit{See Leegin}, 127 S. Ct. at 2713-20.
\item[238.] Piraino, \textit{supra} note 47, at 364 (noting that the Chicago School’s economic model is overly simplistic as it assumes the market will always behave perfectly, information is equally available to all competitors, and that entry is not equally possible for all firms). \textit{See also} Jean Wegman Burns, \textit{Vertical Restraints, Efficiency, and the Real World}, 62 Fordham L. Rev. 597, 605-07 (1993) (citing the economic assumptions made the Chicago school as: 1) efficiency is the central concern of consumers, 2) any other consumer concerns besides efficiency are economically irrelevant, 3) interbrand competition is the key to maintaining low prices and market efficiency, 4) vertical restraints are an economically efficient way of broadening consumer choice, 5) manufacturer’s marketing choices must prevail over that of the retailer’s, 6) any discount retailer is simply a “free-rider,” and 7) that the market will correct any competitive problems and will do so in a more efficient and less intrusive manner than the courts). Additionally, at a basic level, economic models almost always rely on the idea that consumers and businesses always act rationally—that business seek to maximize profits and consumers to maximize their own interests—a theory adopted by Milton Friedman. Carl T. Bogus, \textit{Introduction}, ROGER WILLIAMS U. L. Rev. 1, 3-5 (2000). A view that may be over-simplistic and is often deemed merely an assumption rather than economic fact. \textit{See id}.
\item[239.] \textit{See supra} note 63 and accompanying text for an overview of the distinctions between the Harvard and Chicago Schools of economic thought.
\item[240.] Jean Wegman Burns, \textit{Challenging the Chicago School on Vertical Restraints}, 2006 Utah L. Rev. 913, 916-19 (2006) (explaining that informational dysfunctions, powerful multi-brand retailers, and sunk costs may all impact the market in way that may not be self-correctable; additionally, it is argued that consumers place a higher importance on intramarket competition, prefer low prices over efficiency, and want businesses to act fair and
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the Chicago School is based called into question, the need for the majority to have considered some type of quantitative data was exacerbated, but still ignored.

The problem inherent with relying on economic theory alone may have been on the majority’s mind when it stated, “per se rule[s] [are] appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that [a practice] would be invalidated in all or almost all instances under the rule of reason.” However, if the majority was to undermine Dr. Miles, and show its theoretical underpinnings had been eroded, it must have borne the burden of showing that courts cannot predict with confidence that vertical price restraints would “be invalidated in all or almost all instances under the rule of reason.” The majority failed to rise to this challenge, relying solely on theory and failing to cite any quantitative study in its entire opinion—studies which have found that vertical price restraints limit intrabrand competition and harm consumers by raising prices.

ethically more so than they want the market to be perfectly efficient). See also Warren S. Grimes, *The Future of Distribution Restraints Law: Will the New Learning Take Hold?*, 2006 UTAH L. REV. 885, 886-96 (2006) (citing a number of reasons as to why the Chicago School is based on false assumptions, but specifically citing the error of ignoring intrabrand competition); Robert L. Steiner, *Intrabrand Competition – Stepchild of Antitrust*, 36 ANTITRUST BULL. 155 (1991) (arguing that intrabrand competition is important to the market and beneficial to consumers and that the simplistic way the Chicago School views intrabrand competition incorrectly discounts the economic benefits of the practice).
Further, the majority erred by ignoring the impact that vertical minimum price fixing has on intramarket competition.\textsuperscript{244} Both the Chicago School and the Supreme Court rely on the principle that \textit{interbrand} and not \textit{intrabrand} competition is the best means to foster market efficiency and thus should be the focus of antitrust jurisprudence and legal analysis.\textsuperscript{245} This view is based on the theory that retail markets tend to be perfectly competitive, that they are a "pass-through" market where any change in the manufacturing market results in an equal change in the retail market.\textsuperscript{246} However, this view is in error since it fails to take into account retailing as a separate and distinct market process and ignores the fact that the manufacturer/retailer relationship is often competitive as opposed to complementary as assumed by the Chicago School.\textsuperscript{247} Further, the Chicago School inherently assumes that interbrand competition even exists or is relevant in a given market, an assumption that may be inaccurate in the age of multi-brand retailing and marketing segmentation.\textsuperscript{248} In such cases, ignoring above-average, or monopolistic profits as its loss after the practice was outlawed was not offset in the market. See \textit{id}. Another study cited showed that when vertical price maintenance was eliminated from the market, neither manufacturers nor retailers realized any notable change in marginal returns. \textit{Id.} Finally, one study noted by the authors showed that retail outlets controlled by the manufacturer had higher retail prices than non-manufacturer controlled, or independent retail outlets, evidencing the fact that vertical minimum price maintenance tends to lead to higher consumer prices. See \textit{id}.


\textsuperscript{245} Burns, \textit{supra} note 238, at 605 (explaining that the Chicago School relies on the theory that interbrand and not intrabrand competition is the key to low prices and market efficiency); \textit{Bus. Elecs. Corp. v. Sharp Elecs. Corp.}, 485 U.S. 717, 725 (1988) (noting that interbrand and not intrabrand competition is the central concern of antitrust jurisprudence). See also \textit{supra} note 112 for definitions of interbrand and intrabrand competition.

\textsuperscript{246} Harbour, \textit{supra} note 244, at 987.

\textsuperscript{247} Harbour, \textit{supra} note 244, at 987, 992-94 (citing Robert L. Steiner, \textit{The Third Relevant Market}, \textit{45 ANTITRUST BULL.} 719, 724 (2000)); Grimes, \textit{supra} note 240, at 887-88. Retailing creates vertical competition between manufacturers and retailers who are each vying for the largest share of a product's retail price. Harbour, \textit{supra} note 244, at 987, 992-94 (citing Robert L. Steiner, \textit{The Third Relevant Market}, \textit{45 ANTITRUST BULL.} 719, 724 (2000)). The competitive nature of the manufacturer/retailer relationship is evidenced by the fact that empirical evidence tends to show that the profit margins of manufacturers and retailers are inversely related. \textit{Id.} If vertical firms had a complimentary relationship, their profit margins would never be inversely related. \textit{Id.} The impact of retail sales on the market is also evidenced by the fact that such sales accounted for over $3.5 trillion worth of the U.S. economy in 2004. \textit{U.S. CENSUS BUREAU, ANNUAL BENCHMARK REPORT FOR RETAIL TRADE AND FOOD SERVICES: JANUARY 1992 THROUGH FEBRUARY 2005}, at 8 tbl.4 (March 2005), \textit{available at} http://www.census.gov/prod/2005pubsbr04-a.pdf.

