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ASSORTED ANTI-*LEEGIN* CANARDS: WHY RESISTANCE IS MISGUIDED AND FUTILE

ALAN J. MEESE*

ABSTRACT

In Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), the Supreme Court reversed Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), which had banned minimum resale price maintenance (“minimum RPM”) as unlawful per se. For many, Leegin was a straightforward exercise of the Court’s long-recognized authority, implied by the Sherman Act’s rule of reason, to adjust antitrust doctrine in light of new economic learning. In particular, Leegin invoked the teachings of transaction cost economics (“TCE”), which holds that many non-standard agreements, including minimum RPM, are voluntary mechanisms that reduce the transaction costs that manufacturers incur when they rely upon independent dealers to distribute their goods. For instance, proponents of TCE, including Nobel Laureate Oliver Williamson, have asserted that minimum RPM can prevent free riding and ensure that dealers engage in an optimal amount and type of promotion. Invoking these and other possible benefits, the Leegin Court ruled that minimum RPM could produce “redeeming virtues” and thus did not satisfy the normal test for per se condemnation. In so doing, the Court adhered to the rule of reason’s requirement, articulated in Standard Oil Co. v. United States, 221 U.S. 1 (1911), that courts adjust antitrust doctrine when “more accurate economic conceptions” undermine previous decisions.

However, some have chosen to resist Leegin to the utmost. In particular, scholars, enforcement officials, and forty-one state attorneys general have sought to convince Congress and/or state legislatures to reinstate the per se rule by statute, for instance, and have contended that minimum RPM is unlawful per se under existing state antitrust laws. Many have also argued that, pending Leegin’s reversal, courts should subject minimum RPM to a “quick look” rule of reason, whereby the practice is presumed unlawful, immediately casting upon the defendant a burden of justification. Perhaps because of these efforts, legislation that would have reversed Leegin and codified Dr. Miles was proposed by Congress in 2011.

There is, of course, a long history of Congress overriding straightforward applications of the Sherman Act, sometimes at the behest of special interest groups that benefit from such exemptions. However, those who resist Leegin and seek to reinstate the per se rule against minimum RPM do not rely upon the power of legislatures to pass wealth-reducing legislation. Instead they argue that Leegin “got it wrong” when applying basic antitrust principles animating the rule of reason. For these advocates, then, a new per se ban on minimum RPM would merely undo Leegin’s mistake.

This article refutes the various arguments that Leegin’s detractors have made for reinstating Dr. Miles and/or “quick look” treatment. TCE, it is shown, undermined the central premise of the per se rule, namely, that minimum RPM is economically indistinguishable from a naked horizontal cartel between dealers. This realization casts upon those who resist Leegin a burden of articulating and supporting an alternative rationale for per se condemnation. As the Article shows, Leegin’s detractors have not met this burden. Instead, their various arguments contradict TCE, basic antitrust principles, or both. Taken to their logical conclusion, these arguments would require the Court to abandon decades of jurisprudence based upon TCE and/or the long-standing test for per se illegality. However, Leegin’s detractors have offered no argument in favor of such radical changes.

Thus, far from correcting Leegin’s purported antitrust error, reimposition of the ban on minimum RPM would constitute a rejection of the “more accurate economic conceptions” that should drive antitrust doctrine and thus be akin to a welfare-reducing special interest

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exemption from the Sherman Act. Such exemptions are read narrowly, to minimize the impact of special interest influence in the legislative process. Indeed, even if Congress or the states do codify a per se ban on minimum RPM, state and federal courts will have various doctrinal strategies at their disposal to minimize the wealth-reducing impact of such legislation by, for instance, reading any amendment narrowly and restricting the class of plaintiffs who can challenge such agreements. As a result, resistance to Leegin may be more than merely misguided; it may also be futile.

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I. INTRODUCTION

Section 1 of the Sherman Act bans contractual restraints that are "unreasonable" because they exercise market power and reduce economic welfare. The "rule of reason" thus requires judges to determine whether challenged restraints confer market power or, instead, reallocate rights and obligations in a manner that creates wealth. However, most judges are insufficiently conversant with the sort of microeconomic theory necessary to evaluate the many trade restraints potentially subject to Section 1. When implementing the rule of reason, then, generalist judges must rely upon the expertise of others, particularly economists and economically sophisticated lawyers and legal scholars, about the impact of various restraints upon economic welfare. While courts sometimes undertake a "full-blown" analysis to determine whether a challenged restraint is "unreasonable," courts declare certain categories of restraints "unreasonable *per se*."

It is not surprising, then, that developments in economic science should ultimately influence antitrust doctrine. The Congress that passed the Sherman Act anticipated that antitrust courts would draw upon centuries of common law tradition when developing such doctrine. That tradition, in turn, encouraged courts to revise prior decisions when changes in “economic conceptions”—what modern scholars and judges call “economic theory”—altered judges’ perception of the impact of such restraints. In the same way, economic theory has repeatedly informed the “reason” that judges bring to bear when adjudicating Section 1 controversies. Thus, decisions from prior eras often appear “wrong” to modern eyes because the jurists who rendered them were applying theory now deemed erroneous.

The last century has provided a case study illustrating this account of the relationship between economic theory and antitrust doctrine. During this period judicial treatment of minimum resale price maintenance (“minimum RPM”) and other vertical distributional restraints evolved substantially. In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the Supreme Court declared minimum RPM unreasonable *per se*, that is, unlawful without regard to a contract’s actual economic effect.¹ The Court reasoned that such agreements were equivalent to naked horizontal agreements between dealers. Shortly thereafter the Court narrowed this prohibition, announcing, for instance, that minimum RPM imposed pursuant to consignment agreements was subject to a forgiving, full-blown rule of reason analysis. Congress, in turn, invited states to immunize most minimum RPM under so-called “fair trade” laws, an invitation that most states accepted.

There matters stood until the 1950s, when courts, influenced by neoclassical price theory and its perfect competition model, grew increasingly hostile to partial contractual integration or “non-standard contracts,” particularly distributional restraints. This hostility manifested itself in declarations that particular restraints were unreasonable *per se*, both because they reduced rivalry between the parties to them and, in addition, could not produce redeeming virtues. In so doing, the Court built upon and reaffirmed *Dr. Miles*. Indeed, by the late 1960s, the Court had banned vertical territorial restraints as well as *maximum* resale price maintenance, practices that had previously merited forgiving rule of reason scrutiny.

Just as the scope of antitrust regulation reached its maximum, the field of microeconomic theory known as industrial organization experienced a scientific revolution, in the form of Transaction Cost Economics (“TCE”). TCE offered a new theory explaining why reliance on

1. See 220 U.S. 373 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

atomistic markets to conduct economic activity—transacting—might reduce economic welfare. In particular, TCE posited that reliance on such markets could impose costs on transacting parties, what practitioners of TCE dubbed “transaction costs.” According to TCE, economic actors could reduce such costs by forming new firms or expanding the reach of current firms through complete or partial vertical integration. Indeed, according to Nobel Laureate Oliver Williamson, who pioneered TCE’s advance during the 1970s, TCE established a rebuttable presumption that complete and partial integration in the form of non-standard contracts could reduce the cost of transacting and thereby increase economic welfare. Like other practitioners of TCE, Williamson examined distributional restraints, that is, agreements limiting, say, the prices charged by retail dealers or the territories in which they could operate.

TCE has had a profound influence on Section 1 doctrine, which, after all, governs a wide universe of non-standard contracts. In 1977, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court reversed course, embraced TCE-based arguments, and jettisoned its recent ban on vertical territorial restraints.² In particular, *Sylvania* drew upon arguments, first made with respect to minimum RPM, that reliance upon independent dealers—the market—to distribute a product could lead to suboptimal promotional investments and thus market failure, as some dealers might free ride on promotional investments made by others. Territorial restraints, the Court said, could overcome this free riding, ensuring that dealers could capture the benefits of their promotional investments and reducing a manufacturer’s cost of relying upon the market to distribute its goods. In this way, the Court said, such restraints could further “interbrand competition,” the primary concern of the antitrust laws.

Sylvania signaled a sea change in antitrust jurisprudence; the Court would subsequently reverse or narrow previous decisions that had declared particular non-standard agreements unreasonable *per se*. This trend culminated in 2007, when, in *Leegin*, the Supreme Court invoked TCE logic to overrule *Dr. Miles* and declare minimum RPM subject to full-blown rule of reason analysis, like the vast majority of restraints subject to Section 1.³ Like *Sylvania*, *Leegin* credited arguments by numerous proponents of TCE to the effect that, by setting minimum resale prices, manufacturers and their dealers can overcome various market failures and resulting transaction costs that would otherwise occur if dealers were free to charge whatever they wished. For instance, the Court opined that minimum RPM could ensure that dealers who invest heavily in promoting the manu-

2. See 433 U.S. 36 (1977).

3. See *Leegin*, 551 U.S. at 881.

facturer's product can capture the sales resulting from that investment, free of rivalry from free-riding dealers that decline to engage in promotion and thus charge cut-rate prices. Thus, the Court said, minimum RPM could facilitate entry by upstart manufacturers seeking to attract established dealers to carry and promote new products and also facilitate promotion of more established brands. The Court also concluded that manufacturers could employ minimum RPM to guarantee dealers a stream of income going forward, thereby making termination a meaningful sanction that would deter dealers from breaching various contractual obligations, whether or not those obligations were related to promotion. Given the possibility that minimum RPM could produce such benefits, the Court said, *Dr. Miles* had erred in equating manufacturer-induced minimum RPM with naked agreements between dealers, with the result that *per se* condemnation was inappropriate. Although recognizing that *Dr. Miles* was a longstanding precedent, the Court invoked numerous prior decisions that had revised or abandoned rulings whose factual premises had proven false.

Leegin's straightforward application of TCE should not have been controversial. After all, the Court had repeatedly reiterated *Sylvania*'s transaction cost logic, sometimes in unanimous or near unanimous decisions. Indeed, both proponents and detractors of *Sylvania* recognized at the time that the decision's logic would also undermine the *per se* ban on minimum RPM. Nonetheless, various scholars, political actors, and enforcement officials have rejected *Leegin*, taking various steps to resist it. For instance, some members of Congress introduced legislation to reverse *Leegin*, thereby codifying *Dr. Miles* by statute, a result endorsed by more than forty state attorneys general. At least one state has passed post-*Leegin* legislation banning minimum RPM within its borders, and attorneys general and private plaintiffs in several states have attacked minimum RPM under state antitrust laws, often with success. Finally, some scholars have argued that lower courts applying *Leegin* should subject minimum RPM to a "quick look" rule of reason, presuming all such restraints unlawful unless the defendant meets a heavy burden of establishing that the restraint produces significant benefits.

Of course, Congress and the states are perfectly free to ignore economic theory and ban conduct that is "reasonable" within the meaning of the Sherman Act. Thus, Congress has often overridden straightforward applications of the Sherman Act, either to exempt otherwise lawful conduct or to ban reasonable, wealth-creating conduct, sometimes at the behest of special interest groups that have lobbied for such exceptions. However, opponents of *Leegin* purport to embrace decisions such as *Sylvania* and disclaim reliance on any power to pass wealth-destroying legislation. Instead, these advocates

uniformly assert that minimum RPM almost always reduces welfare, thus purporting to rebut the Williamsonian presumption described above. Indeed, following the lead of these advocates, proposed federal legislation was premised upon findings that *Leegin* was an incorrect exposition of the Sherman Act. In so doing, these scholars and public officials reject the work of leading practitioners of TCE, including those who first offered transaction cost rationales for non-standard agreements, particularly minimum RPM, during the 1960s. In other words, these opponents of *Leegin*, while purporting to embrace TCE's conclusions in other contexts, attack one of TCE's foundational exemplars by claiming that minimum RPM rarely, if ever, overcomes a failure in the distribution market.

This Article defends *Leegin* against its various detractors. In particular, the Article identifies and debunks several arguments that those who resist the decision have deployed in favor of reinstating *Dr. Miles*, whether by federal statute, state legislation, or judicial interpretation of state antitrust law. As *Leegin* explained, there is a strong presumption in favor of full-blown rule of reason analysis of restraints challenged under Section 1; any departure from this standard must rest upon a concrete demonstration that a particular category of restraint is "always or almost always" unreasonable. TCE undermined *Dr. Miles*'s purely theoretical assumption that minimum RPM is the economic equivalent of a naked cartel between dealers, thereby casting upon modern proponents of *per se* condemnation a burden of providing and supporting a substitute rationale for such automatic illegality. None of these arguments, it is shown, comes close to carrying this burden or otherwise justifies a reversal of *Leegin*, legislative or otherwise. Ironically, *Dr. Miles* itself has deprived its supporters of a factual record that might bolster their case, by preventing the sort of full-blown rule of reason analysis that could help shed light on the actual economic effects of the practice. Nor have *Leegin*'s detractors established the ordinary prerequisites for application of the "quick look" rule of reason to minimum RPM.

Indeed, the various objections to *Leegin* are objections to TCE, fundamental principles of antitrust jurisprudence, or both. Put another way, arguments for displacing *Leegin* would, if taken to their logical conclusion, require courts also to overrule numerous other decisions that reflect the economic learning of the TCE revolution. The result would be a body of antitrust law divorced from the very economic theory that Congress expected courts to apply when fashioning antitrust doctrine. Far from correcting any purported error, reversal of *Leegin* by statute or otherwise would create another exemption from the Sherman Act under the guise of enhancing competition, a result analogous to the anti-competitive Robinson-Patman Act. At the same time, it seems unlikely that reimposition of a *per se* ban on

minimum RPM would induce the Supreme Court to abandon decisions such as *Sylvania* and its progeny. The result would therefore be an arbitrary distinction between price and non-price restraints, thereby causing parties to elect non-price restraints for reasons unrelated to wealth creation. It thus seems likely that federal courts and the federal enforcement agencies, who read exemptions from the antitrust laws narrowly, will adopt various strategies that minimize the impact of any legislative response to *Leegin*. Thus, resistance to *Leegin* is not merely misguided as a matter of antitrust principle but is likely futile, as well.

Part II of this Article describes the normative, jurisprudential, and economic foundations of Section 1's rule of reason. Part III recounts *Dr. Miles's per se* ban on minimum RPM, which the Court equated with a horizontal dealer cartel. Part IV details the Court's own effort to narrow *Dr. Miles*, as well as Congressional authorization of so-called "fair trade" legislation, pursuant to which most states authorized minimum RPM for nearly four decades. Part V describes how neoclassical price theory gave rise to antitrust's inhospitality tradition, which manifested itself in judicial hostility to minimum RPM and other non-standard agreements, including non-price vertical restraints. Part VI recounts the transaction cost revolution, which offered beneficial explanations for non-standard agreements, including minimum RPM. Part VII details the Supreme Court's embrace of TCE, first in *Sylvania* and its progeny and then in *Leegin*. Part VIII describes the resistance to *Leegin* and resulting proposals to reverse and/or undermine the decision. Part IX recounts and refutes various arguments made by *Leegin's* detractors, showing that such arguments reject TCE, basic antitrust principles, or both. Part X offers some concluding observations, including various strategies that courts and the enforcement agencies might employ to minimize the anti-reason impact of legislation reimposing the *per se* rule.

II. SECTION 1'S RULE OF REASON: APPLYING "ACCURATE ECONOMIC CONCEPTIONS"

Section 1 of the Sherman Act forbids "contract[s], combination[s], and] . . . conspirac[ies] in restraint of trade."⁴ Taken literally, however, a ban on all agreements that "restrain trade" would grind the economy to a halt.⁵ In the beginning, then, the Supreme Court tempered the Sherman Act's "plain language" to avoid these wealth-

4. 15 U.S.C. § 1 (2006).

5. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("[R]ead literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.").

destroying effects, holding that only direct restraints violate the Act.⁶ Such restraints, the Court held, included horizontal agreements between firms that had received special benefits from the State⁷ and purely private cartels that produced prices above the competitive level.⁸ By contrast, “indirect” restraints included contracts that were incidental to some main, lawful purpose, such as covenants ancillary to the formation of a partnership or ancillary to the sale of a business.⁹ Congress, the Court said, did not mean to ban such minor restraints, even if they had a remote effect on price.¹⁰ Circuit Judge (and future Chief Justice) William Howard Taft, in his influential *Addyston Pipe* decision, sketched a similar distinction between “ancillary” restraints, which were lawful absent some showing of harm, and “naked” restraints, which were automatically unlawful.¹¹

In the landmark *Standard Oil* decision, the Supreme Court confirmed what had been implicit in prior decisions, namely, that Section 1 only bans “unreasonable” restraints.¹² In so doing, the Court emphasized the common law origins of the term “restraint of trade” and that a broader construction of the Act would interfere with wealth-creating commerce, not to mention liberty of contract.¹³ Not all agreements reducing competition were unreasonable, the Court said. Instead, an agreement was unreasonable if it restrained competition “unduly,” by producing monopoly or its consequences—higher

6. See *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 566-68 (1898) (Sherman Act bans only direct restraints of interstate commerce, leaving “indirect” restraints, including “ordinary contracts and combinations” unscathed); *Hopkins v. United States*, 171 U.S. 578, 591-92 (1898) (same).

7. See *Joint Traffic*, 171 U.S. at 568-73 (holding that horizontal price fixing by interstate railroads was a “direct restraint” contrary to Section 1 because railroads had received special benefits from the state).

8. See generally *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (condemning private cartel agreement that produces unreasonably high prices as a direct restraint).

9. See *Joint Traffic*, 171 U.S. at 567-70 (elaborating on the distinction between “direct” and “indirect” restraints); *Hopkins*, 171 U.S. at 591-92 (same); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-84 (6th Cir. 1898), *aff'd as modified by* 175 U.S. 211 (1899).

10. See *Joint Traffic*, 171 U.S. at 567-68; *Hopkins*, 171 U.S. at 591-92.

11. See 85 F. 271. See also ROBERT H. BORK, *THE ANTIRUST PARADOX: A POLICY AT WAR WITH ITSELF* 26 (1993) (calling Taft’s *Addyston Pipe* opinion “one of the greatest”).

12. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See also *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (approving *Standard Oil* and extending the rule of reason to Section 2 of the Sherman Act).

13. See *Standard Oil*, 221 U.S. at 63 (stating that a literal application of the Act “would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce”); *American Tobacco*, 221 U.S. at 179-80 (*Standard Oil* held that the term “restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.”). See also Alan J. Meese, *Standard Oil as Lochner’s Trojan Horse*, 85 S. CAL. L. REV. 783, 784 (2012).

prices, reduced output, and/or deteriorating quality—and thus had the same impact as a “direct” restraint.¹⁴ Moreover, the Court suggested that some contracts were unreasonable on their face, because of their “nature or character,” and could thus be condemned without examination of their actual consequences.¹⁵ The Court also endorsed a flexible approach to the meaning of “restraint of trade,” discussing with approval common law decisions that had refashioned doctrine in light of “more accurate economic conceptions.”¹⁶ In the end, the Court said, the rule of reason required judges to employ “the light of reason” to determine whether a challenged agreement offended “the public policy embodied in the statute,” a process that, while applying a fixed normative standard, could produce different doctrinal results as economic conceptions evolved over time.¹⁷ It is thus no surprise that antitrust doctrine has always reflected the influence of prevailing economic theory.¹⁸

III. *DR. MILES* BANS MINIMUM RPM: CONGRESS AND THE STATES RESIST

Just six weeks before *Standard Oil*, the Court applied the direct/indirect test to vertical restraints for the first time, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹⁹ There, Dr. Miles sought to control resale prices by dealers distributing its products in two different ways. First, the firm entered into consignment agreements with wholesalers. These agreements provided that consignees could only sell to firms designated by Dr. Miles and set a floor on such prices.²⁰ Second, Dr. Miles appointed several thousand retailers authorized to purchase and thus take title to Dr. Miles’s product from consignees or other retailers.²¹ These contracts bound retailers not to sell below a

14. *Standard Oil*, 221 U.S. at 61-62. *See also id.* at 57, 61 (explaining that prohibition on restraints of trade was aimed at conduct “producing or tending to produce the consequences of monopoly”); *id.* at 52 (listing “evils” of monopoly as: 1) the power to fix prices; 2) the power to limit output; and 3) the danger of deteriorating quality of the monopolized product); *id.* at 66 (stating that the rule of reason and the direct/indirect test articulated in *Joint Traffic* ban the same conduct and thus “come to one and the same thing”).