\textsuperscript{248} Grimes, \textit{supra} note 240, at 887. Brand selling segments the market and gives individual firms a higher degree of brand loyalty, or a "power of price" that may allow a firm to raise prices in order to obtain monopoly profits as the increased brand loyalty will
trabrand competition can retard the innovation of new forms of retailing, and lead to increased retail prices in contrast to the overwhelming consumer support of discount retailing. Thus, as intrabrand competition may protect consumers by serving as a check on interbrand competition and have serious procompetitive implications, vertical restraints curbing such competition may be particularly harmful to the market. At the very least, the Chicago School and the courts should acknowledge the benefits of intrabrand competition and judge market efficiency through a “dual-stage” model that considers the effects of both interbrand and intrabrand competition.

Those in favor of focusing on interbrand competition often justify the use of vertical minimum price maintenance by arguing that manufacturers and consumers both share the desire to have retail distribution achieved at the lowest possible cost and thus manufacturers will protect consumers’ interests. This argument has a fundamental flaw in the area of vertical price restraints. Scholars have recognized that manufacturers always seek to maximize their profits when operating a business. Thus, they will seek to maximize consumer demand and consumer prices (total revenue = the number of units sold x price of each unit), as well as to minimize their total

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249. Robert L. Steiner, How Manufacturers Deal with the Price-Cutting Retailer: When are Vertical Restraints Efficient?, 65 ANTITRUST L.J. 407 (1997) (explaining how vertical restraints may be used by manufacturers to the detriment of the market by curbing the introduction of more efficient forms of retailing).

250. Burns, supra note 238, at 632-35.

251. See Harbour, supra note 244, at 991.

252. See Harbour, supra note 244, at 988.

253. BORK, supra note 12, at 290. The majority in Leegin agreed with this view. The Court found that, “[I]n general, the interests of manufacturers and consumers are aligned with respect to retail profit margins.” Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2709 (2007). Low retail prices benefit consumers who want to pay discount prices and also benefit manufacturers by increasing the consumer demand for their products, which increases the total quantity of goods sold and thus results in higher profits. See BORK, supra note 12, at 290.

254. See Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 GEO. L.J. 1487, 1491-92 (1983) (noting that relying on the conclusion that manufacturers are representing consumer interests is an impractical view of the distribution system, rather, it is likely that in the long run both manufacturers and retailers will benefit from increased retail prices).

Vertical minimum price maintenance advocates argue that manufacturers will use vertical minimum price maintenance to protect consumers by insuring that retailers keep prices low, which will keep distribution costs low and keep consumer demand for the manufacturer's products high. However, this argument ignores the fact that in maximizing profits, manufacturers seek both to minimize the cost of distribution and to maximize the per unit price charged to consumers. By definition, vertical minimum resale price maintenance allows manufacturers to achieve such an end. Thus, as manufacturers may have a very real interest in increasing the retail prices of their goods, it would be cavalier to assume that manufacturer and consumer interests are always in line with each other.

Proponents of the Chicago School argue that any anticompetitive effects of vertical resale price maintenance will be corrected by the free market and competition. They maintain that vertical price restraints will be kept in check by interbrand competition. Additionally, they argue that vertical minimum price fixing instituted by a manufacturer must provide some benefit to the market because manufacturers, without receiving some benefit in return, have no desire to provide retailers with higher profit mar-

256. See id.
258. See STONIER & HAGUE, supra note 255, at 316; see also Burns, supra note 240, at 913 (noting that vertical price maintenance leads to increased retail prices); Pitofsky, supra note 254, at 1493 (arguing that manufacturers may use RPM to keep wholesale prices high and thus in the long run, consumer and manufacturer's interest are not in line with each other). Additionally, as monopolistic firms exploit their position by setting the price of their products at a point above that where the competitive market would justify, vertical price restraints may also be used as a tool by monopolistic firms to allow them to more accurately set monopolistic prices in the retail market. See J.R. Gould & B.S. Yamey, Professor Bork on Vertical Price Fixing, 76 YALE L.J. 722, 723 (1967) (arguing that vertical price maintenance leads to increased prices and lower output—two of the staples of a monopolistic firm).
259. POSNER, supra note 21, at 22.
260. Bork, supra note 12, at 290 (stating that vertical restraints are checked by the market as they have no effect on interbrand competition); POSNER, supra note 21, at 10, 22 (noting that almost all firms have perfectly elastic demand for their products as a result of interbrand competition, and thus cannot take a monopolist position in the market; the market power of the firm plays a key role in analyzing the possible anticompetitive effects of a vertical price fixing scheme as firms who only supply a small number of the products in a particular market are particularly subject to competition and thus cannot alter their price without driving their customers to substitute brands). Professor Posner argues that interbrand competition serves as a check because when a firm obtains a monopoly and is able to achieve above normal profits, the above normal profits will provide other firms with an incentive to enter the market and compete. POSNER, supra note 21, at 10. Additionally, if substitutes are already available in the market, any increase in the price of a good by a firm (who has elastic demand) will result in consumers substituting a rival brand. POSNER, supra note 21, at 22. In both cases, the end result is that competition will drive prices back down and destroy the monopoly. POSNER, supra note 21, at 10, 22.
Finally, supporters of vertical price restraints maintain that even though such restraints may be anticompetitive, they are still beneficial to the market in the aggregate as the “cost” to the economy of the restraint may not be more than the offsetting benefit consumers receive from its presence. These arguments are short sighted for a number of reasons.

First, interbrand competition may not provide the check on the market that theorists believe. Retail price competition may be harmful to manufacturers because it may put pressure on a manufacturer to reduce its wholesale prices—decreasing its total return. Vertical minimum price maintenance may easily be used to remedy this issue by allowing the manufacturer to expressly control retail price competition. The Court in *Leegin* recognized the danger such power posed by noting that vertical minimum price maintenance may facilitate horizontal cartels between manufacturers to eliminate retail price competition. However, the Court ignored the very real possibility that even absent horizontal cartel agreements, vertical resale price maintenance may lead to the tacit coordination of manufacturers to limit retail price competition. If retail prices are visibly fixed by manufacturers, who largely lack any utility in retail price competition, price competition may be largely undercut by manufacturers who will prefer to maintain the status quo and keep retail prices high. If interbrand competition is limited by resale price maintenance, the fact that intramarket competition is ignored by antitrust jurisprudence and almost completely restricted by vertical minimum price fixing becomes very damaging to the market, as intra-

261. *Bork*, *supra* note 12, at 290 (noting that courts are less concerned with intrabrand competition because manufacturers desire to minimize retail price competition).

262. Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229 (2005). This argument in essences sets forth the theory that although vertical price restraints may be anticompetitive, they are not anticompetitive to the point where the economy is made worse off in the aggregate, and thus a monopoly does not exist. *Id.*

263. *Phillip E. Areeda, Antitrust Law ¶ 1606c, at 96-98 (1989).*

264. *See supra* note 192 and accompanying text (noting the *Leegin* Court’s acknowledgment of this argument).


266. *See supra* note 261 and accompanying text.

267. *See Areeda, supra* note 263, ¶¶ 1602d, 1606a, 1606b, at 31, 91, 96 (noting that if resale price maintenance was practiced at all times in an industry when “fair trade” laws permitted it, it was often practiced by *many* manufacturers). It was noted that manufacturers may individually adopt vertical price restraints for “legitimate” reasons, or with the hope that rival firms will do the same; either way, the end result is industry-wide price coordination among manufacturers. *See Areeda, supra* note 263, ¶¶ 1602d, 1606a, 1606b, at 31, 91, 96. If many manufacturers adopted retail price maintenance, interbrand competition would be reduced and manufacturers would have a reduced incentive to provide wholesale, or retail, price cuts. *See Areeda, supra* note 263, ¶¶ 1602d, 1606a, 1606b, at 31, 91, 96.
market competition is the only other means through which the market may be kept competitive.268

Additionally, the assumption that most manufacturers in the market experience purely elastic demand and thus would not be able to take advantage of vertical minimum price fixing may ignore market realities.269 As the market has become more competitive, retailers and manufacturers seek additional means through which to maintain competitive advantages.270 One such way that manufacturers and retailers have sought to achieve this end is by segmenting the market.271 Market segmentation is a marketing concept that recognizes that the needs and wants of consumers are all somewhat different (or "heterogeneous").272 By dividing the market based on consumer needs and wants into "sub-markets," a firm may obtain a competitive advantage by focusing on meeting the demands of one or many individual sub-markets.273 Marketing segmentation will thus provide a firm with a competitive advantage and in turn, make the demand for the goods sold or manufactured by the company more inelastic.274 While marketing segmentation may benefit the market as consumers are better able to purchase goods which more closely meet their needs and wants,275 the inelastic demand inherently formed by the practice also creates an opportunity, albeit a small one, for a manufacturer to extract a small level of monopoly profits.276 Further, as information technology and database marketing have

268. Grimes, supra note 240, at 887.
269. See supra note 260 for a discussion of this rationale.
270. See Judith McNamara & Lucy Cradduck, Can We Protect How We Do What We Do? A Consideration of Business Method Patents in Australia and Europe, 16 INT'L J.L. & TECH. 96, 97 (2008) ("Businesses have an incentive to maintain any competitive advantage and to protect good business models . . . .").
271. MICHAEL WEDEL & WAGNER A. KAMAKURA, MARKET SEGMENTATION: CONCEPTUAL AND METHODOLOGICAL FOUNDATIONS 3 (Jehoshua Eliashberg ed., 2d ed. 2000) (noting that intramarket competition has become more important as brand selling and marketing segmentation practices have become widespread).
272. WEDEL & KAMAKURA, supra note 271, at 3.
273. WEDEL & KAMAKURA, supra note 271, at 3.
274. See WEDEL & KAMAKURA, supra note 271, at 3. As the firm is gearing its products to meet the needs of a particular sub-market, the demand for the good from that sub-market will be increased. This will also make demand for the product more inelastic as the fact that the product has been closely tailored to meet the needs of the sub-market will make rival goods less attractive and thus less comparable substitutes. See WEDEL & KAMAKURA, supra note 271, at 3. The existence of such "sub-markets," their effect on demand, and their connection to antitrust jurisprudence was recognized by the Court in Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
275. See WEDEL & KAMAKURA, supra note 271, at 3.
276. See supra note 260 and accompanying text. While a sub-market may be small, the widespread use of marketing segmentation may create a market environment where many manufacturers are able to exploit a small monopoly on a single sub-market, but with the aggregate effect being a significant amount of monopoly profits being achieved by the
made it easier for marketers to identify and react to consumer needs and wants, a real threat exists that firms may be able to achieve and sustain such a position.\footnote{277}

Finally, advocates for eliminating the per se rule against resale price maintenance argue that even if vertical minimum price restraints may increase prices to consumers, there is no reason to suspect that such a price increase is anticompetitive, as benefits stemming from such practices will likely outweigh any “costs” to the market.\footnote{278} These advocates argue that manufacturers adopt vertical minimum price fixing programs to ensure that all retailers provide certain services and products, which add value to a manufacturer’s goods.\footnote{279} The problem with this argument is that resale price maintenance advocates may be ignoring the very consumer welfare they argue antitrust law is designed to protect.

Consumer welfare is tied to the level of “utility” consumers derive from the market—the level of satisfaction a consumer is able to achieve from his available financial resources.\footnote{280} The problem with the Court’s holding in \textit{Leegin} is it relies on the view that consumer utility is maximized solely by a perfectly efficient market with maximum output at the lowest price possible.\footnote{281} While this viewpoint may ignore a number of market functions from which consumers derive utility,\footnote{282} the problem with vertical minimum price fixing is it \textit{directly} impedes a clearly identified market practice from which consumers derive particular utility: discount retailing.\footnote{283}
Resale price maintenance is particularly harmful to discount retailing because by definition, vertical minimum price fixing allows manufacturers to set the minimum price at which a product may be sold in the retail market, placing a cap on discount retailers' ability to compete via low prices. Such a blatant impediment to discount retailing may not be justified as many discount retailers are able to offer low prices not because they eliminate value-added services and act as "free-riders," but because their distribution system is more efficient than other retail firms.

2. The Majority Failed to Adequately Address Stare Decisis Concerns

In Leegin, the majority overruled a precedent case that had been on the books for nearly one hundred years, but offered little explanation or justification for its decision in light of notions of stare decisis. Specifically, the majority argued that the Sherman Act is a common law statute and that Congress intended the Court to be free to shape antitrust policy so the law would, "evolve with new circumstances and new wisdom." Thus, the Court found justification for its minimal adherence to stare decisis in Leegin by citing that the doctrine has less weight in cases involving the Sherman Act where the "general presumption that legislative changes should be left to Congress has less force."