15. *Id.* at 58.

16. *Id.* at 55. *See also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 69 (4th ed. 2011) (explaining that pre-Sherman Act common law reflected “rules of classical political economy concerning the nature of competition and the efficiency consequences of various anticompetitive practices”).

17. *Standard Oil*, 221 U.S. at 63-64.

18. *See* HOVENKAMP, *supra* note 16, at 69 (“One of the great myths about American antitrust policy is that courts first began to adopt an ‘economic approach’ to antitrust problems in the relatively recent past. . . . [However,] [a]ntitrust has always been closely tied to prevailing economic doctrine.”).

19. 220 U.S. 373 (1911).

20. *Id.* at 375-79 (reproducing consignment agreements).

21. *Id.* at 379-81 (reproducing the contract between Dr. Miles and approved retailers).

particular price.²² In this way, Dr. Miles sought to limit *intra*brand competition, that is, competition between various dealers selling its own products, thereby leaving competition with other products—*inter*brand competition—unscathed.²³

The case began as a tort action in federal court premised on diversity of citizenship.²⁴ Dr. Miles alleged that the defendant, an unapproved retailer, had induced approved retailers and consignees to sell it Dr. Miles's product below contractually specified prices.²⁵ Dr. Miles sought to enjoin the practice, claiming that the defendant had tortiously interfered with the price-setting agreements by intentionally inducing breach.²⁶ The defendant sought to avoid liability by claiming that the contract directly restrained interstate commerce contrary to Section 1.²⁷

The Court agreed with the defendant, holding that the agreements between Dr. Miles and approved retailers "relate[d] directly to interstate as well as intrastate trade, and operate[d] to restrain trade or commerce among the several States" and had the "purpose" of restraining "the entire trade," such that the restraint of trade was "obvious."²⁸ The Court assumed that dealers, and not Dr. Miles, were the primary beneficiaries of higher retail prices.²⁹ Even if Dr. Miles did derive some (unspecified) benefit, the Court said, its minimum RPM would fare no better than a "direct agreement" between dealers to fix prices.³⁰ But such an agreement, the Court said, would contravene numerous Sherman Act and common law decisions banning naked horizontal price fixing.³¹ In short, the Court equated minimum RPM

22. *Id.* at 380.

23. *See* HOVENKAMP, *supra* note 16, at 490 (distinguishing *intra*brand from *inter*brand competition).

24. Dr. Miles was an Indiana corporation and Park & Sons was a Kentucky corporation. *Dr. Miles*, 220 U.S. at 374, 381.

25. *Id.* at 381-82.

26. *Id.* at 382.

27. *Id.* at 390-91.

28. *Id.* at 400.

29. *Id.* at 407 ("But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury.")

30. *Id.* at 407-08 ("[T]he complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.")

31. *Id.* at 408 (citing *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified* by 175 U.S. 211 (1899); *Craft v. McConoughy*, 79 Ill. 346 (1875); *Chapin v. Brown*, 83 Iowa 156 (1891); *W.H. Hill Co. v. Gray & Worcester*, 127 N.W. 803 (Mich. 1910); *People v. Milk Exchange*, 145 N.Y. 267 (1895); *People v. Sheldon*, 139 N.Y. 251 (1893); *Judd v. Harrington*, 139 N.Y. 105

with a naked horizontal agreement between thousands of dealers and thus, not surprisingly, condemned it.³²

IV. THE COURT BACKTRACKS AND CONGRESS RESISTS

Dr. Miles had a long and eventful life. Less than a decade after announcing the decision, the Court limited its reach, holding that manufacturers were free to announce a price and then terminate dealers who undercut it, absent an antecedent agreement between dealer and manufacturer fixing resale prices.³³ Just seven years later, the Court, in an opinion by William Howard Taft, held that the automatic ban on minimum RPM did not apply when the manufacturer retained title to the product pursuant to a consignment agreement appointing retailers as agents.³⁴ By 1926, then, the Court had approved two different means of circumventing *Dr. Miles*.³⁵

The federal government itself imposed minimum RPM on some industries during the Great Depression. In 1933, Congress passed, and President Roosevelt signed, the National Industrial Recovery Act (NIRA).³⁶ The Act authorized the President to impose “codes of fair competition” on an industry-by-industry basis. Within a year of passage, “approximately eighty [such] codes” mandated minimum RPM.³⁷ Even before Congress had acted, some states, led by California, had immunized such agreements from attack under their own antitrust laws, so long as the agreements were truly vertical and took place in markets characterized by significant interbrand competition.³⁸

The Supreme Court unanimously rejected the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*, nullifying federally coerced

(1893)). One of these decisions, it should be noted, involved minimum RPM. See *W.H. Hill Co.*, 127 N.W. at 804.

32. See HOVENKAMP, *supra* note 16, at 491 (*Dr. Miles* assumed “that RPM is really a manifestation of price fixing among the retailers, who have involved the manufacturer in the agreement so that it can help police the cartel.”); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 156 (1976) (“According to the Court in *Dr. Miles*, resale price maintenance benefits dealers (at least ‘primarily’) and is bad because it has the same effect as a dealers’ cartel.”).

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

34. See *United States v. Gen. Elec. Co.*, 272 U.S. 476, 484 (1926).

35. See Hon. William F. Baxter, *Vertical Practices—Half Slave, Half Free*, 52 *ANTITRUST L.J.* 743, 744 (1983) (contending that, after *Colgate* and *General Electric*, “although the *Dr. Miles* case was on the books, the industrial world was largely untroubled”).

36. See National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195.

37. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 58-59 (1966).

38. See 1931 Cal. Stat. 583 (authorizing minimum RPM whenever agreements were vertical and the products governed by such contracts faced “fair and open competition with commodities of the same general class produced by others”). See also Ewald T. Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 *CALIF. L. REV.* 640, 640 & n.2 (1936) (reporting that, as of 1935, nine other states, in addition to California, representing forty percent of the nation’s population, had adopted fair trade legislation).

minimum RPM.³⁹ However, by 1937, forty-two states had authorized minimum RPM in intrastate commerce.⁴⁰ That same year, Congress passed the Miller-Tydings Act, which gave these “fair trade” statutes interstate teeth.⁴¹ Passed at the behest of small, less efficient retailers, Miller-Tydings immunized minimum RPM in interstate commerce whenever such agreements were truly vertical and the manufacturer’s product was subject to “full and free competition” from similar products.⁴² The 1952 McGuire Act strengthened Miller-Tydings, allowing states to authorize the imposition of minimum RPM on so-called “non-signers,” that is, retailers who refused to enter such agreements.⁴³ At one time (before Alaska and Hawaii entered the Union), forty-six of forty-eight states were so-called “fair trade” states, though the number fell to thirty-seven out of fifty by 1975.⁴⁴

V. *DR. MILES* REDUX: PRICE THEORY, THE INHOSPITALITY TRADITION, AND NON-PRICE RESTRAINTS

Non-price vertical restraints received comparatively little attention until nearly four decades after *Dr. Miles*. In the late 1940s, the Department of Justice announced its view that vertically imposed exclusive territories were unlawful *per se* and subsequently obtained numerous consent decrees banning the practice.⁴⁵ The FTC attempted to follow suit in the 1960s but met resistance in the lower courts, which rejected the *per se* label and validated such restraints under a forgiving rule of reason.⁴⁶ The Department of Justice met similar resistance in the Supreme Court when it sought *per se* condemnation of

39. See generally 295 U.S. 495 (1935).

40. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 398 (1951) (reporting that, by 1937, forty-two states had adopted fair trade laws).

41. See Miller-Tydings Act, Pub. L. No. 75-314, tit. VIII, 50 Stat. 673, 693 (1937).

42. *Id.* See also LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 378 (1977) (reporting support for fair trade “by small retailers facing competition from more efficient chain[s]”); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1064-67 (2005) (same).

43. See McGuire Act, Pub. L. No. 82-542, 66 Stat. 631 (1952).

44. See AMERICAN BAR ASS’N, ANTITRUST LAW DEVELOPMENTS 9 (Harvey M. Applebaum et al. eds., 1975). Moreover, as of 1975, only sixteen states allowed manufacturers to enforce such agreements against non-signers. See *id.* See also Richard K. Bates, *Constitutionality of State Fair Trade Acts*, 32 IND. L.J. 127, 134 (1957) (reporting that ten state supreme courts had found non-signer provisions unconstitutional).

45. See Sigmund Timberg, *Territorial Exclusives*, 29 ANTITRUST L.J. 233, 243 (1965).

46. See *Sandura Co. v. FTC*, 339 F.2d 847, 849 (6th Cir. 1964) (rejecting ban on vertically imposed exclusive territory); *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 833 (7th Cir. 1963) (same); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 409 (5th Cir. 1962) (finding that exclusive territory imposed ancillary to a trademark license was reasonable). See also *Tri-Cont’l Fin. Corp. v. Tropical Marine Enters.*, 265 F.2d 619, 624-25 (5th Cir. 1959) (sustaining as reasonable agreement preventing purchaser of a vessel from competing with the seller on certain routes for ten years).

agreements reserving certain customers to a manufacturer.⁴⁷ As of 1963, then, minimum RPM was unlawful *per se* (except in fair trade states), while vertical territorial restraints were judged under a friendly rule of reason.

The enforcement agencies' attacks on non-price restraints followed naturally from the dominant economic paradigm of the time, neo-classical price theory. Premised on the perfect competition model, price theory presumed that unconstrained atomistic markets functioned effectively and that efficiencies were necessarily technological in nature and thus realized *within* firms.⁴⁸ As a result, agreements that reached beyond the firm to constrain trading partners were necessarily suspect, because they reduced rivalry without any possible benefits.⁴⁹ Scholars operating within this tradition were suspicious of complete vertical integration and generally condemned partial contractual integration such as tying agreements, exclusive dealing, RPM, or non-price vertical restraints.⁵⁰

Shortly after World War II, Courts began to embrace price theory's account of non-standard agreements, producing the "inhospitality tradition" of antitrust law, a term coined by Donald Turner, the economist-lawyer who would head the antitrust division during the 1960s.⁵¹ In particular, courts condemned numerous non-standard

47. See generally *White Motor Co. v. United States*, 372 U.S. 253 (1963).

48. See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 370-71 (1985) (explaining how price theory treated efficiencies as technological in nature and thus as arising "within" the firm).

49. See *id.* at 366 (According to price theory, "efforts to reconfigure firm and market structures that violated those 'natural' boundaries were believed to have market power origins."); *id.* at 371 ("[T]here is nothing to be gained [within price-theoretic paradigm] by introducing nonstandard terms into market-mediated exchange . . .").

50. See JOE S. BAIN, *INDUSTRIAL ORGANIZATION* 357-58 (1959) (contending that complete vertical integration was generally motivated by a desire to acquire or protect market power); JOHN PERRY MILLER, *UNFAIR COMPETITION: A STUDY IN CRITERIA FOR THE CONTROL OF TRADE PRACTICES* 199-200 (1941) (contending that tying agreements were necessarily the result of monopoly power); Derek C. Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 307-08 (arguing that exclusive dealing contracts serve no beneficial purpose); William S. Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1419 (1968) (contending that courts should condemn non-price vertical restraints as unlawful *per se*); Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION L. & ECON. 21, 44-45 (2005) (explaining how price theory's hostility to non-standard contracts flowed from the inability to surmise a beneficial purpose of such limits on rivalry); George J. Stigler, *The Extent and Bases of Monopoly*, 32 AM. ECON. REV. 1, 8-13, 22 (1942) (concluding that such integration could produce technological efficiencies but usually injured competition); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 699 (1962) [hereinafter Turner, *Conscious Parallelism*]; (same); Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 73-74 (1958) [hereinafter Turner, *Tying Arrangements*] (arguing that courts should ban tying contracts).

51. See Oliver E. Williamson, *The Economics of Governance*, 95 AM. ECON. REV. 1, 5 & n.8 (2005) (citing Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C.

agreements as “unreasonable *per se*” or nearly so, because they: (1) always reduced rivalry between the parties to them and (2) always lacked redeeming virtues.⁵²

Four years after rejecting a *per se* ban for territorial restraints, the Supreme Court reversed course, at Turner’s behest, in *United States v. Arnold, Schwinn & Co.*⁵³ Relying upon *Dr. Miles* and price-theoretic logic, the Court condemned non-price vertical restraints, such as exclusive territories and customer allocations as unreasonable *per se*, whenever title had passed from manufacturer to dealer.⁵⁴ Like franchising itself, the Court said, such restraints were not a “usual” method of business, and they reduced competition without countervailing virtues.⁵⁵ At the same time, the Court rejected the bid by the United States to go even further, that is, to apply the same *per se* ban to restraints the defendant had accomplished through consignment arrangements.⁵⁶ According to the Court, intrabrand competition was not the only relevant consideration under the rule of reason, and the restraints Schwinn had imposed on consignees did not restrain (interbrand) competition in the “product market as a whole.”⁵⁷ As a result, the Court said, rule of reason treatment was appropriate, and there was no reason to disturb the district court’s finding that the intrabrand restraints contained in the defendant’s consignment arrangements furthered overall competition.⁵⁸ Shortly thereafter the Court held that dealers who had entered minimum RPM and other non-standard contracts could nonetheless challenge such agreements, because manufacturers generally employed coercive market power to impose them.⁵⁹ The Court did not square this

L. REV. 5, 47 (2004) [hereinafter Meese, *Intrabrand Restraints*] (attributing this term to Turner). See also Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 119-34 (2003) [hereinafter Meese, *Rule of Reason*] (describing inhospitality tradition’s price-theoretic origins and resulting influence on antitrust doctrine).

52. See Meese, *Rule of Reason*, *supra* note 51, at 124-34 (detailing these judicial developments). See also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (articulating this two-part *per se* rule).

53. 388 U.S. 365 (1967). See also Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, 17 ANTITRUST 61, 64 (2003) (describing Turner’s role in government’s Schwinn brief).

54. *Schwinn*, 388 U.S. at 379 (citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)) (“Under the Sherman Act, it is unreasonable, without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.”).

55. *Id.* (“To permit [post-sale restraints] would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale.”).

56. *Id.* at 379-80 (describing the government’s argument).

57. *Id.* at 381-82.

58. *Id.* at 380-81 (invoking the trial court’s findings that restraints contained in consignment agreements helped Schwinn compete against mass merchandisers).

59. See *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134 (1968).

claim with *Dr. Miles's* equation of minimum RPM with a dealer cartel.⁶⁰ The Court also banned *maximum* RPM, which assured consumers *lower* prices than dealers might charge.⁶¹

Following the same dictates of price theory, Congress repealed fair trade legislation in 1975, thereby restoring *Dr. Miles* by default.⁶² Thus, for the first time in 85 years, both price and non-price agreements were unlawful *per se* throughout the land, so long as title had passed to the dealer.⁶³ At the same time, identical agreements imposed via consignment arrangements were analyzed under a forgiving rule of reason.⁶⁴

VI. THE REVOLUTION COMETH: TCE DISPLACES PRICE THEORY

Even during the inhospitality era, dissenting scholars rejected price theory's focus on technological efficiencies and the resulting condemnation of vertical restraints. For instance, three decades before *Schwinn*, Ronald Coase offered a non-technological explanation for the existence of firms and thus vertical integration.⁶⁵ According to Coase, the firm was a particular type of contract, whereby employees agreed to follow the directives of employers within a broad range.⁶⁶ Moreover, Coase argued that economic actors rely upon firms to conduct economic activity when the alternative—reliance upon atomistic markets—results in prohibitive costs, what economists would later call transaction costs.⁶⁷ Thus, Coase implied that technological considerations were beside the point because, absent transaction costs, independent economic actors who owned each distinct phase of the production process could bargain to employ the most efficient process.⁶⁸ Moreover, while Coase did not explicitly say so, his insight al-

60. See *supra* notes 23-32 and accompanying text.

61. See *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968).

62. See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801. See also SULLIVAN, *supra* note 42, at 378-79 (discussing repeal of fair trade laws with approval); *id.* at 14-17 (discussing various price-theoretic texts as sources of economic learning relevant to antitrust); *id.* at 379-87 (articulating classic price-theoretic objections to minimum RPM).

63. See *supra* notes 35, 54-58 and accompanying text (explaining how *Colgate*, *General Electric*, and *Schwinn* limited the *per se* rule to instances of actual agreement between manufacturer and dealer regarding product whose title had passed).

64. See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379-82 (1967) (analyzing territorial restraints imposed via consignment agreements under a forgiving rule of reason).

65. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

66. *Id.* at 390-91.

67. See *id.* at 391-92; see also Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 349 (1967) (employing the term "transaction costs").

68. See Victor P. Goldberg, *Production Functions, Transaction Costs and the New Institutionalism*, in *ISSUES IN CONTEMPORARY MICROECONOMICS AND WELFARE* 395, 397-98 (George R. Feiwel ed., 1985) (explaining that technical economies cannot explain firm boundaries because, absent transaction costs, such economies can "be achieved equally well if the factors of production are owned by independent individuals").

so suggested a non-technological explanation for partial integration, that is, contractual integration that stood somewhere between “firm” and “market.”⁶⁹

However, as Coase himself has admitted, his work was “much cited and little used.”⁷⁰ Certainly Coase’s lessons were lost on the price theorists who ritually condemned partial contractual integration. These scholars simply could not explain such agreements absent a hypothesis of monopoly power.⁷¹ It was not until 1960 that scholars offered beneficial accounts of non-standard agreements, accounts that resonated with Coase’s transaction cost insight. Most famously, Lester Telser contended that manufacturers who rely upon market transactions—sales to independent dealers—to distribute their products might adopt minimum RPM for reasons contrary to the interests of those dealers.⁷² In particular, Telser contended that, left to their own devices, dealers might “free ride” on efforts by other dealers to promote the manufacturer’s product, efforts that required investments that dealers could not recover once made.⁷³ The prospect of such free riding, he said, might deter dealers from making such investments.⁷⁴ By imposing minimum RPM, Telser said, manufacturers could prevent low service dealers from luring away customers with price cuts, thereby ensuring that dealers who did make such investments would recoup them.⁷⁵ While Telser did not mention Coase or “transaction costs,” his insight identified costs of market transacting—free riding, market failure, and suboptimal promotion—that manufacturers could avoid by means of partial contractual integration.⁷⁶

While the Supreme Court and the enforcement agencies ignored Telser’s work, others did not. Most notably, Robert Bork embraced and expanded Telser’s argument, arguing that non-price vertical restraints, such as exclusive territories, could also prevent free riding.⁷⁷

69. See R.H. Coase, *Nature of the Firm: Meaning*, 4 J.L. ECON. & ORG. 19, 29-30 (1988) (discussing unpublished notes from the 1930s assessing transaction cost rationales for partial integration).