Stare decisis involves a policy judgment by the Court as to whether or not it is appropriate to overturn a precedent case and reflects the rationale that in many cases, "it is more important that the applicable rule of law be

284. BORK, supra note 12, at 436.
285. Pitofsky, supra note 254, at 1493. This argument largely undercut the combating "free-riders" justification raised by the majority in Leegin. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007); supra note 185 and accompanying text for a discussion of the "free-rider" effect.
286. Leegin, 127 S. Ct. at 2723-25. And, in discussing stare decisis, one legal authority has noted:

Stare decisis is a judicial policy, based on the principle that, absent powerful countervailing considerations, like cases should be decided alike in order to maintain stability and continuity in the law. The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.
20 AM. JUR. 2D Courts § 129 (2007).
288. Id. at 2720 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).
settled than that it be settled right.”289 Such a policy promotes, “even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”290 The doctrine requires the Court to consider the pragmatic and prudential effects of overruling an established rule of law and compare the costs of affirming or overturning a settled case.291 The Court should not overturn prior holdings lightly,292 especially when a case involves issues of statutory interpretation, such as in Leegin, where Congress is free to change the Court’s interpretation of the law.293

In conducting its analysis, the majority erred by ignoring altogether many of the traditional criteria utilized by the Court in considering the issue of stare decisis in a particular case.294 In Planned Parenthood v. Casey,295 the Court stated that in considering stare decisis, it will consider 1) whether a case’s central rule has been found unworkable, 2) whether the rule could be removed without serious inequity to those who have relied on it, or without significant damage to society, 3) whether the law’s growth has left the rule a doctrinal anachronism discounted by society, and 4) whether the central premise of the case has so far changed as to render its central holding irrelevant or unjustifiable in dealing with the issue it addressed.296 Additionally, the Court will apply stare decisis with particular care when property or contract rights are implicated.297

First, the central ruling of Dr. Miles (per se rule against vertical minimum resale price maintenance) cannot be said to be unworkable. The per se rule against vertical minimum price fixing was well settled law for nearly a century.298 The rule provided administrative ease and helped ensure judicial consistency in the area of vertical price restraints, an area that may otherwise become quite muddled in light of the nature of vertical restraints and

290. Payne, 501 U.S. at 827.
294. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2723-25 (2007). The Court offered no justification for this departure and only considered 1) that the Court has exceptional power to shape the law under the Sherman Act, and 2) that Congress had never overtly acted to outlaw minimum resale price maintenance before. Id.
296. Casey, 505 U.S. at 855.
their inability to be adequately judged under the rule of reason. Additionally, the per se rule was not exclusively applied in the area of vertical restraints, rather the Court had provided an escape hatch for reasonable vertical restraints. The Colgate doctrine allowed reasonable vertical price restraints to be applied so long as no actual price fixing agreement was created.

Second, the significant reliance on the Dr. Miles rule has created a market where its removal may harm both particular businesses and society as a whole. Particularly, discount retailers, "have financed, structured, and operated their businesses," in reliance on the Dr. Miles rule against vertical minimum resale price maintenance. Additionally, the dissent in Leegin recognized that society has also relied on the Dr. Miles rule by investing in shopping malls with discount retailer anchor tenants, locating their homes near discount retailers, and relying on discount retailers for jobs. The significant reliance on discount retailing by both society and discount retailers is particularly noteworthy as such reliance in both cases implicates property rights and contract rights. Finally, society largely depends on discount retailers for many of its shopping needs—their loss would hurt both consumers and the retail economy.

299. Leegin, 127 S. Ct. at 2734-35 (Breyer, J., dissenting). Muddying judicial analysis and increasing administrative costs may encourage some manufacturers to enter into anticompetitive agreements as enforcement may become too costly or too difficult for a plaintiff to win. See supra notes 40-48 and accompanying text; see also infra Part IV.C.1.

300. United States v. Colgate & Co., 250 U.S. 300, 307-08 (1919). The Colgate doctrine held that a manufacturer may set a minimum resale price for its goods and decline to sell to any retailer that did not comply with his/her suggested prices. Id. This was found to be fundamentally distinct from an agreement to fix prices in violation of the Sherman Act. Id. See also supra notes 91-96 and accompanying text for a discussion of the Colgate case. Critics argue that the Colgate doctrine is difficult and costly for companies to apply and often leaves them unable to take advantage of vertical price restraints as the risk of violating the doctrine far outweighs the benefit a company may derive from the practice. Brief of PING, Inc. as Amicus Curiae Supporting Petitioner at 9-19, Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480).


302. Leegin, 127 S. Ct. at 2735-36 (2007) (Breyer, J. dissenting) (noting, inter alia, that allowing resale price maintenance would increase the average yearly retail expenditures of a family of four by $750 to $1000).

303. See Payne v. Tennessee, 501 U.S. 808, 828 (1991). Arguably, retailers who have invested in inventory, store locations, distribution centers and who employ significant numbers of employees with unique benefits packages have both property and contract interests in their business. Additionally, private homeowners who purchased their homes near a discount retailer (especially in small towns) also have property rights implicated by the Leegin decision. See Leegin, 127 S. Ct. at 2735 (Breyer, J., dissenting).

304. See supra note 283 (noting that Wal-Mart alone comprised approximately ten percent of all retail sales in 2006). In addition to Wal-Mart, two other U.S. discount stores,
Third, while the Court has systematically eroded the use of per se rules in the area of vertical restraints, it cannot be said that a per se rule of illegality for *vertical minimum retail price maintenance* has been discounted by society.305 First, Congress has acted repeatedly to preserve the *Dr. Miles* rule by both declining to provide funding to the Justice Department to overturn the rule and by passing the Consumer Goods Pricing Act of 1975, which repealed the Fair Trade Laws.306 While the *Leegin* majority failed to give this argument any credence, the Court had previously recognized that, "Congress . . . has expressed its approval of a per se analysis of vertical price restrictions by repealing the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States."307 The *Leegin* Court however, offered no justification for this abrupt change in its interpretation of Congress' actions.308 Additionally, within four months of the *Leegin* decision, Senators Herb Kohl and Joe Biden had already co-sponsored a bill titled the "Discount Pricing Consumer Protection Act," which is expressly aimed at overturning the *Leegin* ruling.309


Fourth, the central premise of *Dr. Miles* has not been clearly eroded nor has it changed so much as to render its central holding irrelevant or unjustifiable. While *Dr. Miles* did ultimately base its economic justifications for the per se rule of illegality on two economic premises which have been discredited, modern economic analysis still instructs that the central holding of *Dr. Miles* (a per se rule of illegality for vertical minimum price fixing) is still sound policy. While economists agree that there may be beneficial uses for vertical minimum price maintenance, the *Leegin* majority wholly failed to show that vertical resale price restraints will not "always or almost always" tend to restrict competition through any empirical data, instead relying entirely on an economic theory whose foundations are as uncertain as the Court’s ultimate holding in *Leegin*. The Court recognized in *Khan*, that it will not "lightly assume that the economic realities underlying earlier decisions have changed," suggesting that it will overturn prior antitrust holdings only when the "great weight" of evidence shows the rule to be in error. *Leegin* seems to change the nature of that notion, suggesting that the Robert’s Court does not require a "great weight" of evidence to overturn prior antitrust jurisprudence, but instead a lack of empirical data and widespread theoretical disagreement seems to be sufficient.