70. See R.H. Coase, *Industrial Organization: A Proposal for Research*, in POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 62-63 (Victor R. Fuchs ed., 1972).

71. See Meese, *supra* note 50, at 44-45 (explaining how price theory’s hostility to non-standard contracts flowed from the inability to surmise any beneficial purpose of such limits on rivalry).

72. See Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 86-87 (1960).

73. *Id.* at 91-92.

74. *Id.*

75. *Id.*

76. See Meese, *supra* note 50, at 52-53 (contending that Telser’s insight was an early application of TCE).

77. See Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) [hereinafter Bork, *Price Fixing*]. See also Robert

Moreover, Bork expressly embraced Coase's assertion that "the firm" was simply one form of contractual integration and argued that partial contractual integration, including minimum RPM and exclusive territories, could also produce efficiencies.⁷⁸ As a result, Bork said, courts should treat partial integration the same way as, say, complete integration by merger, validating both absent an affirmative showing of anticompetitive harm.⁷⁹ Moreover, Bork did not limit his analysis to vertical restraints, but applied the same reasoning to some horizontal restraints.⁸⁰ Such an approach, he said, would simply replicate the approach taken with respect to other ancillary restraints, such as covenants ancillary to the formation of a partnership, which Bork treated as a paradigmatic case in which non-standard contracts could overcome market failure.⁸¹

Other scholars soon embraced and elaborated upon the Telser-Bork line of argument.⁸² Among these scholars was Oliver Williamson, who, like Coase, would later win the Nobel Prize for his work articulating the transaction cost paradigm.⁸³ While a special employee at the Department of Justice, Williamson had objected to the government's brief in *Schwinn*.⁸⁴ Eight years later, Williamson suggested that vertical integration was presumptively an effort to minimize transaction costs.⁸⁵ Four years after that he suggested that market restrictions like those condemned in *Schwinn* were presumptively methods of economizing on transaction costs, including the harm

H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968) [hereinafter Bork, *Resale Price Maintenance*].

78. See Bork, *Price Fixing*, *supra* note 77, at 384 n.29; *id.* at 474; Meese, *supra* note 50, at 53-54 (describing Bork's reliance on Coase's transaction cost reasoning).

79. See Bork, *Price Fixing*, *supra* note 77, at 472 (footnote omitted) (citing Coase, *supra* note 65) ("In economic analysis, a contract integration is as much a firm as an ownership integration. The nature of the standards applied to them through the Sherman Act should be the same."). Ironically, Coase was unaware of Bork's work when he claimed that his article, while cited during the 1960s, had no "noticeable effect on what was written in the text." See Coase, *supra* note 69, at 23.

80. See Bork, *Price Fixing*, *supra* note 77, at 429-38 (discussing the benefits of horizontal and vertical intrabrand restraints interchangeably in support of rule of reason treatment for both).

81. *Id.* at 380-82.

82. See Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Victor P. Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

83. See Press Release, The Royal Swedish Academy of Sciences, The Prize in Economic Sciences 2009 (Oct. 12, 2009), http://www.nobelprize.org/nobel_prizes/economics/laureates/2009/press.pdf.

84. See Williamson, *supra* note 53, at 64 (recounting this objection).

85. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 20 (1975) (footnote omitted) (stating that "a presumption of market failure is warranted where it is observed that transactions are shifted out of a market and into a firm").

caused by opportunistic free riding by dealers.⁸⁶ As Bork had done over a decade earlier, Williamson analogized the (beneficial) impact of such non-price vertical restraints to the impact of minimum RPM.⁸⁷ Moreover, Williamson would subsequently reiterate that TCE dictates a “rebuttable presumption” that complete integration or partial integration via non-standard contract reflects voluntary cooperation between economic actors that reduces the cost of transacting and thus increases economic welfare.⁸⁸

As Williamson would later explain, these developments reflected a genuine scientific revolution in industrial organization theory.⁸⁹ Moreover, this revolution had implications far beyond the law of vertical restraints or, for that matter, antitrust.⁹⁰ Indeed, scholars have employed transaction cost reasoning to problems as varied as international security arrangements,⁹¹ company towns,⁹² sharecropping,⁹³ and marriage.⁹⁴ In short, the economics profession has embraced TCE as a theoretical apparatus that can inform research agendas in a va-

86. See Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 955 (1979) [hereinafter Williamson, *Assessing Vertical Market Restrictions*] (explaining that “free rid[ing]” was an example of “subgoal pursuit” by franchisees that could undermine the franchise system). See also Oliver E. Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439, 1440 n.3 (1974) [hereinafter Williamson, *The Economics of Antitrust*] (stating, without additional explanation, that “the [restraints challenged in *Schwinn*] can usefully be examined in transaction cost terms”).

87. See Williamson, *Assessing Vertical Market Restrictions*, *supra* note 86, at 958 n.26 (explaining that both minimum RPM and exclusive territories can combat such free riding) (citing POSNER, *supra* note 32, at 149-50, 160, 185; Telser, *supra* note 72, at 86).

88. See WILLIAMSON, *supra* note 48, at 28 (contending that there is “a rebuttable presumption that nonstandard forms of contracting have efficiency purposes”); Williamson, *Assessing Vertical Market Restrictions*, *supra* note 86, at 958 (“The basic presumption of the transaction cost approach is that successive interfaces are organized in a manner that economizes on transaction costs.”). See also Alan J. Meese, *Market Power and Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291 (2013) (explaining how TCE implies that parties enter efficient non-standard contacts voluntarily).

89. See Alan J. Meese, *Reframing Antitrust in Light of Scientific Revolution: Accounting for Transaction Costs in Rule of Reason Analysis*, 62 HASTINGS L.J. 457 (2010). See also Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 274 (1987) (concluding that TCE and the resulting reinterpretation of vertical integration was a manifestation of a “genuine scientific revolution”).

90. For a summary of the influence of transaction cost reasoning in antitrust, see Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95 (2002).

91. See Katja Weber, *Hierarchy Amidst Anarchy: A Transaction Costs Approach to International Security Cooperation*, 41 INT’L STUD. Q. 321 (1997).

92. See WILLIAMSON, *supra* note 48, at 35-38.

93. See Douglas W. Allen & Dean Lueck, *Transaction Costs and the Design of Cropshare Contracts*, 24 RAND J. ECON. 78 (1993).

94. See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents: Or, “I Gave Him the Best Years of My Life,”* 16 J. LEGAL STUD. 267 (1987).

riety of fields.⁹⁵ This ability to inspire and inform disparate research agendas or “normal science” is the hallmark of a successful scientific paradigm.⁹⁶

VII. THE SUPREME COURT JOINS THE REVOLUTION: FROM SYLVANIA TO LEEGIN

Just two years after Congress repudiated “fair trade,” the Supreme Court abandoned the consistent treatment of price and non-price vertical restraints, in *Continental T.V., Inc. v. GTE Sylvania Inc.*⁹⁷ There, the Court reconsidered *Schwinn*. The Court rejected *Schwinn*’s dispositive focus on the passage of title, holding that no meaningful economic distinction justified disparate treatment of sale and non-sale transactions.⁹⁸ Moreover, the Court announced that courts should examine both types of restraints under the rule of reason, thus overruling *Schwinn*’s recent and novel *per se* ban on some non-price restraints.⁹⁹

The Court conceded that non-price restraints necessarily reduced intrabrand competition, that is, competition between dealers.¹⁰⁰ However, the mere fact that a restraint always reduced such competition did not thereby render it unlawful *per se* under prevailing doctrine, the Court said.¹⁰¹ Instead, such restraints also had to lack redeeming virtues to merit such outright condemnation.¹⁰² Relying upon recent advances in economic theory, more precisely TCE, the Court concluded that such restraints could produce redeeming virtues in some cases, thereby undermining the case for *per se* condemnation.¹⁰³ Most famously, the Court asserted that such agreements could encourage

95. See Howard A. Shelanski & Peter G. Klein, *Empirical Research in Transaction Cost Economics: A Review and Assessment*, 11 J.L. ECON. & ORG. 335, 336-38 (1995) (recounting various other applications of TCE).

96. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

97. 433 U.S. 36 (1977).

98. *Id.* at 47-57.

99. *Id.* at 57-59.

100. *Id.* at 54 (“Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers.”).

101. See *infra* notes 127-47 and accompanying text (describing the two-part *per se* rule applied during the inhospitality era).

102. See *Sylvania*, 433 U.S. at 50 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). See also *supra* note 52 and accompanying text.

103. See *Sylvania*, 433 U.S. at 54-58 (noting that such restraints might produce “redeeming virtue[s],” thereby obviating *per se* condemnation, and explaining that restraints can aid in maintaining interbrand competition (citing Posner, *supra* note 82, at 283, 285, 287-88; Bork, *Price Fixing*, *supra* note 77, at 403)). See also Oliver E. Williamson, *Symposium on Antitrust Law and Economics*, 127 U. PA. L. REV. 918, 920 (1979) (explaining that *Sylvania* assumed that “the transaction-cost approach provide[s] a sounder basis for antitrust enforcement in this area”).

dealers to promote the manufacturer's product by ensuring that a dealer could capture the benefits of promotional investments.¹⁰⁴

Absent such restrictions, the Court said, dealers could locate anywhere they wished, and dealers who declined to engage in promotion could free ride on those who did.¹⁰⁵ The prospect of such free riding could deter all dealers from engaging in promotion, thereby hampering interbrand competition, which the Court characterized as "the primary concern of antitrust law."¹⁰⁶ Because such restraints could produce such redeeming virtues, the Court said, courts should not condemn them unless fact-intensive rule of reason scrutiny established that they produced harm.¹⁰⁷ However, the Court emphasized that it had no intent to disturb *Dr. Miles's per se* ban on minimum RPM.¹⁰⁸

The Court's simultaneous (re)embrace of *Dr. Miles* and invocation of the free riding rationale to justify overruling *Schwinn* was ironic. After all, scholars had first articulated the free riding rationale in the context of minimum RPM.¹⁰⁹ Others, including Robert Bork and Oliver Williamson, later extended this rationale to non-price restraints as part of the larger transaction cost revolution.¹¹⁰ Thus, invocation of this rationale to justify rule of reason treatment for non-price restraints seemed to undermine *Dr. Miles*. Indeed, concurring in *Sylvania*, Justice White resisted the free rider rationale because it would also call *Dr. Miles* into question.¹¹¹ As he put it, "[t]he effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints."¹¹² Scholars agreed that the rationale of *Sylvania*, if applied consistently, would ultimately require the Court to repudiate *Dr. Miles*.¹¹³

Sylvania was not a "one off" or a sport, but instead became a driving force behind widespread reformulation of antitrust doctrine over the next three decades, reformulation that paralleled scientific advances brought about by the TCE revolution.¹¹⁴ In *NCAA v. Board of*

104. See *Sylvania*, 433 U.S. at 54-56.

105. *Id.* at 55.

106. *Id.* at 52 n.19.

107. *Id.* at 57-59.

108. *Id.* at 51 n.18 ("The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy.")

109. See Telser, *supra* note 72, at 91-92.

110. See *supra* notes 77-87 and accompanying text (collecting authorities).

111. See *Sylvania*, 433 U.S. at 69 (White, J., concurring) ("[T]he economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well.")

112. *Id.* at 70.

113. See Robert H. Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171; Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

114. See HOVENKAMP, *supra* note 16, at 46-56 (describing numerous applications of TCE in the antitrust context). See also Meese, *Rule of Reason*, *supra* note 51, at 134-44 (de-

Regents of the University of Oklahoma, for instance, the Court invoked *Sylvania* for the proposition that horizontal restraints on competition “in a limited aspect of a market may actually enhance marketwide competition,” thereby preventing *per se* condemnation of the restraints before the Court.¹¹⁵ Shortly thereafter, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court cited *Sylvania* for the proposition “that there is a presumption in favor of a rule-of-reason standard” and “that interbrand competition is the primary concern of the antitrust laws.”¹¹⁶ The Court also invoked *Sylvania* for the proposition that “[t]he Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”¹¹⁷ As a result, the Court said, changed economic understandings of the impact of trade restraints could justify reversal of a decision that depended upon a different understanding.¹¹⁸ The Court also relied upon *Sylvania* for the proposition that an agreement between a dealer and a manufacturer to terminate another, price-cutting dealer could reflect a procompetitive effort to combat free riding by the latter.¹¹⁹

The Court again invoked *Sylvania* a decade later, when reconsidering and reversing the *per se* ban on maximum RPM.¹²⁰ The Court unanimously reiterated *Sylvania*’s conclusion “that the primary purpose of the antitrust laws is to protect interbrand competition.”¹²¹ The Court also reiterated that Congress expected the courts to draw upon dynamic common law tradition when implementing the Sherman Act and that it was appropriate to “reconsider[] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.”¹²²

scribing the evolution of TCE and its influence on the scope of *per se* rules during this period); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 11-23 (2003) (describing the relevance of TCE for various antitrust problems).

115. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984). *See also* Meese, *supra* note 50, at 28-29 (describing this aspect of *NCAA*).

116. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

117. *Id.* at 732 (citing *Sylvania*, 433 U.S. at 53 n.21).

118. *See id.* at 731 (“The term ‘restraint of trade’ in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term ‘restraint of trade’ was well recognized at the time the Sherman Act was enacted.”).

119. *See id.* (invoking *Sylvania* for the proposition that “manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by ‘free riding’ on the services provided by other dealers”).

120. *See State Oil Co. v. Khan*, 522 U.S. 3 (1997).

121. *Id.* at 15 (citing *Business Electronics*, 485 U.S. at 726).

122. *Id.* at 21.

The Supreme Court finally accepted what Justice White had characterized as *Sylvania's* invitation to overrule *Dr. Miles* in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹²³ There, the plaintiff, a retailer, challenged the defendant's nationwide imposition of minimum RPM.¹²⁴ In the lower court, the defendant offered to prove, via expert testimony, that the restraint was necessary to reduce the cost of transacting—relying upon the market to distribute its goods—by overcoming a market failure and encouraging approved retailers to promote the defendant's products.¹²⁵ Relying on *Dr. Miles*, both the trial court and the Fifth Circuit rejected this offer to prove that a *per se* unlawful practice produced benefits.¹²⁶

The Court began its analysis by adopting the same standard for *per se* liability as *Sylvania* or, for that matter, numerous cases from the inhospitality era. That is, to merit *per se* condemnation, a restraint must have “‘manifestly anticompetitive’ effects” and, in addition, “lack . . . any redeeming virtue.”¹²⁷ The Court acknowledged that minimum RPM could, under some conditions, pose anticompetitive risks.¹²⁸ For instance, industry-wide minimum RPM could facilitate a manufacturer cartel by discouraging a manufacturer from cutting prices, because dealers could not pass those discounts on to consumers.¹²⁹ However, relying upon the sort of transaction cost reasoning employed in *Sylvania* and subsequent decisions, the Court explained that economists had identified numerous “procompetitive effects” associated with minimum RPM, benefits that had not been apparent to the *Dr. Miles* Court.¹³⁰ These benefits, the Court said, were similar to benefits produced by non-price vertical restraints, benefits the Court had recognized as “redeeming virtues” in *Sylvania* and subsequent decisions.¹³¹ For instance, the Court said, minimum RPM could prevent dealers from free riding on each other's promotional services, encouraging dealers to make promotional investments.¹³² Moreover, minimum RPM could facilitate a manufacturer's reliance upon dealers who have cultivated a reputation for selling high quality merchandise, thereby allowing consumers to rely upon such retailers'

123. 551 U.S. 877 (2007).

124. *Id.* at 882-84 (detailing the history and content of the restraint).

125. *Id.* at 884-85 (detailing lower court proceedings).

126. *Id.*

127. *Id.* at 886 (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)).

128. *See id.* at 892-94.

129. *Id.* at 892.

130. *Id.* at 889 (“[E]conomics literature is replete with procompetitive justifications for a manufacturer's use of [minimum] resale price maintenance.”).

131. *Id.* at 890 (“The justifications for vertical price restraints are similar to those for other vertical restraints.” (citing *Sylvania*, 433 U.S. at 54-57)).

132. *See id.* at 890-91 (citing POSNER, *supra* note 32, at 172-73).

certification of the quality of the products in question.¹³³ By preventing discounting, the Court said, minimum RPM can protect the economic viability of firms that make the investments necessary to maintain a high quality operation.¹³⁴ As a result, the Court said, minimum RPM could facilitate interbrand competition, including new entry by upstart manufacturers who could assure themselves of promotion and/or quality certification adequate to wrest consumers away from established brands.¹³⁵

The Court also invoked literature contending that minimum RPM can produce benefits in retail markets not susceptible to free riding. By granting dealers a guaranteed margin, minimum RPM can ensure that dealers expect to receive a stream of earnings greater than they would receive in a perfectly competitive market.¹³⁶ Dealers will forfeit these earnings (what economists call a “performance bond”) if terminated, giving the manufacturer a powerful tool for ensuring dealers’ compliance with the manufacturer’s expectations for dealer performance.¹³⁷ Each of these explanations was an application of TCE, which predicts that unconstrained dealers may behave opportunistically, imposing costs on manufacturers and consumers.¹³⁸ Each also depended upon the assumption, articulated in *Sylvania* and subse-

133. *See id.* at 891 (citing Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 347-49 (1984)).

134. *See id.*

135. *Id.* at 890-91 (Minimum RPM “can increase interbrand competition by facilitating market entry for new firms and brands.”).

136. *Id.* at 892 (“Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer’s market share by inducing the retailer’s performance and allowing it to use its own initiative and experience in providing valuable services.”).

137. *See id.* The Court also opined that this strategy would allow manufacturers to rely upon dealer “initiative and experience in providing valuable services.” *Id.* However, the Court did not explain how a manufacturer could pursue a strategy of relying upon dealers’ individual judgments about appropriate promotional strategies while at the same time possessing concrete, enforceable expectations about what strategies dealers should pursue, expectations that could form the basis for a decision to terminate a dealer. *See* Alan J. Meese, *Property Rights and Intra-brand Restraints*, 89 CORNELL L. REV. 553, 615-16 (2004) (questioning the claim that manufacturers employ performance bonds to enforce particular promotional expectations). Nonetheless, this shortcoming does not itself undermine this “performance bond” theory of minimum RPM. That is, a manufacturer may wish to demand a performance bond from its dealers even if it does not mean to rely upon their expertise in choosing promotional strategies. *See, e.g.*, Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265, 266-67 (1988) (explaining reasons that may induce manufacturers to demand performance bonds to assure dealer performance of obligations unrelated to promotional free riding). Moreover, where manufacturers do wish to decentralize promotional decisionmaking, minimum RPM and non-price vertical restraints can serve as contractual property rights, ensuring that dealers who make promotional investments internalize the benefits of doing so. *See* Bork, *supra* note 77, at 956; Meese, *supra*, at 595-607; *see also* Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1, 2 (1982).

138. *See supra* notes 85-88 and accompanying text.

quently reaffirmed, that interbrand competition is the primary concern of antitrust.¹³⁹

The Court did not assert that minimum RPM always or even usually produces one or more of the benefits just identified. Instead, the Court merely concluded that beneficial minimum RPM is neither infrequent nor hypothetical.¹⁴⁰ As a result, the Court could not conclude that minimum RPM “always or almost always tend[s] to restrict competition and decrease output,” with the result that such contracts should, like non-price restraints, receive fact-intensive rule of reason scrutiny.¹⁴¹

Of course, *Dr. Miles* was a long-standing precedent.¹⁴² Nonetheless, invoking *Sylvania* and other decisions, the Court explained that the doctrine of *stare decisis* had less weight in the antitrust context, given the common law nature of the Sherman Act.¹⁴³ The Court had relied upon similar TCE-based arguments when rejecting bans on non-price vertical restraints and maximum price fixing; there was no reason to ignore such new learning in the context of minimum RPM.¹⁴⁴ This learning, of course, had undermined the central premise of *Dr. Miles*, namely, that minimum RPM is economically indistinguishable from naked horizontal price fixing between dealers.¹⁴⁵ Indeed, retaining *Dr. Miles* would call *Sylvania* and its progeny into question.¹⁴⁶ Finally, the ban on minimum RPM could simply encourage manufacturers to respond by adopting non-price restraints that were less efficient, and sometimes more anticompetitive, simply because such restrictions were treated less harshly than price restraints.¹⁴⁷

139. See *Leegin*, 551 U.S. at 890 (“[T]he primary purpose of the antitrust laws is to protect [interbrand] competition.” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997))).

140. See *id.* at 894 (“[A]lthough empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical.”).

141. *Id.* at 894 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

142. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-43 (1987) (finding that New York’s regulatory imposition of minimum resale liquor prices contravened *Dr. Miles*); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977) (reaffirming *Dr. Miles* in dicta).

143. See *Leegin*, 551 U.S. at 899 (“*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. . . . From the beginning the Court has treated the Sherman Act as a common-law statute.”).

144. *Id.* at 900-02 (“[T]he Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints.”).

145. *Id.* at 888 (describing *Dr. Miles*’s unjustified equation of manufacturer-imposed minimum RPM with horizontal collusion between dealers).

146. *Id.* at 902 (“If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question.”).

147. *Id.* For instance, the Court noted that exclusive territories by their nature eliminate all forms of competition between dealers, while minimum RPM merely limits price competition. *Id.* at 903-04.

VIII. THE NEW RESISTANCE

Many accepted *Leegin* as a straightforward application of TCE to minimum RPM, given the Court's common law authority to adjust doctrine in light of new learning.¹⁴⁸ However, some scholars, lawyers, and political actors have chosen to resist *Leegin* to the utmost. Such resistance has taken many forms. For instance, just as industry sought legislative relief from *Dr. Miles*, some current and former enforcement officials, including the attorneys general of forty-one states, have asked Congress for relief from *Leegin*.¹⁴⁹ Some members of Congress introduced bills that would do just that, i.e., amend the Sherman Act to codify *Dr. Miles*.¹⁵⁰ The Senate Judiciary Committee approved one such bill in November 2011, after receiving testimony from low-cost retailers critical of *Leegin*.¹⁵¹ Others have invoked "antitrust federalism" and advocated state legislation banning minimum RPM.¹⁵² Several state attorneys general have brought post-*Leegin* actions against minimum RPM, urging courts to ignore *Leegin* and condemn such restraints outright under existing state antitrust laws.¹⁵³

148. Thomas A. Lambert, *Dr. Miles Is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937, 1940-41 (2009).

149. See, e.g., *Testimony before the Subcomm. on Courts & Competition Policy, H.R., Judiciary Comm.*, 111th Cong. (2009) (statement of Pamela Jones Harbour, Comm'r, Federal Trade Commission) [hereinafter Harbour Testimony 2009], available at <http://judiciary.house.gov/hearings/pdf/Harbour090428.pdf>; *The Leegin Decision: The End of the Consumer Discounts or Good Antitrust Policy?: Hearing before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. 6-8 (2007) (statement of Robert Pitofsky, Sheehy Professor of Antitrust Law and Regulation, Georgetown University Law School) [hereinafter *Leegin* Senate Judiciary Hearing], available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg41548/pdf/CHRG-110shrg41548.pdf>; Letter from 41 State Attorneys General, Nat'l Ass'n of Att'ys Gen., in Support for the Discount Pricing Consumer Protection Act of 2009 (H.R. 3190) to Rep. John Conyers, Chairman, House Judiciary Comm., U.S. House of Representatives and Rep. Lamar Smith, Ranking Member, House Judiciary Comm., U.S. House of Representatives (Oct. 27, 2009) [hereinafter Letter from 41 State Attorneys General], available at http://www.naag.org/assets/files/pdf/signons/20091027.HR_3190.pdf.

150. See, e.g., Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011); Discount Pricing and Consumer Protection Act of 2009, H.R. 3190, 111th Cong. (2009).

151. See Jeffrey May, *Senate Bill Restoring Per Se Rule for Resale Price Maintenance Passes Senate Judiciary Committee*, TRADE REG. TALK (Nov. 7, 2011, 1:36 PM), <http://traderegulation.blogspot.com/2011/11/senate-bill-restoring-per-se-rule-for.html>. See also *Leegin* Senate Judiciary Hearing, *supra* note 149, at 8-10 (reproducing testimony of one such retailer).

152. See MD. CODE ANN., COM. LAW § 11-204(b) (West 2009); Joseph Pereira, *State Law Targets 'Minimum Pricing'*, WALL ST. J. (Apr. 28, 2009), <http://online.wsj.com/article/SB124087840110661643.html>. See also Richard A. Duncan & Allison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 173, 174 (2008) (identifying at least thirteen states where minimum RPM is likely unlawful *per se* under current law).

153. See *New York v. Herman Miller, Inc.*, No. 08-CV-02977, 2008-2 Trade Cas. (CCH) ¶ 76,454 (S.D.N.Y. filed Mar. 25, 2008) (stipulated final judgment and consent decree awarding damages and banning minimum RPM under state law); *California v. Bioelements, Inc.*, No. 10011659, 2011 WL 486328 (Cal. Super. Ct. filed Jan. 11, 2011) (proposed

Private parties, too, have invoked state laws when attacking such restraints; just last year one state supreme court declared the restraint challenged in *Leegin* unlawful *per se* within its own borders.¹⁵⁴ Finally, some scholars and most states have embraced a temporary fallback position, contending that, so long as *Leegin* is good law, federal courts should subject minimum RPM to the “quick look” version of the rule of reason, under which the mere existence of a challenged restraint establishes a *prima facie* case, thereby casting upon the defendant a burden of adducing evidence that the restraint produces benefits.¹⁵⁵

There is, of course, no constitutional or other barrier preventing Congress or the states from reinstating *Dr. Miles*. There is a long history of Congress overriding straightforward applications of the Sherman Act, either to exempt otherwise unlawful conduct or to ban reasonable conduct that would otherwise create wealth, sometimes at the behest of special interest groups that stand to benefit from such exceptions.¹⁵⁶ Fair trade legislation provides an example of the former, while the 1935 Robinson-Patman Act is a prime example of the latter.¹⁵⁷ Like fair trade legislation, Robinson-Patman, which bans certain forms of price discrimination, was passed at the behest of small retailers, who feared that more efficient chains would obtain volume discounts from manufacturers and pass such discounts on to consumers.¹⁵⁸

final judgment including permanent injunction detailing a consent decree banning minimum RPM under state law); *People v. Tempur-Pedic Intl., Inc.*, 944 N.Y.S.2d 518 (N.Y. App. Div. 2012) (considering a state challenge to minimum RPM under New York law). See also Alan M. Barr, *Antitrust Federalism in Action—State Challenges to Vertical Price Fixing in the Post-Leegin World*, ANTITRUST SOURCE, Dec. 2009, at 1 (describing these and other post-*Leegin* challenges to minimum RPM).

154. See *O'Brien v. Leegin Creative Leather Prods.*, 277 P.3d 1062, 1086-88 (Kan. 2012) (declaring minimum RPM unlawful *per se* under Kansas antitrust law). *But cf.* *Spahr v. Leegin Creative Leather Prods.*, No. 2:07-CV-187, 2008 WL 3914461, at *7 (E.D. Tenn. Aug. 20, 2008) (applying the rule of reason under Tennessee law).

155. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (elaborating on the “quick look” framework); John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 ANTITRUST BULL. 423 (2010); see also *infra* notes 292-94 and accompanying text (collecting authorities contending that courts should subject minimum RPM to a “quick look” analysis).

156. See, e.g., ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS APRIL 2007 Ch. IV.B (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/letter_to_president.pdf (detailing various exemptions from the antitrust laws); Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216 (2012) (contending that the new federal consumer protection regime rejects consumer sovereignty and bans conduct that would be unobjectionable under consumer-centered antitrust policy).

157. Robinson-Patman Act of 1935, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13 (1936)).

158. See Schragger, *supra* note 42, at 1060-66 (describing the anti-efficiency impetus for the Robinson-Patman Act). See also Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 70-71 (1967) (describing anti-consumer consequences of the Robinson-Patman Act).

Indeed, as explained earlier, Congress has sometimes even imposed anticompetitive restraints against parties' will.¹⁵⁹ States too are free to coerce their citizens into conduct that would be felonious if adopted by private parties, even when such "regulation" destroys wealth and transfers income from out-of-state consumers to in-state producers or from one set of producers to the other.¹⁶⁰ They may also ban conduct that would be wealth-creating and thus lawful under the Sherman Act.¹⁶¹

However, *Leegin's* detractors have not invoked the authority of states or the national government to ban otherwise reasonable restraints. Moreover, these advocates would reject any analogy to fair trade legislation or the Robinson-Patman Act. Instead they argue that *Leegin* "got it wrong" when applying basic antitrust principles animating the rule of reason. Moreover, legislation proposed in 2011 that would have codified *Dr. Miles* was premised upon a finding that *Leegin* "incorrectly interpreted the Sherman Act."¹⁶² For those who resist *Leegin*, then, a Congressional or state *per se* ban on minimum RPM or judicial adoption of a "quick look" approach would merely undo the Court's purported mistake.

The remaining parts of this Article identify and refute numerous arguments that those resisting *Leegin* have made for restoring *Dr. Miles*. Each argument, it is seen, rejects TCE, basic antitrust principles, or both. As a result, one cannot characterize restoration of *Dr. Miles* as a bona fide application of *Standard Oil's* rule of reason. Instead, reimposition of the ban on minimum RPM would constitute a rejection of the "more accurate economic conceptions"¹⁶³ that should drive antitrust doctrine and thus be akin to a welfare-reducing special interest exemption from basic antitrust principles.

IX. REFUTING THE RESISTANCE

This part recounts and refutes various arguments made by those who resist *Leegin*. Simply put, TCE undermines the central economic premise of *Dr. Miles*, namely, that minimum RPM is the equivalent of a naked dealer cartel. *Leegin's* detractors have not carried their burden of articulating and supporting a substitute rationale for *per se*

159. See *supra* notes 36-38 and accompanying text (describing so-called "codes of fair competition" imposed under the NIRA).

160. See *Parker v. Brown*, 317 U.S. 341 (1943) (rejecting Sherman Act and dormant commerce clause challenges to state-imposed raisin cartel).

161. See *California v. Am. Stores Co.*, 495 U.S. 271 (1990) (holding that states may ban mergers that are lawful under federal law).

162. See S. 75, 112th Cong. § 2(a)(5) (2011) (asserting that *Leegin* "incorrectly interpreted the Sherman Act").

163. *Standard Oil Co. v. United States*, 221 U.S. 1, 55 (1911).

condemnation. Instead, each such argument rests upon a rejection of TCE, basic antitrust principles, or both.

A. Leegin Is Correct Even if Free Riding Is “Rare”

Some who resist *Leegin* have asserted that the sort of “free riding” invoked by *Leegin* is rare, with the result that most minimum RPM agreements are likely anticompetitive.¹⁶⁴ However, *Leegin* does not depend upon the assumption that dealer free riding is common. On the contrary, *Leegin* depends upon a far weaker assumption, namely, that free riding is *sometimes* present in those industries in which manufacturers choose to adopt minimum RPM, thereby undermining *Dr. Miles’s* assumption that such agreements are necessarily equivalent to a dealer cartel.¹⁶⁵

To be sure, proponents of TCE have asserted that transaction costs and thus market failures are “ubiquitous,” a fact confirmed by the very existence of firms which, according to TCE, arise to overcome such costs and failure.¹⁶⁶ Moreover, these scholars have contended that any number of non-standard contracts can reduce transaction costs.¹⁶⁷ However, *Leegin* only purports to apply in those industries where firms have adopted a particular form of non-standard contract, namely, minimum RPM; the decision made no assumption about how many firms will do so. Indeed, during the fair trade era, the vast majority of firms in states that adopted fair trade laws, which were more permissive than the rule of reason analysis contemplated by *Leegin*, declined to adopt minimum RPM.¹⁶⁸ Section 1 of the Sherman Act speaks only to those contracts that parties actually employ. Thus, a finding that free riding is only possible in

164. See, e.g., Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32, 44-45 (2007) (contending that the sort of free riding identified in *Leegin* occurs in “rare and narrow circumstances”); Marina Lao, *Resale Price Maintenance: A Reassessment of its Competitive Harms and Benefits*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 59, 73-74 (Josef Drexler et al. eds., 2011); *Leegin* Senate Judiciary Hearing, *supra* note 149, at 7. See also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 916 (2007) (Breyer, J., dissenting) (suggesting that free riding is relatively rare (citing Robert Pitofsky, *Why Dr. Miles Was Right*, 8 REGULATION 27, 29-30 (1984))); Letter from 41 State Attorneys General, *supra* note 149, at 2 (invoking supposed absence of evidence that minimum RPM creates benefits); Brief of the American Antitrust Institute as Amicus Curiae in Support of Respondent at 19-20, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (use of RPM to combat free riding is “not common or important”).

165. See *supra* note 32 and accompanying text (explaining *Dr. Miles’s* equation of minimum RPM and dealer cartels).

166. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 26 (1988) (contending that transaction costs and resulting market failure are “ubiquitous”).

167. See *supra* notes 85-88 and accompanying text.

168. See Edward S. Herman, *A Statistical Note on Fair Trade*, 4 ANTITRUST BULL. 583, 584 (1959) (reporting that around one percent of the nation’s manufacturers employed minimum RPM in fair trade states).

a small fraction of the nation's industries is entirely consistent with *Leegin*.

What if, however, we were to determine (somehow) that most industries in which minimum RPM is present are *not* susceptible to dealer free riding? Assume, for instance, that minimum RPM is present in twenty percent of the nation's industries, but that conditions conducive to free riding are only present in one quarter of them, that is, five percent. Surely these data would undermine *Leegin*.

In fact, such data would not call *Leegin* into question. Full-blown rule of reason treatment of a category of restraints does not depend upon an assertion that most of the restraints in question produce significant benefits. Instead, as explained earlier, a category of agreements is unlawful *per se* if the agreements within the category necessarily have a "pernicious effect on competition" *and*, in addition, "lack . . . redeeming virtue[s]."¹⁶⁹ Put another way, conduct is unlawful *per se* if, based on experience, courts determine that full-blown rule of reason scrutiny will "always" or "almost always" condemn such agreements.¹⁷⁰ Under this formulation, which *Leegin*'s detractors do not seem to question, it is not enough that a restraint would "usually" or "probably" fail rule of reason scrutiny. *Per se* rules are stilettos, not bludgeons.

In any event, control of free riding is not the only possible "redeeming virtue" of minimum RPM. *Leegin* also opined that, for instance, minimum RPM could create a performance bond that dealers would forfeit if terminated for shirking non-promotional obligations.¹⁷¹ Practitioners of TCE developed this rationale to explain why minimum RPM occurs in markets where free riding is unlikely.¹⁷² Hence, dispositive proof that free riding *never* occurs would not undermine *Leegin*. Thus, this argument for restoring *Dr. Miles* rests upon a flawed understanding of TCE's case against *Dr. Miles*, a misapplication of the standard for *per se* illegality, or both.

169. *Leegin*, 551 U.S. at 886 ("To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive effects' and 'lack . . . any redeeming virtue[.]'" (citations omitted)); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 8 (1979) (same). See also *supra* notes 127-47 and accompanying text (describing the two-part *per se* rule developed during the inhospitality era).

170. See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("*Per se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982))).

171. See *Leegin*, 551 U.S. at 892.

172. See Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L.J. 431, 442 (2009).

B. The Absence of Empirical Evidence Demonstrating that Minimum RPM Produces Significant Benefits Does Not Undermine Leegin

Many scholars and officials have asserted there is not substantial empirical evidence supporting the claim that minimum RPM produces benefits in a significant number of cases, with the result that Congress and/or the states should reinstate *Dr. Miles*.¹⁷³ However, it is not clear why proponents of *Leegin* should bear the burden of proving that minimum RPM produces benefits. While certain restraints are unreasonable *per se*, such summary condemnation is the rare exception, not the rule.¹⁷⁴ Private contracts are presumptively reasonable, and parties seeking to void such contracts must ordinarily prove that such agreements produce harm.¹⁷⁵ Finally, modern courts only condemn a category of restraints as unlawful *per se* if *experience* with rule of reason scrutiny teaches that full-blown scrutiny will always or almost always condemn the restraint.¹⁷⁶ Thus, if courts were writing on a “clean slate,” it would seem appropriate to cast the burden of proof upon those who would *condemn* all minimum RPM agreements, no matter the market position of the parties, as unlawful *per se*.¹⁷⁷

Of course, courts are not writing on a clean slate; *Dr. Miles* was on the books (with substantial exceptions and qualifications) for nearly a century before *Leegin*. But this fact cuts in *Leegin*'s favor. After all,

173. See, e.g., *Leegin* Senate Judiciary Hearing, *supra* note 149, at 6 (statement of Pamela Jones Harbour, Comm'r, FTC, commenting that “[t]here still is no body of sound empirical economic evidence to show that minimum vertical price fixing is, on balance, more likely than not to benefit consumers”); *id.* at 7 (statement of Robert Pitofsky) (“It is 95 years later, and they still have not come up with an iota of data, of empirical support, that free riders drive services out of the market, that manufacturers introduce minimum resale price maintenance in order to attract services. It is all Economics 101 theory.”); Lao, *supra* note 164, at 82-83 (asserting that “there is little reliable empirical evidence” regarding the impact of minimum RPM); Letter from 41 Attorneys General, *supra* note 149, at 1 (“[W]e are not aware of any empirical study that shows enhanced consumer welfare in the form of services or other customer benefits. Sufficient experience with state ‘fair trade laws’ during the middle of the last century evidenced that consumers paid significantly more for goods when manufacturers could maintain prices at the retail level.”). One scholar, it should be noted, takes a more nuanced position, contending that the absence of such evidence is one factor that should cause courts to reject a “full blown” rule of reason in favor of a more hostile “quick look” approach, under which such restraints are automatically presumed unlawful, thereby casting upon the defendant a burden of producing evidence that the restraint produces significant benefits. See Lao, *supra* note 164, at 85 (contending that “quick look” treatment is appropriate “given the absence of reliable empirical evidence on the prevalence and significance of RPM’s procompetitive effects”).

174. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

175. See, e.g., *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004) (explaining that proof of actual harm is the first step in an ordinary rule of reason case).

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

177. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (“[In *Sylvania*] [w]e noted that especially in the vertical restraint context ‘departure from the rule-of-reason standard must be based on demonstrable economic effect, rather than . . . upon formalistic line drawing.’” (quoting *Sylvania*, 433 U.S. at 58-59)).