Thus, a thorough analysis of commonly considered *stare decisis* criteria suggests that *Dr. Miles* was not ripe for the Court to strike down in *Leegin*. At the very least, the majority wholly failed to give any weight to considerable evidence of societal reliance on the one hundred year old precedent. The majority justified its lack of *stare decisis* consideration by citing that the doctrine has less weight when dealing with the Sherman Act, as the Court is expected to shape the Act just as the common law. In *Funk v. United States*, the Court considered its role in deciding whether to adhere to an antiquated common law rule in light of Congress’ ability to change the law as well. The Court argued that it need not wait for Congress to change the common law, but that the Court, if called upon to do so, may, "decide [the issue] in accordance with present-day standards of wis-

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310. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404, 408 (1911) (relying on the right of a retailer to alienate his own property as he sees fit by analogizing vertical price fixing to horizontal price fixing to hold vertical minimum resale price maintenance per se illegal).
314. *See Leegin*, 127 S. Ct. at 2723-25; *see supra* Part IV.B.1.
316. 290 U.S. 371 (1933).
317. Id. at 381-82. The Court was considering whether the spouse of the defendant is a competent witness in a criminal case. Id. at 373.
This suggests that while the Court obviously has the power to shape the common law, it also has a duty to consider the implications of mandating a substantial change in the law. Such a duty does not affect the right of the Court to shape the common law, but simply requires the Court, when acting as a lawmaking body, to fully consider the impact of its decision, just as Congress or any other legislature has an inherent duty to do. To ignore such effects would illogically counter the Court’s preference for encouraging the “evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process,” in an area where the Court is charged with fully shaping the legal landscape, and thus arguably, where the Court’s concern for such principles should be at a zenith.

C. PRACTICAL IMPACT OF THE LEEGIN DECISION

I. Vertical Minimum Price Fixing: Per Se Legality?

After Leegin, vertical minimum price fixing agreements are no longer subject to a rule of per se illegality, but rather, are now analyzed under the “rule of reason.” Under the rule of reason, the fact-finder must analyze,
on a case-by-case basis, all the facts and circumstances surrounding an alleged violation of the Sherman Act in deciding whether the conduct in question is an unreasonable restraint on competition.\textsuperscript{322} Thus, implicit in the Court's decision to subject a restraint to the rule of reason is the assumption that the particular practice at issue may in fact be functionally analyzed and restrained under the rule—a consideration the majority in \textit{Leegin} took into account.\textsuperscript{323} But was the majority correct in assuming that vertical minimum resale price maintenance could be effectively policed under the rule of reason? Advocates for overturning \textit{Dr. Miles} have long argued that all vertical restraints should be completely lawful—or per se legal.\textsuperscript{324} In subjecting vertical minimum resale price maintenance to the rule of reason, is it possible the Court granted their wish?

The rule of reason was created to provide the courts flexibility in judging business practices for Sherman Act violations;\textsuperscript{325} however, such flexibility has made the rule difficult and costly to apply with any consistency.\textsuperscript{326} First, discovery and pre-trial expenses are incredibly high in rule of reason cases, as courts consider all the facts and circumstances involved in the particular case at bar.\textsuperscript{327} Even though many cases settle before trial,\textsuperscript{328} the cost of pre-trial discovery is significant enough to prompt settlement, or to simply price a victim of an anticompetitive practice out of achieving justice altogether.\textsuperscript{329}

\textsuperscript{322} See \textit{supra} note 35 and accompanying text for a full description of the factors considered by the rule of reason. The rule of reason is considered to be a legal "standard" that allows for a more seasoned analysis of the restraint at issue, as opposed to bright-line per se rules that render a practice illegal merely based on the type of restraint at issue. See \textit{supra} note 52. See generally Crane, \textit{supra} note 44.

\textsuperscript{323} \textit{Leegin}, 127 S. Ct. at 2719-20. The majority noted that while resale price maintenance does pose anticompetitive dangers, as courts gain experience with such practices and in analyzing them under the rule of reason, they will be able to establish a litigation structure in which the rule could pragmatically work to restrict only anticompetitive uses of vertical price fixing. \textit{Id.} at 2720.

\textsuperscript{324} \textit{Bork}, \textit{supra} note 12, at 288 ("Analysis shows that every vertical restraint should be completely lawful.").

\textsuperscript{325} See \textit{supra} notes 33-34 and accompanying text.

\textsuperscript{326} See \textit{supra} note 40 and accompanying text.

\textsuperscript{327} See \textit{supra} note 43 and accompanying text noting the exceptional cost in discovering large number of documents, creating and analyzing statistical data, and in hiring experts both to review discovery evidence and to testify at trial.

\textsuperscript{328} See \textit{supra} note 42 and accompanying text.

\textsuperscript{329} See \textit{supra} note 43 and accompanying text. Such effects stemming from discovery costs may also encourage defendants to settle, even when the trade practice utilized by the defendant is not actually anticompetitive as it may be less expensive for a defendant to abandon an economically beneficial practice than to risk losing at trial and being subjected to treble damages. See \textit{supra} note 44 and accompanying text. In such cases, society also suffers, as the market has become less efficient from the loss of the beneficial market practice. See \textit{supra} note 44 and accompanying text.
Additionally, it is not perfectly clear what criteria the court must use to judge a practice under the rule or reason, how each criterion should be judged, or how much weight to give each criterion considered. This fact is further evidenced by the current legal division over how courts should consider the market impact of a particular business practice, with the largest debate stemming from whether a firm must have "market power" for a practice to be found truly anticompetitive. This division stems from the economic argument that without market power, a firm could not raise prices above competitive levels (to enjoy monopoly profits) without losing sales to competitors. The Leegin Court seemed to advocate a "market power" requirement in the area of vertical minimum resale price maintenance cases by stating that only where the practice becomes widely used in a market or where a manufacturer has market power does minimum resale price maintenance pose a true threat of harming the economy. Such a requirement may prove fatal to antitrust plaintiffs as scholars have recognized the difficulty a court would face in measuring and utilizing a firm's true market power in a given case. Additionally, as proving market power involves defining the relevant market in which to compute the defendant's actual market share, increased use of niche marketing and marketing segmenta-

330. See, e.g., Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1917). In that case, the Court argued that the court must consider, inter alia, the nature of the business at issue, the applicable market both before and after the practice was instituted, the actual or probable effect of the practice, and the reason for adopting the practice. Id.

331. See Mark R. Patterson, The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History, 37 SAN DIEGO L. REV. 1, 4-5, 30-32 (2000) (explaining that three federal circuits require an unequivocal showing of market power, while four others have not overtly required market power be proven, but have suggested that absent market power a practice cannot be anticompetitive). Market power is defined as "the ability [of a firm] to set [its] price above marginal cost." William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 HARV. L. REV. 937, 939 (1981). See, e.g., United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948) (evidencing the market power requirement by stating that in judging the market impact of a business practice under the rule of reason, "the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demand, and other characteristics of the market," are all relevant (emphasis added)).