Dr. Miles (which itself invoked no empirical evidence), rested upon the purely theoretical claim that minimum RPM was indistinguishable in economic effect from a horizontal dealer cartel, that is, could not further any procompetitive interest, a position that numerous price theorists embraced during the inhospitality era.¹⁷⁸ Such logic, of course, applied with equal force to non-price restraints, impelling the *Schwinn* Court to condemn such agreements, as well.¹⁷⁹

TCE, of course, completely undermines the theoretical equation of vertical restraints with analogous naked horizontal restraints. Without this purely theoretical premise, the logic of *Dr. Miles* collapses, thereby mandating rule of reason treatment for such restraints, unless proponents of *per se* condemnation carry *their* burden of establishing the sort of “demonstrable economic effect” necessary to justify *per se* condemnation.¹⁸⁰ To be sure, those who resist *Leegin* have attempted to make this case. They point out that minimum RPM reduces price competition (undeniably true—that’s the point), thereby satisfying the first part of the *per se* rule’s two-part test.¹⁸¹ Moreover, *Leegin*’s detractors have repeatedly invoked experience with the fair trade era, during which *Dr. Miles* was only applicable in a fraction of the country.¹⁸² Despite this experience with widespread fair trade, *Leegin*’s detractors say, there is no evidence that minimum RPM overcame free riding or otherwise furthered the interests of consumers.¹⁸³

However, proponents of *Dr. Miles* are too quick to treat the fair trade era as a source of data relevant to an evaluation of *Leegin*’s rule of reason. For one thing, the fair trade regime was more permissive of RPM than any full-blown rule of reason. As explained earlier,

178. See Edward S. Herman, *A Note on Fair Trade*, 65 YALE L.J. 23, 23-24 (1955) (reporting that economists were in “virtually unanimous agreement” that “‘fair trade . . . in practical effect . . . nullifies the antitrust prohibitions against horizontal price fixing’” (citation omitted)); *id.* at 24 n.6 (collecting authorities for this proposition). See also *supra* note 32 and accompanying text.

179. See *supra* notes 53-54 and accompanying text (describing *Schwinn*’s reliance upon *Dr. Miles*).

180. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007) (failure of *Dr. Miles*’s main rationale requires reexamination of the economic foundations of the *per se* rule); *Business Electronics*, 485 U.S. at 724 (*per se* condemnation depends upon demonstrated economic effect).

181. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (articulating a two-part test for *per se* condemnation).

182. See *supra* notes 34-44 and accompanying text.

183. See Harbour Testimony 2009, *supra* note 149, at 4-5 (invoking 1975 Congressional findings based on experience during the fair trade era to support legislative reversal of *Leegin*); Letter from 41 Attorneys General, *supra* note 149, at 1-2; Robert Pitofsky, *Are Retailers Who Offer Discounts Really “Knaves”? The Coming Challenge to the Dr. Miles Rule*, 21 ANTITRUST 61, 62-63 (2007) (invoking fair trade experience in support of *Dr. Miles*). See also Edward D. Cavanagh, *Vertical Price Restraints After Leegin*, 21 LOY. CONSUMER L. REV. 1, 22-23 (2008) (contending that during the fair trade era, minimum RPM occurred in some industries in which conditions for dealer free riding were not present).

many fair trade laws authorized manufacturers to *compel* dealers to accept minimum RPM against their will.¹⁸⁴ An era that includes numerous agreements coercively imposed on unwilling retailers is not a useful source of data for evaluating the hypothesis that such agreements are *voluntary* integration designed to overcome market failure and reduce transaction costs.¹⁸⁵

More fundamentally, application of fair trade immunity did not turn on the presence or not of free riding or any other putative benefits of minimum RPM. Instead, under Miller-Tydings, states could immunize minimum RPM whenever: (1) the agreements were vertical, and (2) there was “free and open competition”—what today we would call interbrand competition—between the manufacturer’s product and other goods.¹⁸⁶ Absent such interbrand competition, states could not immunize minimum RPM, regardless of whether such restraints produced benefits.¹⁸⁷ Moreover, so long as there *was* such (apparent) competition—a condition courts almost always found—the presence of anticompetitive harm did not obviate fair trade immunity, even when minimum RPM was adopted throughout the industry.¹⁸⁸ In these circumstances, firms could enter minimum RPM agreements, even agreements that would produce economic harm and fail *Leegin’s* rule of reason, with impunity, undeterred by any rule of reason scrutiny.¹⁸⁹

184. See *Bates*, *supra* note 44, at 134 (reporting that ten state supreme courts had found non-signer provisions unconstitutional). See also *supra* notes 39-44 and accompanying text.

185. See *supra* notes 39-44 and accompanying text.

186. See, e.g., *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313-14 (1956) (applying language in the Miller-Tydings Act providing that states could not confer fair trade immunity on horizontal agreements).

187. See, e.g., *Eastman Kodak Co. v. FTC*, 158 F.2d 592, 593-94 (2d Cir. 1946) (rejecting manufacturer’s invocation of fair trade immunity because black and white film was not a substitute for defendant’s color film, with the result that the defendant possessed a monopoly such that there was no “free and open competition” between the manufacturer’s product and others). Cf. *Columbia Records Inc. v. Goody*, 105 N.Y.S.2d 659, 663 (N.Y. App. Div. 1951) (finding that products were in “fair and open competition” for purpose of exemption provided under state law).

188. See, e.g., *Revere Copper & Brass, Inc. v. Econ. Sales Co.*, 127 F. Supp. 739 (D. Conn. 1954) (fair trade exemption applied even if dealer proved that defendant and sole rival charged identical prices to dealers); 1947 FTC ANN. REP. 60 (1947) (reporting that after *Eastman Kodak*, 158 F.2d at 593-94, the Commission modified its original order invalidating minimum RPM upon finding that “free and open competition” was present after one firm entered a previously-monopolized market). See also Herman, *supra* note 178, at 25-26 (noting that *Eastman Kodak* was the only decision holding that there was insufficient competition to invoke the fair trade exemption).

189. See *Gen. Elec. Co. v. Super. Ct. of Alameda Cnty.*, 291 P.2d 945 (1955) (rejecting dealer’s argument that manufacturer’s excessive profits despite free and open competition would undermine the application of fair trade law). See *infra* notes 298-302 and accompanying text (detailing the conditions under which minimum RPM would fail rule of reason scrutiny).

As a result, the universe of minimum RPM agreements that arose under a fair trade regime differed from that which will likely arise under a post-*Leegin* rule of reason. That is, the ratio of anticompetitive to procompetitive agreements was likely higher during the fair trade era than it will be post-*Leegin*. Moreover, during the fair trade era, parties to litigation over the application or not of state fair trade statutes had no reason to generate evidence about the benefits of such practices or whether such benefits might outweigh harms.¹⁹⁰ While Congress repealed the fair trade laws in 1975, doing so merely reinstated *Dr. Miles*, which banned minimum RPM, without regard to whether such agreements produced benefits.¹⁹¹ As a result, minimum RPM litigation focused on other issues, such as whether there was actually an agreement between a manufacturer and its dealers, whether that agreement really “fixed prices,” and whether title to the relevant product had in fact passed to the dealer.¹⁹²

In any event, even if fair trade regimes had treated the benefits of minimum RPM as pertinent, parties would have had little reason to investigate whether such agreements reduced free riding. Simply put, for most of the fair trade era, the notion of private agreements overcoming market failure and thus producing non-technological efficiencies was foreign to the economics profession and, thus, to members of the bar and legal academy who relied upon economic theory to inform antitrust analysis. The perfect competition model, with its numerous heroic assumptions, had a strong grip on those who applied economics to antitrust.¹⁹³ To be sure, price theorists recognized that not all markets are perfectly competitive. Moreover, many such theorists studied the impact of monopoly, oligopoly, and/or monopolistic competition.¹⁹⁴ Still, while these scholars recognized that some markets could be characterized by fewer sellers than necessary for

190. See *infra* notes 275-80 and accompanying text (elaborating on the role of proof of benefits in overall rule of reason analysis).

191. See *supra* notes 62-64 and accompanying text (detailing the repeal of fair trade laws).

192. See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726-28 (1988) (articulating the definition of “price fixing” relevant for application of *Dr. Miles*); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 760-61 (1984) (articulating the standards governing whether manufacturer and dealers had entered a price agreement); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1436 (7th Cir. 1986) (articulating the standard for distinguishing *bona fide* agency agreements from sham consignment designed solely to achieve RPM). See also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380-81 (1967) (holding that territorial restraints accomplished via consignment arrangements are analyzed under the rule of reason).

193. See generally FRANK M. MACHOVEC, *PERFECT COMPETITION AND THE TRANSFORMATION OF ECONOMICS* (1995) (describing the evolution of classical economics and the perfect competition model).

194. See generally EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933); JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933). See also Joe S. Bain, *Market Classifications in Modern Price Theory*, 56 Q.J. ECON. 560, 569-74 (1942) (offering detailed taxonomy of various market structures).

perfect competition, they nonetheless generally retained most other assumptions of perfect competition when analyzing such markets.¹⁹⁵ As I have shown elsewhere, rigorous embrace of some such assumptions simply precluded recognition that reliance on atomized markets could produce market failure and/or that private agreements could overcome this condition.¹⁹⁶ Moreover, economists and then legal scholars did not introduce the argument that minimum RPM could reduce free riding until 1960, the same year (coincidentally?) that Ronald Coase first contended that parties could, by contract, reallocate legal entitlements in a way that eliminates antecedent market failure.¹⁹⁷ Thus, while minimum RPM thrived during the fair trade era, economists, legal scholars, and members of the antitrust bar had no reason to examine whether this practice was a voluntary contractual mechanism for overcoming market failure. Like other scientists, economists do not gather facts in a vacuum, but instead must rely upon some theory to inform the contours of factual inquiry.¹⁹⁸ Given the state of economic theory and legal rules during most of the fair trade era, economists and others had no reason to ask whether open, notorious, and lawful minimum RPM reduced free riding or otherwise overcame some market failure. Pre-modern astronomers may just as well have studied the exact contours of a (stationary) Earth's "orbit" around the Sun.

To be sure, some early practitioners of TCE, notably Robert Bork and Lester Telser, embraced transaction cost reasoning during the 1960s, but these scholars were a decided minority. Even Donald Turner and Richard Posner, one an economist and the other an economically sophisticated antitrust lawyer, rejected the Telser-Bork view and co-authored the brief that convinced the Supreme Court to extend *Dr. Miles* and declare non-price post-sale restraints unlawful

195. See FRIEDRICH A. HAYEK, *The Meaning of Competition*, in INDIVIDUALISM AND ECONOMIC ORDER 92, 94 (1948) ("Most [assumptions of perfect competition] are equally assumed in the discussion of the various 'imperfect' or 'monopolistic' markets, which throughout assume certain unrealistic 'perfections.'"). See also CARL KAYSER & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 8 (1959) ("[T]hough the model of [perfectly] competitive market structure is not usable as such in our definition of competition, other concepts of the model are."); Meese, *supra* note 89, at 469 & n.47 (collecting various authorities to this effect).

196. See Meese, *supra* note 50, at 70-80.

197. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Telser, *supra* note 72. See also *supra* notes 72-88 and accompanying text (detailing the evolution of TCE, beginning with Telser's assertion that minimum RPM could overcome market failure).

198. See KUHN, *supra* note 96, at 59-61 (explaining that background expectations driven by theory limit the type of data that a scientist may find); KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 107 (5th ed. 1968) ("Theory dominates the experimental work from its initial planning up to the finishing touches in the laboratory."); Ronald H. Coase, *The New Institutional Economics*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 229 (1984) (chiding institutional economists for gathering a mass of facts with no theory to guide them as to what was relevant).

per se in *Schwinn*.¹⁹⁹ A 1968 article by an economist in the *Harvard Law Review* on vertical intrabrand restraints did not mention Telser's work on minimum RPM and argued that courts should condemn all such restraints, even those imposed pursuant to a consignment arrangement.²⁰⁰ The piece devoted three paragraphs to a rejection of the "free rider" argument propounded earlier in the decade by Bork, claiming that such promotion would lead to product differentiation and that, if consumers really valued such services, a separate market would spring up to supply them.²⁰¹

Thus, TCE did not really take root until the mid-1970s, just as Congress repealed the fair trade laws and restored *Dr. Miles* by default.²⁰² In so doing, Congress quite ironically created a legal regime that deprived the antitrust community of the very data *Leegin's* detractors claim they crave. After all, *per se* condemnation drives certain restraints underground, depriving scholars of the sort of judicial records that inform empirical investigation.²⁰³ By banning all minimum RPM, then, *Dr. Miles* itself prevented economists from gathering data about the true impact of minimum RPM, just as they were learning what to look for. Calls for more data ring hollow coming from those who support the very legal regime that prevents the acquisition of such information. If more knowledge is what we want, full-blown rule of reason scrutiny is the best way to get it. But until then, proponents of *Dr. Miles* have simply not carried *their* burden of articulating and empirically supporting a rationale for *per se* condemnation.

In any event, the absence of empirical evidence has never precluded courts from adjusting rules governing restraints of trade. For instance, in the early fifteenth century, English courts condemned all trade restraints outright, without regard to reasonableness.²⁰⁴ Three centuries later, these courts reversed course, announcing they would

199. See Williamson, *supra* note 53, at 64 (describing the roles of Posner and Turner in preparing the government's *Schwinn* brief). As explained earlier, Williamson objected to the brief at the time. See *supra* note 84 and accompanying text.

200. See Comanor, *supra* note 50, at 1432-33 (1968).

201. *Id.* at 1433.

202. See *supra* note 103 (collecting authorities applying TCE reasoning to vertical restraints in the 1970s).

203. See HOVENKAMP, *supra* note 16, at 536 (arguing that courts should examine minimum RPM under the rule of reason in part because "[b]oth legal policy makers and economists learn a great deal from studying the records of business litigation"); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 6-7 (1984) ("Once a practice has been declared unlawful, a business is likely to defend a lawsuit by denying that it engaged in the practice. Rarely will it say: 'Yes, we did that, and here is why it is economically beneficial that we did.' Judges thus are deprived of opportunities to reconsider, with the light of knowledge, what they decided in ignorance.").

204. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) ("The inhibition against restraints of trade at common law seems at first to have had no exception." (citing *Dyer's Case*, Y.B. 2 Hen. V, fol. 5, pl. 26 (1414) (Eng.))).

enforce reasonable, partial ancillary restraints.²⁰⁵ None of the courts adduced any empirical evidence in support of its conclusions, which instead were premised upon theory about the impact of such restraints. The Supreme Court described these developments with approval in *Standard Oil*, as did William Howard Taft in his foundational *Addyston Pipe* opinion.²⁰⁶ In the same way, nineteenth-century American courts repeatedly emphasized that the common law of trade restraints was not static, but instead responsive to judicial reappraisal in light of what *Standard Oil* would later call “more accurate economic conceptions.”²⁰⁷

The Supreme Court has repeatedly explained that Congress expected courts to draw upon “common law tradition” when implementing the Sherman Act.²⁰⁸ This tradition, of course, included the authority of courts to fashion antitrust doctrine without waiting for empirical evidence, especially when judge-created doctrines have themselves precluded the acquisition of such evidence! Presumably Congress had these decisions and their common law methodology in mind when it adopted a term—“restraint of trade”—laden with common law meaning and such “dynamic potential.”²⁰⁹

It should come as no surprise, then, that the Supreme Court has itself repeatedly rejected or mandated *per se* condemnation without empirical evidence supporting its conclusions. At one time, for instance, tying agreements were subject to a forgiving rule of reason, under which defendants could articulate benefits that justified such

205. See *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711). See also *Addyston Pipe*, 85 F. at 280-81 (discussing these developments).

206. *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911) (“Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified . . .”); *Addyston Pipe*, 85 F. at 280 (describing various policy considerations that led English and then American courts to abandon an outright ban on trade restraints).

207. See *Standard Oil*, 221 U.S. at 55; *Addyston Pipe*, 85 F. at 280-81 (describing American developments). See also *Gibbs v. Consol. Gas Co.*, 130 U.S. 396, 409 (1889) (“The decision in *Mitchel v. Reynolds* is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified.” (citations omitted)). See also *infra* note 345 and accompanying text (collecting state decisions to the same effect).

208. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“[Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant.”).

209. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1998) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”).

practices.²¹⁰ After World War II, however, the Court declared in dicta that “[t]ying agreements serve hardly any purpose beyond the suppression of competition” and opined that there were almost always less restrictive alternatives that would achieve the same objective as such arrangements.²¹¹ The Court cited no empirical evidence, citing instead a law review note and a monograph authored by a price theorist.²¹² The note cited only the same monograph for its conclusion.²¹³ Despite this flimsy foundation, the Court repeated this nostrum for decades.²¹⁴ As a result, the Court declared unlawful *per se* any tying contract entered by a firm with economic power, reasoning that all such ties were necessarily the result of power used to impose them.²¹⁵ The Court found such power in any departure from perfect competition, even asserting that the very imposition of a tie itself established that the defendant had economic power.²¹⁶ Here again the Court offered no empirical evidence supporting its assertion that ties obtained by firms not in perfect competition were the result of market power. Nor did the Court offer any empirical support for subsequent adjustments in tying doctrine, including its redefinition of the type and quantum of economic power necessary to establish a *per se* violation.²¹⁷

The Court’s approach to non-price vertical restraints has been equally untethered to empirical support. The *Schwinn* Court, for in-

210. See *FTC v. Gratz*, 253 U.S. 421 (1920) (declining to ban tying contracts); *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff’d per curiam*, 299 U.S. 3 (1936) (sustaining a tie because the requirement could protect the manufacturer’s goodwill).

211. See *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949) (“Tying agreements serve hardly any purpose beyond the suppression of competition. The justification most often advanced in their defense—the protection of the good will of the manufacturer of the tying device—fails in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough.”) This language was dicta because the Court was in fact evaluating an exclusive dealing contract between a gasoline refiner and its dealers.

212. *Id.* at 306 (citing MILLER, *supra* note 50, at 199; Note, *Section 3 of the Clayton Act—Coexisting Standards of Legality?*, 49 COLUM. L. REV. 241, 246 (1949)).

213. See Note, *supra* note 212, at 246 n.40 (citing MILLER, *supra* note 50, at 199).

214. See *Fortner Enters., Inc. v. U.S. Steel Corp.* (*Fortner I*), 394 U.S. 495 (1969); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594 (1953).

215. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-16 (1984); *Fortner I*, 394 U.S. at 503-04.

216. See *Fortner I*, 394 U.S. at 503-04 (stating that the ability to impose a tie on an appreciable number of buyers suggests that the seller has economic power); *United States v. Loew’s Inc.*, 371 U.S. 38, 52 (1962) (holding that the possession of a copyright confers economic power for purposes of tying doctrine). See also *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 49 (9th Cir. 1971) (holding that a trademark conferred economic power for purposes of the *per se* rule).

217. See *Jefferson Parish*, 466 U.S. at 26-29 (holding that a market share of thirty percent did not establish economic power for purposes of the *per se* rule despite product differentiation). See also *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 705 (7th Cir. 1984) (explaining that *Jefferson Parish*’s approach to defining economic power “doom[ed] the franchise trademark [tying] cases” that had treated any departure from perfect competition as sufficient to establish such power).

stance, offered no empirical evidence supporting the distinction it drew between sale and non-sale transactions.²¹⁸ The best that can be said for the decision is that it reflected the consensus economic *theory* of the time, which posited a distinction between agreements that reached beyond a firm and influenced the behavior of purchasers or suppliers, and those that controlled a firm's own property before title passed.²¹⁹ The former, courts and scholars said, had market power origins, while the latter could produce technological efficiencies.²²⁰

A decade later, the Court, influenced by the teachings of TCE, rejected this distinction, pointing out, properly, that there was no economic rationale for treating the choice between consignment and sale as dispositive, with the result that the same legal standard should apply to both transactional forms.²²¹ Yet, a desire for a consistent rule did not thereby establish the content of that rule; the Court could have chosen *per se* condemnation for *both* transactional forms (as the United States had sought in *Schwinn*) or, instead, rule of reason treatment for both.²²² The Court famously chose the latter course, in a result that many detractors of *Leegin* endorse.²²³ However, the Court offered no empirical evidence that a substantial proportion of non-price vertical restraints in fact produce the sort of benefits that the Court invoked.²²⁴

Still, the mere fact that these various developments lacked empirical bases does not thereby condemn them. Supreme Court justices are not well-positioned to second-guess a scientific consensus. Bans on tying, minimum RPM, and other non-standard contracts reflected the mainstream view within the economics profession, driven by price theory, that such agreements could not produce benefits. This consensus informed the "reason" that Section 1 requires courts to

218. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 377-83 (1967).

219. See Meese, *Intrabrand Restraints*, *supra* note 51, at 38-49 (explaining price theory's conclusion that restraints purporting to control purchasers after passage of title could not produce efficiencies and therefore had market power origins). See also *supra* notes 53-64 and accompanying text.

220. See Meese, *Intrabrand Restraints*, *supra* note 51, at 42-44.

221. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). Cf. Bork, *Price Fixing*, *supra* note 77, at 472 ("In economic analysis, a contract integration is as much a firm as an ownership integration. The nature of the standards applied to them through the Sherman Act should be the same." (citing Coase, *supra* note 65, at 381)).

222. See, e.g., Comanor, *supra* note 50, at 1433-35 (advocating a *per se* ban on all such agreements, regardless whether title had passed).

223. See, e.g., Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467, 471 (2008) (expressing agreement with *Sylvania's* rule of reason holding).

224. The *Sylvania* Court did refer to unspecified "decision[s] sustaining vertical restrictions under the rule of reason" as evidence that such restraints produce "redeeming virtues." See *Sylvania*, 433 U.S. at 54. The absence of any citation of such cases or explanation of the test these courts employed makes it difficult to evaluate this evidence.

bring to bear on antitrust problems.²²⁵ The very same sort of consensus still drives the Court's *per se* ban on naked horizontal price fixing, a ban not found in pre-Sherman Act common law.²²⁶ No Supreme Court decision invokes empirical evidence that such price fixing produces harm; the case is purely theoretical and, so far as we know, correct.

In any event, the demand for empirical evidence by *Leegin's* detractors is difficult to square with their continuing support for *Dr. Miles*. That decision, after all, rested upon the purely theoretical conclusion—now known to be false—that minimum RPM is analogous to a dealer cartel.²²⁷ Absent a “demonstrable showing” that minimum RPM nonetheless satisfies the criteria for *per se* treatment, a showing *Leegin's* detractors have not made, continued resistance to *Leegin* constitutes a rejection of TCE and/or a rejection of basic antitrust principles, such as the two-part test for *per se* illegality.

C. The Purported Availability of So-Called “Less Restrictive Alternatives” Does Not Undermine *Leegin*

Proponents of *per se* condemnation frequently contend that manufacturers can achieve RPM's legitimate objectives by so-called “less restrictive alternatives,” that is, practices that combat dealer free riding or achieve other objectives without setting resale prices. For instance, one scholar claims that manufacturers can instead design and pay for advertising themselves, or provide promotional allowances to dealers that do advertise.²²⁸ Failing this, he says, manufacturers can rely upon non-price restraints such as territorial restraints that “close[]” distribution and thus encourage dealer promotion.²²⁹ Twenty-seven states and some scholars have even argued that manufacturers can simply stipulate by contract the type of promotion desired and pay dealers separately for it.²³⁰

225. See *supra* notes 48-52 and accompanying text.

226. See *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 23-24 (1990) (articulating a *per se* ban on price fixing regardless of reasonableness); HOVENKAMP, *supra* note 16, at 63-64 (explaining that pre-Sherman Act common law enforced horizontal agreements setting reasonable prices); *id.* at 178-79 (detailing the economic rationale for a ban on price fixing).

227. See *supra* notes 28-32 and accompanying text.

228. See Grimes, *supra* note 223, at 491-94.

229. *Id.* at 492-93.

230. See Amended States' Comments Urging Denial of Nine West's Petition at 9, *In re Nine W. Grp., Inc.*, No. C-3937 (F.T.C. Jan. 18, 2008), available at <http://www.ftc.gov/os/comments/ninewestgrp.080117statesamendedcomments.pdf> (“The manufacturer could require its distributors to provide services as a matter of contract and even pay separately for those services. In that circumstance, the manufacturer could terminate or threaten to terminate the relationship if the retailer did not live up to those obligations. That alternative way of fostering services for consumers is more effective and efficient than [minimum RPM.]”); Cavanagh, *supra* note 183, at 22-23 (identifying separate contracting as a less restrictive alternative); Kirkwood, *supra* note 155, at 445 (“The most obvious [less restrictive alternative] is simply to require dealers, as a condition of retaining their dealerships, to

The universal or near-universal presence of such alternatives can bolster the case for *per se* illegality, by suggesting that defendants can always achieve the benefits achieved via minimum RPM while allowing dealers at least nominal pricing discretion.²³¹ One could argue that the widespread availability of such alternatives signals that “rule of reason [analysis] will [always] condemn” minimum RPM, thereby justifying *per se* condemnation.²³²

The invocation of less restrictive alternatives to justify *per se* condemnation of minimum RPM is not new. Price theorists hostile to non-standard agreements have been making this argument for decades. Indeed, ironically, many once invoked the prospect of less restrictive alternatives to justify *per se* condemnation of various *non-price* restraints of the sort that some of *Leegin’s* detractors now invoke as alternatives for minimum RPM. For instance, Donald Turner once argued that exclusive territories should be unlawful *per se*, given the purported presence of less restrictive alternatives.²³³ He had previously made the same argument with respect to tying contracts.²³⁴ Derek Bok, then a colleague of Turner’s at Harvard Law School, argued that less restrictive alternatives would satisfy any le-

provide the desired services.”); Pitofsky, *supra* note 183, at 63 (“[I]f the manufacturer really has in mind particular services, the common commercial practice is to contract separately for them with the retailer, i.e., advertising support, warranty programs, and so forth. Those opposing *per se* rules in this area implicitly assume that the manufacturer knows better than the retailer or the market what will or will not work in the marketplace.”).

231. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 25 n.42 (1984) (invoking the availability of purportedly less restrictive alternatives as a rationale for the *per se* rule); *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (same); Turner, *Tying Arrangements*, *supra* note 50, at 59-60 (same). See also Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 71-72 (1997) (describing so-called “categorical balancing” whereby the supposed presence of less restrictive alternatives justifies a *per se* ban on tying contracts, even though such contracts sometimes produce benefits).

232. See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (opining that “[p]er se treatment is appropriate” when courts are confident that rule of reason scrutiny of restraints in question will result in condemnation) (citations omitted). Such an argument would depend upon the methodology for establishing a *prima facie* case, however. For instance, if courts deemed such restraints “inherently suspect,” such that the mere existence of such agreements established a *prima facie* case, then one could predict that rule of reason analysis would always condemn them. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 769-70 (1999) (opining that certain restraints are inherently anticompetitive and thus presumptively unreasonable). If instead courts required plaintiffs to prove actual anticompetitive harm to establish a *prima facie* case, it would be more difficult to conclude that rule of reason analysis will always or almost always condemn such agreements.

233. See Turner, *Conscious Parallelism*, *supra* note 50, at 699 (explaining that the requirement that the dealer use its best efforts within an area of “primary responsibility” will assure effective promotion by dealers). See also Christopher D. Stone, *Closed Territorial Distribution: An Opening Question in the Sherman Act*, 30 U. CHI. L. REV. 286, 313-14 (1963) (contending that less restrictive alternatives would achieve the same objective and thus widen distribution of goods and reduce prices).

234. Turner, *Tying Arrangements*, *supra* note 50, at 59-60.

gitimate objectives of exclusive dealing agreements.²³⁵ Subsequently, scholars contended that there were less restrictive means of achieving the legitimate objectives of location clauses or horizontal allocations of territories ancillary to a wealth-producing joint venture.²³⁶

For almost as long, however, proponents of TCE have been offering rebuttals of such arguments. These rebuttals confirm that support for less restrictive alternatives depends upon outmoded price-theoretic assumptions, a misunderstanding of TCE's rationales for vertical restraints, or both. For instance, more than four decades before *Leegin*, Robert Bork responded to the claim that manufacturers could achieve the same benefits as exclusive territories by adopting so-called "areas of primary responsibility."²³⁷ Such provisions would require dealers to promote optimally the manufacturer's product within a certain territory, but without preventing dealers from also serving each other's primary territories.²³⁸ Bork admitted that such provisions could, in theory, achieve the same promotional investments as an exclusive territory.²³⁹ At the same time, he rebutted the claim that such alternatives would work in the real world. His rebuttal, which rests upon transaction cost considerations, is worth quoting at length.

The area-of-primary-responsibility clause . . . permits selling across territorial lines and thereby makes it less profitable for resellers to engage in local sales effort. The resellers' interests then diverge from the manufacturer's. The manufacturer must, therefore, know what degree of local sales effort is optimal in each reseller's territory and must assiduously police each reseller to see that he expends, against his own interest, the effort desired. This solution is obviously not satisfactory.

It would be extraordinarily costly for the manufacturer to learn at first hand the real sales potential of every dealer's area and just how and where each dealer's sales effort should be ex-

235. Bok, *supra* note 50, at 307-08 (concluding that parties could always achieve legitimate objectives of exclusive dealing contracts by simply terminating shirking dealers).

236. See, e.g., Brief for Petitioners at 48-49, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (No. 76-15) (contending that less restrictive means would produce the same benefits as location clauses); SULLIVAN, *supra* note 42, at 386 (same); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 911-12 (1985) (contending that less restrictive alternatives could produce same benefits as horizontal ancillary exclusive territories).

237. See Bork, *Price Fixing*, *supra* note 77, at 465-69. See also *White Motor Co. v. United States*, 372 U.S. 253, 270-72 (1963) (Brennan, J., concurring) (offering this alternative to exclusive territories); *United States v. Philco Corp.*, 1956 Trade Cas. (CCH) ¶ 68,409, at 71,753 (E.D. Pa. 1956) (approving a consent decree permitting areas of primary responsibility as an alternative to exclusive territories).

238. See Bork, *Price Fixing*, *supra* note 77, at 467-68 (describing the operation of such provisions).

239. *Id.* at 467 ("Such clauses do, however, permit the manufacturer to demand of the dealer the amount of local sales effort which the manufacturer considers optimum.").

pended. Since the dealer who is required to undertake unremunerative tasks can hardly be relied upon to identify all such tasks so that they may be imposed upon him, the manufacturer will have to integrate partially into the dealer level to make the survey the dealer is not motivated to make. This survey, moreover, cannot be made once for all time. Changes in population, income, tastes, products, and other factors will continually alter sales potential. The manufacturer will, therefore, have to be in as constant contact with local markets as all of his dealers combined. This procedure is probably so costly in most cases that the manufacturer will not do the job completely. Instead, he will rely upon inaccurate indicia such as whether the dealer comes up to the dealer average in sales to areas containing similar populations. . . . Market division, which gives each dealer the incentive to cultivate his area as intensively as is worthwhile from the point of both the dealer and the manufacturer, eliminates all the extra costs and inaccuracies of an attempt to enforce an area-of-primary-responsibility clause.²⁴⁰

In short, the “primary responsibility” approach would be a perfect alternative in a price-theoretic world, where manufacturers could costlessly gather information about the preferences of consumers, costlessly determine appropriate promotional strategies for each territory, costlessly communicate those strategies to dealers, and then costlessly monitor whether, in fact, dealers complied with these directives. However, as Bork implicitly realized, the real world is beset with numerous types of information costs, costs that would make such a strategy a non-starter. By contrast, exclusive territories would allow manufacturers to avoid such costs while at the same time harnessing the expertise of local dealers, who presumably know far more about local preferences and how to tailor appropriate promotional strategies than a functionary at corporate headquarters. As Bork would expressly note in a subsequent article, exclusive territories and minimum RPM, while granted by contract, can function as the economic equivalent of property rights, ensuring that dealers internalize the full costs and benefits of their promotional activities and thereby aligning dealers and manufacturers’ incentives.²⁴¹

240. *Id.* at 468.

241. See Bork, *Resale Price Maintenance*, *supra* note 77, at 956 (“R.p.m., like vertical market division, is the means by which the manufacturer induces reseller provision of [information] by making sure that the reseller can recover the [information’s] cost. The process is closely analogous to the social recognition of property rights as a means of inducing economic activities. Contract law delegates to private persons the power to create property rights because of their superior knowledge of the efficiencies to be gained in particular situations. R.p.m. is best viewed as an instance of this general principle. The net effect of r.p.m. is to increase the amount of an existing product (or, more accurately, to enlarge the information component, for example, of a composite product consisting of a physical item and information about the item) which is offered to consumers.”). See also Marvel, *supra* note 137, at 2-4; Meese, *supra* note 137, at 600-07.

Similar considerations require rejection of the claim by *Leegin's* detractors that less restrictive alternatives will serve the same objective as minimum RPM. Consider, for instance, the most prevalent claim, namely, that manufacturers can simply contract for the type of promotional services they desire, an alternative that opponents of various vertical restraints have been advancing for decades.²⁴² As Bork and other scholars have explained, this approach would make perfect sense if the cost of bargaining and acquiring information was zero, as the perfect competition model assumes.²⁴³ In this case, manufacturers could readily ascertain just how susceptible each dealer's customers were to various forms of promotion, tailor a promotional strategy for each dealer, and then (costlessly) negotiate contracts obligating each dealer to engage in optimal promotion, at whatever price the parties (costlessly) agree to. Manufacturers would then (costlessly) monitor each dealer, terminating dealers who did not comply. But of course, as TCE taught us, bargaining and information costs are not zero, but instead can be quite significant, particularly in franchisor-franchisee relationships. Relegating manufacturers to these alternatives will increase the cost of distribution and/or reduce the effectiveness of promotion.

More fundamentally, most arguments for less restrictive alternatives misconceive the nature of the interest served by minimum RPM and, for that matter, exclusive territories. Take again the claim that manufacturers can simply tell dealers how, when, and where to promote the manufacturer's product and then terminate those dealers that do not comply.²⁴⁴ Invocation of this alternative sets up manufacturers as central planners, who know the exact promotional strategy that each dealer should employ. However, if manufacturers believed themselves capable of such planning, they could take on the task of distribution themselves, determining optimal promotional strategies and directing employee-dealers to execute such strategies. As TCE has taught us, a manufacturer's decision to rely upon the market to accomplish a particular task is not exogenous, but depends upon the

242. See *supra* notes 76-79 and accompanying text (describing this view by several of *Leegin's* detractors).

243. See WILLIAMSON, *supra* note 48, at 187 (contending that less restrictive alternatives often increase the cost of policing and preventing dealer opportunism). See also Bork, *Price Fixing*, *supra* note 77, at 467-68; Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 78 (1994) ("The question, however, is not whether alternatives exist but whether they are superior to the vertical restraints they replace, either from the standpoint of economic efficiency or of competition. This is not an easy standard to meet"); Meese, *supra* note 137, at 589-92 (explaining how manufacturers rely on dealers because the cost of planning promotional decisions is prohibitively high, contrary to the assumptions of price theory).

244. See *supra* note 230 (collecting scholarly authorities asserting that such supervision of dealers' promotional decisions is a less restrictive means of assuring appropriate promotion).

relative cost of such reliance, on the one hand, and the alternative of complete vertical integration, on the other.²⁴⁵ Manufacturers who adopt minimum RPM have by hypothesis chosen to rely upon independent dealers to distribute their products, presumably because they do not want to take on the task of making promotional decisions for each and every location where the manufacturer's product is sold.²⁴⁶ Unlike employees, who presumably earn fixed wages, such dealers can earn a profit and thus can at least potentially capture the full benefits of any promotional investment they make.²⁴⁷ By relying upon the market to distribute their products, manufacturers can entrust promotional determinations to independent for-profit dealers with both the incentive and local knowledge to discover optimal promotional tactics.²⁴⁸ Armed with this discretion, different dealers might employ different strategies, depending upon the nature of the local consumer population and the myriad of evolving factors that Bork identified.²⁴⁹ For instance, a dealer in a locality full of retirees might rely heavily on newspaper and radio advertisements. A dealer in a locality with a young population might rely on social media and other forms of internet advertising. A dealer in a college town may vary its strategy depending upon whether school is in session.

A manufacturer can perfect this decentralized and dealer-centric system of distribution by employing minimum RPM to confer upon dealers the equivalent of a property right in the fruits of their promotional efforts.²⁵⁰ That is, by assigning individuals ownership in the fruits of their investments, this contractual property can transform a public good—promotional information—into a private good and thereby ensure optimal provision.²⁵¹ The alternative of reliance upon manufacturer planning and resulting payment for promotional ser-

245. See Coase, *supra* note 65, *passim*.

246. See Meese, *supra* note 137, at 589-92.

247. *Id.* at 590-91.

248. *Id.* at 595-98.

249. See Bork, *Price Fixing*, *supra* note 77, at 467-68.

250. See Bork, *Resale Price Maintenance*, *supra* note 77, at 956. See also Marvel, *supra* note 137, at 2-4; Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 193 (1997) [hereinafter Meese, *Price Theory and Vertical Restraints*] (“[R]eliance upon payments for individual services will attenuate the benefits of a dealer system of distribution. Presumably, different classes of dealers face customers with different service needs [and] granting each dealer an exclusive territory would allow for dealer-by-dealer decision making about the appropriate mix of various presale and postsale services. . . . [By contrast,] individualized negotiation . . . would eliminate the benefits of relying upon dealers' judgment as to the appropriate mix of services to provide” (footnote omitted)); Meese, *supra* note 137, at 595-98.

251. See Meese, *supra* note 137, at 600-07. See generally R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

vices serves an entirely different interest, and one only useful in a price-theoretic world.²⁵²

252. Some of *Leegin's* detractors claim that dealers protected by minimum RPM may choose not to promote the manufacturer's product, thereby "pocketing" the additional margin between the retail price and the cost of the product. *See, e.g.,* Grimes, *supra* note 223, at 477; Kirkwood, *supra* note 155, at 446-47. Some also contend that dealers may employ the extra margins to invest in dealer-specific quality improvements instead of promotion. *See id.*

The first critique apparently assumes, without justification, that demand for the manufacturer's product is exogenous and thus unrelated to promotional investments. In such circumstances, dealers may well have no reason to promote the manufacturer's product. If, however, there is stiff interbrand competition, including from vertically integrated manufacturers, dealers that fail to promote the manufacturer's product will attract fewer sales at the stipulated price, so long as dealers of other products are themselves engaging in promotion or if products sold by those dealers have such a strong enough reputation that they "sell themselves." *Cf. Telser, supra* note 72, at 95 (explaining that, over time, heavily-promoted products may gain sufficient public acceptance to obviate the need for additional promotion). In such an environment, dealers governed by minimum RPM may have little choice but to engage in promotion to protect their sales against inroads by interbrand rivals. *See Meese, supra* note 137, at 617-18 (explaining that product differentiation and resulting consumer demand for a manufacturer's product is not exogenous but instead depends upon promotion in an environment characterized by interbrand competition).