332. See generally Landes & Posner, supra note 331, at 937.

333. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2719 (2007). The majority's market power requirement for vertical minimum price fixing to be held anticompetitive was recognized by the Leegin dissent. Id. at 2730 (Breyer, J., dissenting).

334. See Leegin, 127 S. Ct. at 2730 (Breyer, J., dissenting) ("The Court's invitation to consider the existence of 'market power' . . . invites lengthy time-consuming argument[s] among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets."); Landes & Posner, supra note 331, at 943.

335. Landes & Posner, supra note 331, at 938.
tion may further make defining the applicable market more difficult or near impossible for a court to do with any certainty.336

Further, one of the main justifications for allowing vertical minimum resale price maintenance, ensuring that all retailers provide retail services that add value to a manufacturer’s goods, is it may provide a perfect disguise for a monopolistic pricing scheme.337 Advocates for judging vertical minimum price maintenance under the rule of reason argue that while such promotional practices may increase the price of a good, they also add value to a product, which customers purchasing the product will receive.338 It is this added utility that some advocates argue should be the crux of considering the nature of a firm’s output, not the number of units produced or any increase in the price of the goods sold.339 However, if a firm had the ability to exert monopolistic profits from consumers, it could justify its prices by arguing that its promotional activities have increased the perceived value of its products to justify its increased prices. For example, a firm could justify increasing its prices to take advantage of monopolistic profits by claiming that it is marketing its goods as “luxury items,” and that high prices add value to its products by making them seem more exclusive; or a monopolist manufacturer could invest a negligible amount of money on advertising or in-store displays to justify its claim that it has added value to its goods.340 Additionally, experts have recognized that technological advances in distributional and marketing analysis have further magnified the risk that vertical minimum price maintenance may be used anticompetitively by a company who otherwise appears to be pursuing a legitimate business goal.341 A significant problem is that in the area of vertical price restraints, courts cannot consistently and accurately decide at what point a price becomes unreason-

336. See Leegin, 127 S. Ct. at 2730 (Breyer, J., dissenting) (recognizing that when judging a manufacturer’s “market power,” the applicable market is often “ill-defined”); United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972) (“[The courts] inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.”). See also supra notes 271-77 and accompanying text for a discussion of market segmentation.

337. See Leegin, 127 S. Ct. at 2715. The dissent in Leegin noted: “How easily can courts identify instances in which the benefits [of vertical minimum resale price maintenance] are likely to outweigh potential harms? My own answer is, not very easily.” Id. at 2730 (Breyer, J., dissenting).

338. BORK, supra note 12, at 295-97.
able.\textsuperscript{342} Thus, the fact that courts cannot easily measure a firm’s market power exacerbates the danger that these justifications pose, as a court may be unable to truly discern whether such practices actually increase the value of a manufacturer’s goods, and thus may be a legitimate business practice.\textsuperscript{343}

Finally, litigation under the rule of reason is likely to lead to inconsistent judicial results in considering the same business practices.\textsuperscript{344} Such splits may inject uncertainty into business planning and reduce innovation as it will be unclear what conduct will be allowed and what conduct will be found to be anticompetitive.\textsuperscript{345} The reason for such inconsistent results is largely that the underlying economic data involved in rule of reason trials is significantly complex and hotly debated.\textsuperscript{346} As most economists disagree

\begin{itemize}
\item \textsuperscript{342} See Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 345 (1982). The Court advocated for analysis of vertical minimum resale price maintenance under a per se rule of illegality by arguing that vertical price fixing:
\begin{quote}
[I]nvolves the power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . Agreements which create such potential power may well be held to be themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed without placing on the government . . . . the burden of ascertaining day to day whether it has become unreasonable through the mere variation of economic conditions.
\end{quote}
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\begin{itemize}
\item \textsuperscript{343} See Landes & Posner, supra note 331, at 943.
\item \textsuperscript{344} Am. Bar Ass'n, supra note 46, at 102-03 ("[C]ommentators still condemn the rule of reason as indefinite and unworkable . . . . [T]he nebulous nature of the rule can lead to inconsistent results.").
\item \textsuperscript{345} Maricopa County Med. Soc'y, 457 U.S. at 344 ("For the sake of business certainty and litigation efficiency, [the Court has] tolerated the invalidation of some agreements that a full-blown inquiry [under the rule of reason] might have proved to be reasonable."); United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 n.10 (1972) ("Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of law, it can, of course, make per se rules inapplicable in some or all cases . . . .").
\item \textsuperscript{346} See Topco, 405 U.S. at 609 ("[C]ourts are of limited utility in examining difficult economic problems."); Am. Bar Ass'n, supra note 46, at 103; Piraino, supra note 47, at 351-52. This point is further evidenced by the divergent economic justifications both the majority and dissent offered in \textit{Leegin}. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714-16, 27-31 (2007) (citing the applicable economic discussions in both the majority and dissenting opinions); see also Brief for Anderson Economic Group, LLC as Amicus Curiae Supporting Respondent at 15, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480) (noting that even with an ideal data set with accurate data, and no change in economic variables, statistical data may not be enough to prove
about the economics at the base of a case, judges, juries, and lawyers, many
of whom have only a basic understanding of economics, cannot be expected
to render sound judgments. Thus, rule of reason cases are likely to result
in a "battle of the experts," with juries and judges and their elementary
understanding of economics, being left to guess at who's theoretical approach
is the most sound.

All these factors combine to show that the rule of reason is replete
with flaws, which raise doubt regarding its ability to engender sound deci-
sions or identify anticompetitive uses of vertical minimum resale price
maintenance. Some economists have recognized the rule's flaws and have
attempted to improve the rule by introducing check-lists and question sets
designed to aid courts in distinguishing instances where anticompetitive
harm are more likely to appear from instances where only competitive
benefits are likely to materialize. However, applying such guidelines
presents the same obstacles to courts as does a full blown economic analy-
sis under the rule of reason. Further, the expensive costs and incredible
risks involved with filing a suit under the rule of reason leave it far too
likely that a victim of an anticompetitive vertical minimum price mainte-
nance scheme will decline to file suit altogether. Thus in the end, it ap-
pears as though the Court in Leegin may have granted the wish of many
vertical minimum price maintenance advocates by making the practice in
effect (and perhaps intentionally) per se legal.

Anticompetitive behavior at trial, and that courtroom statistical analysis has failed to keep
pace with advances in statistical analysis in the field of economics (citations omitted)).