Indeed, a little game theory will illustrate this point. Assume two sets of dealers, one set selling Fords and one set selling Toyotas. Assume that both manufacturers adopt minimum RPM as a means of granting their dealers property rights over the results of their promotional efforts, with the result that dealers only face interbrand competition. Assume further that, taken together, dealers would (as these critics implicitly assume) maximize their joint welfare by declining to invest in promotion, but that the Sherman Act forbids such interbrand collusion. Finally, assume that, if a dealer of one product (say Fords) declines to invest in promotion while the dealer of the other product (say Toyotas) does, the promoting dealer will gain significant sales at the expense of the non-promoting dealer.

Given these assumptions, we can model dealer decisionmaking with the following normal form game illustrated by a two-by-two table. There are four possible strategy combinations, each of which provides particular payoffs to each dealer, as illustrated. (The payoffs for the Ford dealers are the first number in each combination.)

		TOYOTA	
		Don't Promote	Promote
F	Don't Promote	50, 50	25, 60
	Promote	60, 25	30, 30

As the table shows, the two dealers would maximize their joint welfare by agreeing not to promote (the upper left-hand cell), reducing their costs and reaping whatever sales that would nonetheless result, perhaps as a result of the manufacturer's own promotional efforts. Absent such an (unlawful) agreement, however, each dealer would have to choose its promotional strategy without knowledge of the strategy chosen by the other. Moreover, given the (plausible) payoffs illustrated by this chart, each dealer would have a dominant strategy, that is, a strategy that maximizes its payoff regardless of whether the rival dealer chooses to promote or not. In particular, each dealer would have a dominant strategy of promoting and thus would choose that strategy, leading to a (non-cooperative) Nash equilibrium, the lower right-hand cell on the chart. (The result is a Nash equilibrium because neither party would gain by choosing a different strategy, given the strategy chosen by the other.) While the result would not maximize the joint welfare of the dealers, the resulting increase in sales would presumably increase the welfare of consumers and manufacturers.

Minimum RPM is not the only method of creating such a property right. As Bork and others have argued, contractually granted exclusive territories can also create such a right.²⁵³ But this does not establish that exclusive territories and minimum RPM are always interchangeable. For instance, in some cases, the nature of the product, promotional technology, and consumer base might be such that granting dealers meaningful exclusive territories will result in inadequate promotion. Moreover, granting exclusive territories may actually reduce intrabrand competition more than minimum RPM, as the latter simply sets a minimum price, while the former grants dealers local quasi-monopolies that may allow them to price well above the price that a minimum RPM regime might set. Finally, in some circumstances, manufacturers might find it easier to monitor the price that a dealer is charging than to determine whether a dealer is advertising or otherwise soliciting customers outside an assigned territory.

It should also be noted that the practical size of an exclusive territory may be exogenous to the distributional needs of manufacturers, with the result that exclusive territories cannot serve as effective contractual property rights. Dealers often advertise on local television, radio, and in local newspapers. The coverage of these outlets is fixed by interaction between the technology of media production and the nature and dispersion of the local population. In Chicago, for instance, newspaper, radio, and television advertising serves up to 2.7 million individuals.²⁵⁴ It is not clear how a manufacturer could confine a dealer to a geographic subset of this market, given that a radio advertisement that reaches the South Side will also reach the North Side and vice versa. Moreover, reliance upon a single dealer to serve a population so varied and widely dispersed may sacrifice the benefits of localized dealer knowledge that practitioners of TCE have emphasized.²⁵⁵ Finally, dealers may experience diseconomies of scale, with the result that reliance upon a single dealer will increase the average cost of distribution. For these and other reasons, a manufacturer may wish to locate more than one dealer in such a locality,

See generally DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* 6-49 (1994) (describing normal form games and the concept of Nash equilibrium).

The fear that dealers will attempt to attract customers via non-promotional competition does not undermine the claim that minimum RPM will enhance promotion. Manufacturers can simply forbid dealers from engaging in certain forms of non-price rivalry. Moreover, promotional and non-promotional investments are not mutually exclusive; nothing about *minimum* RPM, which creates a price *floor*, prevents dealers from making both sorts of investments. Indeed, the whole point of contractual property rights is to empower dealers to attract sales. Manufacturers may be indifferent to how dealers accomplish this objective.

253. *See* Marvel, *supra* note 137, at 2; Meese, *supra* note 137, at 600-02.

254. *See State and County Quick Facts: Chicago, Illinois*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/17/1714000.html> (last updated June 27, 2013, 2:00 PM) (reporting 2012 Chicago metropolitan area population of 2.714 million).

255. *See supra* notes 136-39 and accompanying text.

thereby rendering reliance upon an exclusive territory impractical and less effective than minimum RPM.

In sum, the less restrictive alternatives that *Leegin's* detractors have identified are either less effective, more costly, or both. As Oliver Williamson noted long ago, different distributional settings may pose different problems and thus call for different solutions.²⁵⁶ Scholars and advocates who embrace such alternatives have simply substituted price theory for TCE, thereby rejecting four decades of advances in economic science.

D. Proof that Minimum RPM Resulted in Higher Retail Prices During the Fair Trade Era Does Not Undermine Leegin

Some who resist *Leegin* emphasize that minimum RPM results in higher retail prices than would prevail if the practice were unlawful, as evidenced by the impact of minimum RPM during the fair trade era.²⁵⁷ For some, this evidence strengthens the case for *per se* condemnation.²⁵⁸ For others it supports a hostile “quick look” rule of reason, whereby the mere existence of minimum RPM imposes a burden on a defendant to prove that the practice produces significant benefits.²⁵⁹ Some of these same advocates treat such evidence as a challenge to proponents of *Leegin* to adduce evidence that, as a global matter, the benefits of minimum RPM outweigh its harms.²⁶⁰ In fact, legislation proposed in 2011 relied in part upon legislative findings that minimum RPM led to higher prices during the fair trade era and that post-*Leegin* minimum RPM will likely increase retail prices.²⁶¹

This argument is intuitively appealing. After all, *Standard Oil's* rule of reason bans contracts that produce monopoly or its consequences, and the most obvious consequence of monopoly is higher prices that result from an exercise of market power and concomitant

256. WILLIAMSON, *supra* note 48, at 48-49.

257. See, e.g., Harbour Testimony 2009, *supra* note 149, at 4-5 (invoking previous Congressional findings that minimum RPM led to higher retail prices in “fair trade” states); Letter from 41 State Attorneys General, *supra* note 149, at 1 (“[E]mpirical studies show that agreements on minimum resale prices raise consumer prices, often significantly.”); Kirkwood, *supra* note 155, at 431-32 (discussing empirical evidence that minimum RPM increases retail prices); Lao, *supra* note 164, at 67 (“A troubling fact about RPM is that virtually all studies show it leads to higher consumer prices.”); *id.* at 67 n.54 (collecting citations of various studies reaching this conclusion).

258. See Harbour Testimony 2009, *supra* note 149, at 4-7; Letter from 41 State Attorneys General, *supra* note 149, at 1-2.

259. See Kirkwood, *supra* note 155, *passim*; Lao, *supra* note 164, at 84-85; See also *infra* Part IX.E (discussing and refuting arguments for such an approach).

260. See Harbour Testimony 2009, *supra* note 149, at 1 (invoking supposed paucity of evidence that the benefits of minimum RPM outweigh the harms presumed because of evidence of higher prices); Letter from 41 State Attorneys General, *supra* note 149, at 1-2 (same).

261. See S. 75, 112th Cong. § 2(a)(3)-(5) (2011).

output reduction.²⁶² It would therefore seem that evidence that minimum RPM results in higher prices would support the repudiation of *Leegin* or, at least, a strong presumption that minimum RPM is unreasonable.

Not so fast. In fact, proof that minimum RPM results in prices that are higher than those in a competitive market is unremarkable and does not support hostile treatment of minimum RPM, either globally or in a particular case. Market power entails the ability profitably to reduce output and raise prices above the competitive level, namely, cost plus a reasonable rate of return.²⁶³ Thus, not all practices resulting in higher prices reflect an exercise of such power. For instance, a firm that enhances the quality of its product by investing additional resources in the production process will incur higher costs and, if the product is successful, charge higher prices resulting from enhanced demand. In the same way, a firm that enters a contract with an expensive advertising firm to develop a new marketing campaign will, if successful, enhance demand and thus price for the firm's (now more expensive) product. While both of these practices (if successful) raise prices, neither necessarily results in prices *above cost*. Jaguar did not violate the Sherman Act when it retained Sterling, Cooper, Draper Price.²⁶⁴

Leegin detractors who invoke evidence that minimum RPM results in higher retail prices implicitly assume that the pre-RPM price is "competitive" and accurately reflects the "costs" of producing and distributing the manufacturer's products. Such an approach makes perfect sense within the price theory paradigm, which assumes away transaction costs and presumes that all efficiencies are technological in nature.²⁶⁵ In such a world, efficiencies would necessarily manifest themselves as reduced production costs and thus lower prices.²⁶⁶ TCE, however, gives us reason to doubt this assumption. TCE asserts that transaction costs are ubiquitous, with the result that reliance upon an unfettered market to distribute a product may well result in a market failure, including dealer free riding.²⁶⁷ If so, the resulting prices will not be "competitive" in any meaningful sense, but will instead reflect suboptimal costs of promotion, a suboptimal demand for the manufacturer's product, and thus a suboptimal equilibrium of

262. See *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911) (detailing harmful consequences of monopoly as higher prices, reduced output, or reduced quality).

263. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 291-93 (6th Cir. 1898) (finding that prices exceeding cost plus a normal rate of return were unreasonable), *aff'd as modified* by 175 U.S. 211 (1899); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

264. See *Mad Men: The Other Woman* (AMC television broadcast May 27, 2012).

265. See *supra* notes 48-50 and accompanying text.

266. See Meese, *supra* note 89, at 480-81.

267. See *supra* Part VI.

price and output.²⁶⁸ If successful, minimum RPM and/or other methods of counteracting this market failure will result in increased expenditures on promotion, increased demand for the manufacturer's product, and thus higher prices. Far from indicating that market power is afoot, such price effects merely confirm that the manufacturer's strategy is effective, as reflected in consumers' enhanced willingness to pay for the product in question.²⁶⁹ As Ronald Coase put it four decades ago, non-standard practices, while apparently restrictive of competition, are often necessary for "bringing about a competitive situation."²⁷⁰

To drive this point home, it is useful to consider the "less restrictive alternatives" that *Leegin's* detractors have applauded, such as non-price restraints and separate contracting for promotional services desired by the manufacturer.²⁷¹ As explained above, such provisions are often less effective and more costly than minimum RPM.²⁷² Let us assume the contrary, however, that such provisions will result

268. See Meese, *supra* note 89, at 514-19 (explaining that, where transaction costs and resulting market failure are present, pre-restraint prices may not reflect "competitive" equilibrium).

269. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) (characterizing product differentiation resulting from horizontal limitation on rivalry as procompetitive). See also Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 156 (1984); Meese, *Rule of Reason*, *supra* note 51, at 147-61 (explaining that proof that an ancillary restraint results in prices higher than the *status quo ante* may reflect benefits of the restraint).

Some have claimed that *Sylvania's* invocation of "interbrand competition" as an overriding concern of antitrust law was novel. See Harbour Testimony 2009, *supra* note 149, at 7 (asserting that *Sylvania's* endorsement of interbrand competition was a "bald proposition"); Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2011 BYU L. REV. 1425, 1486 (characterizing this invocation as "unsupported"). To be sure, *Sylvania* cited no authority for this proposition. However, antitrust courts have recognized the overriding importance of interbrand competition since the late 1890s. For instance, covenants ancillary to the formation of a partnership often prevent partners from engaging in (intra)brand competition with the partnership. However, in *Addyston Pipe*, William Howard Taft opined such restraints "were to be encouraged," because they forced partners to devote their undivided efforts to enhancing the business of the partnership, which, of course, furthered what modern courts would call interbrand competition. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd as modified* by 175 U.S. 211 (1899). See also Bork, *Price Fixing*, *supra* note 77, at 380-83 (explaining Taft's reasoning in transaction cost terms). Indeed, as explained previously, even *Schwinn* invoked the importance of interbrand competition, when holding that non-price vertical restraints included in consignment agreements could be reasonable. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 381-82 (1967).

Another scholar, who endorses *Sylvania*, nonetheless claims that intra)brand restraints may reduce interbrand competition by "creat[ing] incentives for dealers to push a product regardless of its underlying merits" and causing dealers to "resort to image appeals that have nothing to do with a product's merits." See Grimes, *supra* note 223, at 472. However, this concern does not seem to justify a distinction between price and non-price restraints, both of which can encourage such conduct by dealers.

270. See Coase, *supra* note 70, at 67-68.

271. See *supra* notes 228-30 and accompanying text.

272. See *supra* notes 253-56 and accompanying text.

in optimal promotion. If effective, such promotion will, like the promotion induced by minimum RPM, increase each individual dealer's costs and also enhance demand for the manufacturer's product. The result will be higher retail prices, as some of *Leegin's* detractors have admitted.²⁷³ And yet, so far as this author is aware, none of *Leegin's* detractors would ban all non-price vertical restraints or all contracts that specify a dealer's promotional duties. While such agreements result in higher prices, such increases are equally consistent with a beneficial explanation of the restraint, as *Leegin* itself recognized.²⁷⁴

As a result, proof that minimum RPM results in prices that are higher than the *status quo ante* does not establish or suggest that the practice is predominantly anticompetitive and thus properly subject to *per se* condemnation or even hostile rule of reason treatment. After all, agreements are only *per se* unlawful if courts can be confident that rule of reason scrutiny will always or almost always condemn them.²⁷⁵ Such proof, therefore, would not by itself give rise to a *prima facie* case under the rule of reason.²⁷⁶ Thus, even proof that all such restraints result in higher prices than would prevail in an atomistic market does not provide confidence that the rule of reason would condemn such agreements.

Arguments to the contrary seem to conflate the absence of falsification of a theory with confirmation of that theory. Yes, proof that minimum RPM results in higher prices is *consistent with* an anticompetitive account of such agreements. However, such proof is just as consistent with TCE's presumption that such agreements are procompetitive.²⁷⁷ In both cases "consistency" merely denotes the absence of falsification, that is, the failure to refute the proposed theory.²⁷⁸ Such a lack of falsification—consistency with observed data—merely

273. See, e.g., Grimes, *supra* note 223, at 484 (noting, in passing, that alternatives can also increase prices as much as a challenged restraint). Some *Leegin* detractors contend that minimum RPM can reduce the overall welfare of consumers because some consumers do not value the resulting promotion for which they nonetheless pay a higher price. See Kirkwood, *supra* note 155, at 437-38. However, one can level the same critique against any practice that induces additional promotion.

274. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895-96 (2007). See also Meese, *Rule of Reason*, *supra* note 51, at 144-61.

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

276. See *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587-95 (1986) (holding that evidence that is equally consistent with procompetitive and anticompetitive objectives cannot by itself support an inference of anticompetitive harm); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761-64 (1984) (same); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968) (same). See also *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (stating that legal presumptions employed in antitrust litigation should rest on actual market realities and not implausible economic theories).

277. See *supra* notes 82-88 and accompanying text (discussing TCE's presumption that non-standard agreements are beneficial).

278. See POPPER, *supra* note 198, at 265-66.

saves the theory from oblivion. It does not “prove” it.²⁷⁹ Thus, *Leegin’s* proponents may just as well invoke the very same evidence to “establish” a case that minimum RPM is generally or even always procompetitive.

There is, however, one sort of evidence that could perhaps falsify one of these hypotheses, namely, proof of minimum RPM’s impact on output.²⁸⁰ After all, the exercise of market power reduces output below the competitive level and results in above-cost pricing. If, by contrast, minimum RPM induces effective promotion of the manufacturer’s product, demand for the product will rise, thereby inducing increased output. However, none of *Leegin’s* detractors has offered evidence that, say, adoption of the fair trade laws resulted in reduced output in states in which defendants practiced minimum RPM, focusing instead upon the propensity of minimum RPM to raise prices above the atomistic level. In so doing, they have clung to price theory and rejected TCE, which established that price increases are equally consistent with a beneficial account of such restraints.

E. Minimum RPM Is Not an “Inherently Suspect” Practice that Merits a “Quick Look” Analysis

Ordinarily, rejection of *per se* condemnation results in scrutiny under a full-blown rule of reason.²⁸¹ Under this test, plaintiffs must demonstrate that a restraint produces anticompetitive harm to establish a *prima facie* case.²⁸² Failure to establish such harm entitles the defendant to judgment.²⁸³ If the plaintiff establishes such harm, the burden shifts to the defendant to produce evidence that the restraint produces the sort of “redeeming virtue[s]” the defendant identified when avoiding *per se* condemnation.²⁸⁴

Very rarely, however, courts employ a “quick look” rule of reason.²⁸⁵ Under this approach, the mere existence of a restraint deemed

279. *Id.* at 266 (“But compatibility alone [with data] must not make us attribute to the theory a positive degree of corroboration: the mere fact that a theory has not yet been falsified can obviously not be regarded as sufficient.”).

280. *Cf. Lambert, supra* note 148, at 1941-42 (contending that proof that minimum RPM reduced output should establish *prima facie* case against it under a “structured rule of reason”).

281. *See Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977) (endorsing fact-intensive rule of reason scrutiny for non-price vertical restraints).

282. *See, e.g., Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 827 (6th Cir. 2011) (“Applying the rule of reason, we first look to see ‘whether [the plaintiff] has demonstrated “actual detrimental effects” or “the potential for genuine adverse effects on competition” [via proof of market power].’”).

283. *See, e.g., E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 28-29 & n.3 (2d Cir. 2006) (affirming dismissal of Section 1 complaint because plaintiff did not allege market-wide harm).

284. *See Realcomp II*, 635 F.3d at 825-26.

285. *See, e.g., Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2004).

“inherently suspect” establishes a *prima facie* case, casting upon the defendant a burden of producing evidence that the restraint creates benefits.²⁸⁶ Failure to discharge this burden dooms the restraint.²⁸⁷ Moreover, even if the defendant does adduce such evidence, the plaintiff can still prevail by showing that a less restrictive alternative would have produced the same benefits.²⁸⁸

After *Leegin*, both scholars and enforcement officials articulated a structured rule of reason applicable to vertical restraints.²⁸⁹ Under one such approach, for instance, plaintiffs challenging minimum RPM would bear the initial burden of proving that the challenged restraint resulted in reduced output or, in the alternative, that structural market conditions are such that minimum RPM can reduce economic welfare by, for instance, facilitating a cartel between manufacturers.²⁹⁰ Consistent with both TCE and language in *Leegin*, such approaches require plaintiffs to do more than simply prove that minimum RPM resulted in higher prices than the *status quo ante*.²⁹¹

However, numerous scholars, one think tank, and twenty-seven states have argued that, despite *Leegin*, minimum RPM is “inherently suspect” and thus deserves “quick look” analysis.²⁹² There are two mutually reinforcing flavors of this argument. First, some offer this approach as a faithful implementation of *Leegin* itself. These scholars claim that full-blown rule of reason scrutiny will almost never result in condemnation of such restraints, contrary to *Leegin’s* assumption that such restraints sometimes result in harm.²⁹³ Second, some also

286. *Id.* at 35-37.