347. AM. BAR ASS'N, supra note 46, at 103 ("[M]ost economists do not agree on the
competitive impact and consumer welfare effects of any given restraint. Thus, it is question-
able whether different juries would yield consistent answers if presented with identical
facts."); POSNER, supra note 21, at 29-30 ("[C]ourts cannot readily determine when competition
is socially wasteful on balance . . . ").

348. This point is evidenced by the fact that two distinct groups of economists each
filed a brief in the Leegin case, one on behalf of the Respondent and the other on behalf of
the Petitioner. Brief for Anderson Economic Group, LLC as Amicus Curiae Supporting
06-480); Brief of Amicus Curiae Economists Supporting Petitioner, Leegin Creative Leather

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

350. See Leegin, 127 S. Ct. at 2730; see also supra notes 329-31 and accompanying
text (discussing the difficulty judges, juries, and lawyers have in applying complex eco-
nomic data).

351. See supra notes 326-29 and accompanying text (discussing the risks and costs of
filing a rule of reason case).

352. BORK, supra note 12, at 288 ("Analysis shows that every vertical restraint
should be completely lawful.").
2. **Increased Retail Prices, Decreased Retail Innovation**

The most obvious effect of the *Leegin* decision will be increased consumer prices and decreased distributional innovation. Many scholars have recognized that vertical minimum price maintenance, "leads to higher, not lower, consumer prices." Empirical studies have confirmed such effects of vertical minimum price maintenance, noting that vertical price fixing may increase prices between as much as eighteen and twenty-seven percent. Proponents of vertical price fixing discount this effect by arguing that while such promotional activities add to the cost of goods sold, they also increase the perceived value of the goods sold and thus are not harmful to consumers. The problem with such an argument is it again relies on the view that above all else, consumers seek a perfectly efficient market—a view that does not hold true in reality. Consumers have clearly shown their preference for low prices over all other retail services as evidenced by the significant growth in popularity of discount retail outlets in the United States. Such a fact is illustrated by considering that Wal-Mart's share of all retail sales in 2006 accounted for approximately ten percent of all U.S. retail sales. Further, even the Court has recognized that low prices "benefit consumers" and relied on that rationale in striking down the use of a per se rule against vertical maximum price fixing.

Further, scholars have noted that vertical minimum price maintenance may be used by manufacturers to limit retail innovation by making it impossible for retailers to take advantage of lower operation costs by discounting prices. Vertical minimum price maintenance advocates largely

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353. Burns, *supra* note 27, 608 (noting that vertical minimum price fixing leads to increased retail prices). See also Areeda, *supra* note 263, ¶ 1604b, at 42 (noting that vertical minimum price restraints tend to produce higher consumer prices than would otherwise be the case); Bork, *supra* note 12, at 295 (citing that retail promotional activities which may be encouraged through the use of resale price maintenance schemes tend to increase the cost of goods sold); J.R. Gould & B.S. Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722 (1967).


356. See Burns, *supra* note 238, at 605-07.


358. See *supra* note 283 and accompanying text.


argue that with the size and market power of many of today’s discount retailers, further innovation in retailing will occur as these companies will be able to fight manufacturer efforts to fix minimum retail prices. The problem with such an argument is it ignores the likelihood that future innovations in the field of retailing may seek to be implemented not by these now super-retailers, but by small retailers who will not have the same exceptional market power. One retail segment that may suffer significantly in such an environment is that of online retailing, a retail segment that competes largely on price, and has become a popular form of retailing in the United States, accounting for $170.8 billion in consumer spending in 2006.

3. Congressional Reaction: Could Leegin Reshape the Sherman Act Forever?

When the Court overturned a one hundred-year-old precedent in Leegin, the holding of which had long formed one of the most central underpinnings of the competitive market in the United States (i.e. price competition), congressional reaction became an almost certainty. Striking down Dr. Miles represented a significant shift in the economic policy of the United States, the effects of which are both unclear and largely debated by economists. While a sect of economic theorists may have called some of the underpinnings of the Dr. Miles rule into question, the pragmatics, administrative concerns, and public favor (which would have been more obvious had the Court fully considered stare decisis concerns) may largely trump the Court’s view that a shift in the common law was appropriate. In fact, the Court has recognized that shaping economic policy is better left to Congress considering its, “institutional capacity for gathering evidence and taking testimony,” and thus Congress’ ability to analyze the effects of a change in economic policy, “far exceeds [that of the Court’s].”

362. See id.
365. See supra Parts IV.B.2, IV.C.1.
366. See supra Part IV.B.2.
367. See supra Parts IV.A-C.1.
368. United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting); United States v. Topco Assocs., Inc., 405 U.S. 596, 611-12 (1972) (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in an-
Within four months of the *Leegin* decision, a bill had already been introduced in the Senate to overturn the case.\(^{369}\) Introduced by Senator Kohl of Wisconsin, the bill seeks to amend Section 1 of the Sherman Act by adding that, "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 [the Sherman Act]."\(^{370}\) The bill overtly stated as its purpose, "to correct the Supreme Court's mistaken interpretation of the Sherman Act in the *Leegin* decision; and to restore [the per se rule against vertical minimum resale price maintenance]."\(^{371}\) In addition, the bill cited that economic studies have shown that the *Dr. Miles* rule has led to lower prices, which promotes consumer welfare, and noted that prior to the repeal of the Fair Trade Laws, vertical minimum price maintenance schemes were shown to increase consumer prices between eighteen and twenty-seven percent.\(^{372}\)

The introduction of such a bill and the 5-4 decision in *Leegin* evidence how widespread disagreement over economic policy, concerns over the ability of courts to administer the antitrust laws, and the difficulty with which the effects of a shift in antitrust policy may be discerned, has rendered the task of changing antitrust jurisprudence a trying and complex undertaking.\(^{373}\) While the Sherman Act was initially designed as a common law statute to which the Court was to give shape, contemporary economic theory and both the size and diversity of the United States' marketplace may have finally sounded the call for a revision of the Sherman Act.\(^{374}\) As Congress is more adept at "gathering evidence and taking testimony," it is in a far better position to weigh all the applicable evidence and create a more comprehensive antitrust legislation than the Supreme Court.\(^{375}\) Such an undertaking would improve consumer welfare by making trials cheaper... is a decision that must be made by Congress and not by private forces of the courts. . . . [C]ourts are ill-equipped and ill-situated for such decision-making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." (emphasis added)).

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370. *Id.* at § 3(a).
371. *Id.* at § 2(b).
372. *Id.* at § 2(a).
and less complex, which would result in more consistent judgments and
provide stability to the marketplace.376

Revamping the Sherman Act may be done in a number of ways, each
with their own benefits and drawbacks. First, Congress may clearly define
the factors through which the courts should judge particular practices (cre-
ing "elements" to judge each violation), simplifying judicial analysis un-
der the rule of reason.377 While such a change would offer both precision
and stability, it may be slow to react to changes in the marketplace or eco-
nomic theory, a major concern of Congress when the Sherman Act was
originally passed.378 Second, just as Senator Kohl sought to do, Congress
may simply choose to classify certain practices as per se illegal or per se
legal, and leave the remainder subject to a classic rule of reason analysis.379
Such an approach again offers precision and stability, a bit more flexibility,
but is inherently over and under-inclusive.380 Finally, Congress may simply
shift the burden of proof in some rule of reason trials to the defendant.381

In a typical rule of reason case, the plaintiff alleging an anticompeti-
tive practice must first prove that the defendant’s conduct is anticompeti-
tive by introducing proof that the practice at issue is anticompetitive in light of
traditional rule of reason criteria.382 The “quick look” approach modifies the

376. See supra notes 325-29, 344-48 and accompanying text.
377. Some economists have attempted to compile such a listing of elements for judi-
cial analysis of vertical resale price maintenance. See Leegin, 127 S. Ct. at 2730 (Breyer, J.,
dissenting). While many argue that listing such elements does not improve the ability of
judges, juries, or lawyers to digest and consider complex economic data, it certainly may
simplify the law to the point where much of the economic analysis may ultimately be re-
moved from the equation for the fact-finder. See id.
was given broad power to shape the Sherman Act so that the Act may evolve with modern
economic theory and understanding); Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 688.
379. See Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. at 688; Discount Pricing Consumer
380. See Leegin, 127 S. Ct. at 2727 (Breyer, J., dissenting) (recognizing that vertical
minimum price fixing has both pro and anticompetitive consequences). See also supra note
52 discussing the over and under-inclusive nature of per se rules.
is often referred to as a “quick-look” test. James A. Keyte, What it is and How it is Being
Applied: The “Quick Look” Rule of Reason, 11 ANTITRUST 21, 21 (Summer 1997).
Essentially, the “quick-look” is a “truncated rule of reason [test] that has characteristics of both the
per se and full rule of reason approaches.” Id.
382. Thomas C. Arthur, A Workable Rule of Reason: A Less Ambitious Antitrust Role
for the Federal Courts, 68 ANTITRUST L.J. 337, 359 (2000). In such a case, the exceptionally
large costs inherent in a rule of reason trial, and which serve as a major deterrent to plaintiffs
seeking to bring a case, are completely placed on the plaintiff’s shoulders, regardless of the
nature of the defendant’s conduct. See supra notes 41-43 and accompanying text (noting the
significant costs of litigating may bar many victims from filing an antitrust suit under the
rule of reason case).
rule of reason by creating a presumption that certain practices are anticompetitive in every case. The burden then shifts to the defendant to prove that the challenged practice has procompetitive justifications. If the defendant can show procompetitive justifications exist, the court will then conduct a classic rule of reason trial to decide whether or not the practice is truly anticompetitive. Such a presumption may be particularly beneficial in analyzing vertical minimum price fixing, as the ability of the courts to identify anticompetitive uses of the practice may be unusually difficult. Additionally, while it may be argued that such a test may afford an opportunity for plaintiffs to shift the significant cost of trial onto the defendant, thereby encouraging a defendant to settle and abandon a possibly procompetitive practice, such an effect could be eliminated by mandating that if a defendant prevails in proving procompetitive justifications, the plaintiff be liable for the defendant’s court costs and attorney’s fees. This approach would allow the Sherman Act to remain flexible through its traditional common law approach. Additionally, adopting such a test would be less over and under-inclusive than adopting per se rules of legality and illegality. The only downside to adopting a “quick look” test is that it may result in a classic rule of reason trial. However, the “quick look” rebuttable presumption may sufficiently mitigate the flaws inherent in a rule of reason trial by requiring the defendant first show a procompetitive justification for its conduct before a full-blown economic and market analysis must be conducted under the rule of reason.

384. Id.
385. Id.
386. See supra Part IV.C.1; see also Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondents at 28-30, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480) (supporting the adoption of a “quick look” analysis in judging vertical minimum price fixing).
388. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2727 (2007) (Breyer, J., dissenting) (recognizing that vertical minimum price fixing has both pro and anticompetitive consequences). See also supra note 52 noting the inherent over and under-inclusive nature of per se rules.
389. See supra notes 40-48 and accompanying text and Part IV.C.1 discussing the flaws in a classic rule of reason analysis and in using the rule of reason to police vertical minimum resale price maintenance.
V. CONCLUSION

The Supreme Court erred in overturning *Dr. Miles* and its long-held rule that vertical minimum resale price maintenance should be subject to a rule of per se illegality. First, the majority erred in solely relying on economic theories, which are based on a number of assumptions about the market that may or may not prove accurate, to argue that vertical minimum price fixing is not "always or almost always" anticompetitive. At the very least, the Court should have offered empirical data to support its economic assumptions. Further, the Court failed to consider how vertical price fixing is likely to be used, specifically, if procompetitive uses of vertical minimum price fixing are even practical and likely to be implemented in actuality. Additionally, the Court erred by discounting the importance of intramarket competition and the fact that vertical minimum price fixing allows manufacturers to virtually eliminate it from the market, an important fact as intermarket competition, when subject to vertical minimum price restraints, may not provide the check on the market some theorists may suggest. Specifically, some modern competitive practices, such as marketing segmentation, have impacted intermarket competition by making consumer demand for a good more inelastic and in turn, increasing the likelihood that vertical price restraints may be used to absorb monopoly profits. Finally, the Court failed to lend any real credence to *stare decisis* considerations, many of which advocated that *Dr. Miles* and its per se rule against vertical minimum price fixing should be retained.

Further, the practical impact that *Leegin* is likely to have both on the market and antitrust enforcement also evidences the Court's error in striking down *Dr. Miles*. Most importantly to consumers, the *Leegin* case will almost certainly increase retail prices and decrease retail innovation. Such a result is likely to prove unpopular as consumers have overwhelmingly shown their support and preference for discount retailing. Additionally, it is unlikely that anticompetitive uses of vertical minimum price fixing can be effectively policed under the rule of reason. The rule of reason has been shown to have serious flaws, which render analysis under it expensive, inefficient, and worst of all, inconsistent. Further, the rule of reason may not be able to detect anticompetitive uses of vertical minimum price restraints at all. Finally, considering the shortcomings of the Court's decision and the traditional support for the per se rule against vertical minimum price maintenance, *Leegin* is likely to trigger a congressional backlash which at the very least may overturn the Court's holding, but which may have more far reaching implications. The *Leegin* decision and the complex nature of the modern market may suggest that it is time for Congress to finally rethink the Sherman Act and introduce a more comprehensive antitrust legislation. So while the Court has today won its battle against vertical restraints, the
war between the Court and Congress over the future of modern antitrust policy may now be right on the horizon.

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