287. *Id.*

288. *See* Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 675-76 (7th Cir. 1992) (condemning price restraint under “quick look” analysis because the defendants could have achieved the same benefits by means of a less restrictive alternative).

289. *See* Lambert, *supra* note 148, *passim* (reviewing various possible approaches to rule of reason scrutiny of minimum RPM and offering an alternative structured approach); Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for the National Association of Attorneys General: Antitrust Federalism: Enhancing Federal/State Cooperation 7-15 (Oct. 7, 2009), *available at* <http://www.justice.gov/atr/public/speeches/250635.pdf> (articulating post-*Leegin* structured rule of reason analysis).

290. *See, e.g.*, Lambert, *supra* note 148, at 1997-2001.

291. *Id.* at 1971-72. *See also* *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895-96 (2007) (stating that pricing effects alone do not establish anticompetitive effect).

292. *See* Amended States’ Comments Urging Denial of Nine West’s Petition, *supra* note 230, at 9; Petition of Nine West Footwear Corp. to Reopen and Modify Order at 2-4, *In re* Nine W. Grp., Inc., No. C-3937 (F.T.C. Dec. 6, 2007), *available at* <http://ftc.gov/os/comments/ninewestgrp/071206aai.pdf> (letter by the American Antitrust Institute urging the FTC to deny Nine West Group’s Petition to Reopen and Modify Order); Grimes, *supra* note 223, at 492-94; Kirkwood, *supra* note 155, at 423; Lao, *supra* note 164, at 84-85; Pitofsky, *supra* note 183, at 65 (endorsing a “quick look” approach to minimum RPM as a “compromise” between *per se* condemnation and full-blown rule of reason analysis).

293. *See* Kirkwood, *supra* note 155, at 423 (advocating a “quick look” with safe harbors as the best implementation of *Leegin’s* principles for similar reasons); Lao, *supra* note 164, at 84 (“[I]n real-world antitrust litigation, a full-blown rule of reason analysis often operates as a de facto legality rule, which even the *Leegin* Court did not favor.”). *See also* Mi-

argue from first principles that the “quick look” is the optimal methodology for assessing minimum RPM, given the nature of such restraints, their (alleged) probable anticompetitive harm, the sparse empirical evidence of benefits, and the ready availability of less restrictive alternatives.²⁹⁴

Neither argument, either alone or in combination, justifies application of the “quick look” to minimum RPM. For one thing, the *Leegin* Court was fully aware of the “quick look” option. At least two amicus briefs advocated such an approach.²⁹⁵ However, while the Court expressly relied on other amicus briefs, it did not mention or otherwise endorse the “quick look.”²⁹⁶ Moreover, the Court did not stipulate that the rule of reason as applied to minimum RPM should condemn any particular proportion of challenged agreements. Assertions to the contrary are strange, given the admitted paucity of evidence about the impact of minimum RPM in the real world.²⁹⁷ Instead, the Court simply stated that there were “risks of unlawful conduct” and that the “potential anticompetitive consequences of [minimum RPM] must not be ignored”²⁹⁸ The Court could not have known how many firms would in fact adopt harmful minimum RPM despite the deterrent effect of the rule of reason and resulting private and public litigation. Any assertion on this point would have been speculation and thus dicta at best.

Leegin’s refusal to endorse a “quick look” for minimum RPM is not surprising as a matter of antitrust principle. Courts have articulated varying tests for identifying restraints that are inherently suspect, and minimum RPM does not satisfy any such test. For instance, the Supreme Court has suggested that a restraint is inherently suspect when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have

chael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827-28 (2009) (reporting that from 1977 to 1999, plaintiffs’ failure to demonstrate significant anticompetitive effects resulted in dismissal in eighty-four percent of litigated rule of reason cases, and that this figure increased to ninety-seven percent a decade later).

294. See Petition of Nine West Footwear Corp. to Reopen and Modify Order, *supra* note 292, at 2-4; Grimes, *supra* note 223, at 492-93; Kirkwood, *supra* note 155, at 463-72. See also Pitofsky, *supra* note 183, at 65 (suggesting, before *Leegin*, that the Supreme Court adopt a “quick look” approach to minimum RPM if it credits arguments that such contracts can sometimes reduce free riding).

295. Brief for Anderson Economic Group, LLC as Amicus Curiae Supporting Respondent, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480); Brief of the American Antitrust Institute as Amicus Curiae Supporting Respondent, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (contending that minimum RPM should remain unlawful *per se* but that, in the alternative, courts should employ a “quick look” approach).

296. See *Leegin*, 551 U.S. at 889 (citing three different amicus briefs).

297. See *supra* notes 275-79 and accompanying text.

298. See *Leegin*, 551 U.S. at 894.

an anticompetitive effect on customers and markets.”²⁹⁹ More recently the D.C. Circuit put the test in three alternative ways, stating that a restraint is inherently suspect if: (1) “it is obvious from the nature of the challenged conduct that it will likely harm consumers,”³⁰⁰ (2) “judicial experience and economic learning have shown [such restraints] to be likely to harm consumers,”³⁰¹ or (3) there is a “close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare” [i.e., is unlawful *per se*].³⁰²

Minimum RPM does not satisfy any such test. For instance, an observer with “even” a rudimentary knowledge of economics would presumably understand the basic tenets of TCE, its recognition that markets sometimes fail, and Telser’s 1960 insight that minimum RPM can overcome such market failure.³⁰³ For similar reasons, one cannot say that it is “obvious” that minimum RPM will likely harm consumers. Moreover, as explained earlier, the *per se* rule has itself prevented economists from learning about the practice and courts from gaining judicial experience with it.³⁰⁴ Finally, TCE exploded *Dr. Miles*’s assumption that there is a close family resemblance between minimum RPM and naked horizontal price fixing.³⁰⁵ It is no surprise, then, that various scholars and enforcement agencies have rejected “quick look” treatment for minimum RPM.³⁰⁶

To be sure, and as “quick look” proponents point out, a requirement that plaintiffs prove actual anticompetitive harm or conditions

299. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999).

300. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005).

301. *Id.* at 36-37.

302. *Id.* at 37.

303. Indeed, one of *Leegin*’s detractors has claimed that the “free rider” argument “is all Economics 101 theory.” *Leegin* Senate Judiciary Hearing, *supra* note 149, at 7 (statement of Robert Pitofsky). Some may nonetheless assert that “rudimentary” knowledge excludes TCE, which has supplanted the basic price theory that once encouraged hostile treatment of non-standard contracts. See *supra* notes 72-77 and accompanying text. However, the context suggests otherwise. In particular, the Court’s qualification of the term “rudimentary” with “even” connotes that anyone, *including* the most sophisticated economists, would conclude that the challenged practice is harmful. Indeed, after announcing this standard the Court ruled, after reviewing sophisticated economic literature, that the challenged horizontal agreements limiting advertising, while normally unlawful *per se*, were not inherently suspect. See *California Dental*, 526 U.S. at 771-73.

304. See *supra* notes 275-79 and accompanying text.

305. See *supra* Part VI.

306. See HOVENKAMP, *supra* note 16, at 285 n.45 (“[V]ertical nonprice restraints are never subjected to ‘quick look’ analysis.”); *id.* at 538-39 (endorsing structured rule of reason for both price and non-price vertical restraints, imposing upon the plaintiff a burden of proving harm or circumstances suggesting such harm); Lambert, *supra* note 148, at 1971-72. See also Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, *In re* Nine W. Grp., Inc., No. C-3937 (F.T.C. May 6, 2008), available at <http://www.ftc.gov/os/caselist/9810386/080506order.pdf> (modifying previous order banning minimum RPM given the absence of evidence of actual competitive harm); Varney, *supra* note 289, at 7-15 (articulating post-*Leegin* structured rule of reason analysis).

conducive to such harm will be more burdensome than a presumption that such harm exists.³⁰⁷ In particular, these proponents contend that proof that manufacturers possess market power is particularly expensive.³⁰⁸ However, this burden will be no greater than the burden that antitrust law routinely imposes on plaintiffs in a variety of contexts. For instance, plaintiffs alleging “monopolization” contrary to Section 2 must prove a relevant market and the defendant’s share of that market.³⁰⁹ Plaintiffs challenging a merger must prove the relevant market in which the transaction will supposedly lessen competition and prove the market shares of various participants in the industry.³¹⁰ Plaintiffs contending that a tying contract is unlawful *per se* under Section 1 must allege and prove that the defendant has economic power.³¹¹ In each instance failure to prove such a market dooms the plaintiff’s case.³¹² Plaintiffs do, in fact, sometimes succeed in proving such markets.³¹³

Proponents of a “quick look” for minimum RPM may respond by claiming that these practices pose smaller competitive risks than minimum RPM. This is pure conjecture. As explained earlier, *Leegin*’s detractors have not established that minimum RPM usually reduces economic welfare. The evidence they have offered—higher prices during the fair trade era—is equally consistent with TCE’s presumption that the practice overcomes a market failure.³¹⁴ Indeed, *Leegin*’s detractors lack the courage of their convictions. If minimum

307. See, e.g., *Kirkwood*, *supra* note 156, at 457-59 (explaining why this requirement is “[t]he biggest hurdle facing a plaintiff under the full rule of reason” for minimum RPM).

308. *Id.* at 458-59.

309. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480-81 (1992) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

310. See *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 357, 362 (1963).

311. See *Eastman Kodak*, 504 U.S. at 461-64.

312. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-29 (1984) (rejecting plaintiff’s *per se* tying claim because the defendant lacked economic power); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394, 404 (1956) (rejecting the government’s proposed market definition and, thus, the claim that the defendant possessed monopoly power sufficient for a Section 2 claim); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1161 (N.D. Cal. 2004) (rejecting merger challenge because the plaintiff failed to prove its proffered relevant product market).

313. See, e.g., *Eastman Kodak*, 504 U.S. 451, *passim* (rejecting defendant’s effort to undermine plaintiff’s proof of market power for Section 2 and tying purposes); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-05 (1985) (affirming the jury’s finding that defendant violated Section 2); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1032 (D.C. Cir. 2008) (affirming injunction against challenged merger after accepting plaintiff’s proposed market definition); *United States v. Microsoft Corp.*, 253 F.3d 34, 44-46 (D.C. Cir. 2001) (*per curiam*) (holding that Microsoft violated Section 2 by monopolizing the market for “Intel-based PC Operating Systems”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 711 (D.C. Cir. 2001); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 36-37 (D.D.C. 1998) (granting plaintiff’s motion for preliminary injunction preventing proposed merger after embracing plaintiff’s proposed market definition); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1069 (D.D.C. 1997) (same).

314. See *supra* notes 196-98 and accompanying text.

RPM really *is* harmful in a higher proportion of cases than other practices, presumably plaintiffs, including federal and state enforcers, will be able to make such harm apparent to courts.³¹⁵ Moreover, if plaintiffs *do* prevail in a significant proportion of such cases, courts, having gained additional experience with minimum RPM, can depart from the ordinary rule of reason framework at that time.³¹⁶ However, immediate application of a “quick look” rule of reason would contravene both TCE and the standards governing which restraints are inherently suspect.

F. *Leegin Did Not Contravene Stare Decisis*

Several of those who resist *Leegin* contend that *stare decisis* required adherence to *Dr. Miles*, even if the Supreme Court believed the decision to be incorrect in light of new information.³¹⁷ In fact, this assertion appeared in a finding in legislation proposed in 2011.³¹⁸ These detractors repeat many of the arguments made by Justice Breyer, who devoted much of his lengthy dissent to criticism of the majority’s approach to *stare decisis*.³¹⁹ Like Justice Breyer, these scholars and advocates are incorrect.

The invocation of *stare decisis* by *Leegin*’s opponents is supremely ironic contravening, as it does, previous case law that expressly addressed the role of precedent in the antitrust context. For instance, in *State Oil Co. v. Khan*, the Court addressed a three-decades-old precedent declaring maximum RPM unlawful *per se*.³²⁰ After determining that *per se* condemnation was no longer consistent with sound economic reasoning, the Court, in a unanimous opinion by Justice O’Connor, went on to determine whether the doctrine of *stare decisis*

315. Cf. Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. 105, 113 (1969) (contending that recognition of relevance of efficiencies in merger analysis will lead parties and enforcement agencies to develop new techniques for ascertaining and measuring such effects).

316. See Cal. Dental Ass’n v. FTC, 526 U.S. 756, 781 (1999) (suggesting that experience derived from thorough rule of reason analyses can convince courts that restraints should be subject to “quick look” instead).

317. See, e.g., Cavanagh, *supra* note 183, at 27-28 (arguing that the *Leegin* Court “failed to give appropriate weight to . . . *stare decisis*”); Harbour, *supra* note 164, at 45 (“The Court should have been very reluctant to change a longstanding rule of law in response to theoretical economic assumptions, especially when these assumptions lack rigorous and valid empirical support.”); Lance McMillian, *The Proper Role of Courts: The Mistakes of the Supreme Court In Leegin*, 2008 WIS. L. REV. 405, 408. See also Brief of the American Antitrust Institute as Amicus Curiae Supporting Respondent at 5-10, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480) (contending that demands of *stare decisis* are more powerful in the antitrust context than with respect to other statutes).

318. See S. 75, 112th Cong. §2(a)(5) (2011) (asserting that *Leegin* “improperly disregarded 96 years of antitrust law precedent”).

319. See *Leegin*, 551 U.S. at 918-29 (Breyer, J., dissenting).

320. 522 U.S. 3, 7 (1997). In *Khan*, the Court overruled *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which had declared maximum RPM unlawful *per se*.

nonetheless compelled adherence to a wealth-destroying rule.³²¹ Justice O'Connor acknowledged that *stare decisis* generally has greater force in the statutory context and that Congress, and not the courts, should revise erroneous interpretations of statutes.³²² Still, invoking several precedents, she explained that *stare decisis* has *less* force in the antitrust context.³²³ Her reasoning is worth quoting in full:

But “[s]tare decisis is not an inexorable command.” In the area of antitrust law, there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.” As we have explained, the term “restraint of trade,” as used in §1, also “invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.” Accordingly, this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.³²⁴

This unanimous account of antitrust *stare decisis*, which Justice Breyer joined at the time, was not novel. Ten years earlier, the Court had, in an opinion by Justice Scalia, opined that “[t]he Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”³²⁵ Ten years before that, a unanimous opinion by Justice Stevens concluded that Congress “expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”³²⁶ Several other decisions, including of course *Sylvania*, have adjusted or repudiated prior decisions in light of new understandings about the economic impact of challenged practices.³²⁷ Each of these decisions contradicts asser-

321. See *id.* at 20-21.

322. *Id.*

323. *Id.*

324. *Id.* (citations omitted).

325. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988).

326. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant.”).

327. See, e.g., *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (rejecting previous decisions holding that possession of a patent confers economic power for purposes of tying doctrine); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (repu-

tions by Justice Breyer and others that courts should treat Sherman Act precedents like other statutory precedents, requiring a particularly strong justification before courts can overrule a prior decision.³²⁸ If anything, the case for overruling *Dr. Miles* was stronger than was the case for departing from precedent in *Khan*. After all, TCE did more than simply call the “theoretical underpinnings” of *Dr. Miles* into “serious question.”³²⁹ Instead, TCE obliterated the central economic premise of *Dr. Miles*, namely, that vertically-imposed RPM is equivalent to a horizontal cartel between dealers.³³⁰ True respect for *stare decisis* includes respect for those decisions that have repeatedly held that precedent has less force in the Sherman Act context.

Any other approach to *stare decisis* would contravene *Standard Oil*'s century-old construction of the term “restraint of trade.”³³¹ As the Court explained, Congress did not invent the term “restraint of trade,” but instead took the term from the common law.³³² Moreover, the term “restraint of trade” as employed at common law did not refer to a particular, unchanging list of agreements, but instead referred to agreements that courts believed produced particular consequences.³³³ Thus, agreements that were unenforceable during the fifteenth century because courts believed them to be harmful became enforceable in the early eighteenth century as judges revised their understandings of their consequences.³³⁴ As the Supreme Court explained one year before the Sherman Act, an earlier rule defining “restraint of trade” “was made under a condition of things, and a state of society, different from those which now prevail [and] the rule

diating doctrine of intra-enterprise conspiracy contained in prior decisions); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-29 (1984) (rejecting the prior approach to defining “economic power” for purposes of tying doctrine); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (rejecting a *per se* ban on non-price vertical restraints); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) (repudiating a 1920 decision articulating the meaning of “unfair competition” under the Federal Trade Commission Act).

328. Justice Breyer attempted to distinguish *Khan* on the ground that the decision that it overruled was a mere twenty-nine years old, “nowhere close to the century *Dr. Miles* has stood.” See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 927 (2007) (Breyer, J., dissenting). Putting aside the fact that more than forty states accepted Congress's invitation to reject *Dr. Miles* during the fair trade era, the longevity of a precedent does not immunize it from subsequent theoretical developments. After all, the outright ban on trade restraints, first announced in the fifteenth century, survived for three centuries, only to be overruled by judicial fiat. See *supra* notes 204-05 and accompanying text.

329. See *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997).

330. See *supra* notes 130-38, 141, 145 and accompanying text.

331. See 221 U.S. 1, 50 (1911). See also Meese, *supra* note 13, at 786-87 (explaining that modern jurists and scholars uniformly embrace *Standard Oil*).

332. *Standard Oil*, 221 U.S. at 50-51.

333. *Id.* at 58-59.

334. *Id.* at 51, 56-59 (describing this evolution with approval); *United States v. Adyston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898), *aff'd as modified* by 175 U.S. 211 (1899).

laid down is not regarded as inflexible, and has been considerably modified.”³³⁵ Several nineteenth-century state court opinions concurred.³³⁶

Standard Oil described this dynamic, common law approach with approval when articulating the meaning of the statute.³³⁷ Like the common law, the Court said, the term “restraint of trade” did not freeze into place the list of agreements deemed unenforceable in 1890.³³⁸ Instead, the term empowered courts to ban all contracts, including those unknown in 1890, that offended the public policy contained in the Act because they “produce[d] the consequences of monopoly.”³³⁹ To determine whether a challenged arrangement had the prohibited effect, the Court said, judges should apply their “reason.”³⁴⁰ Thus, as Robert Bork explained over four decades ago, “[t]he rules implied by the policy [that animates the rule of reason] are alterable as economic analysis progresses.”³⁴¹ Finally, as explained earlier, *Standard Oil* approved the common law practice of altering doctrine in light of “more accurate economic conceptions”³⁴²

To pile irony on top of irony, *Dr. Miles* itself embraced a dynamic approach to the term “restraint of trade.” After all, at common law, minimum RPM was not automatically unlawful or unenforceable. Indeed, just one year before Congress passed the Sherman Act, the Supreme Court, in *Fowle v. Park*, a case premised upon diversity of citizenship, enforced as reasonable an agreement setting minimum resale prices of patent medicine.³⁴³ William Howard Taft would cite this opinion with approval in his monumental *Addyston Pipe* decision, describing the challenged agreement as “ancillary to the main and lawful purpose of the contract, and . . . necessary to the protection of the covenantee in the carrying out of that main purpose.”³⁴⁴ Moreover, some state courts enforced minimum RPM agreements af-

335. See *Gibbs v. Consol. Gas Co.*, 130 U.S. 396, 409 (1889).

336. See, e.g., *Diamond Match Co. v. Roeber*, 13 N.E. 419, 421-22 (N.Y. 1887) (endorsing modification of the common law of trade restraints in light of changed circumstances); *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525 (Mo. Ct. App. 1880) (“It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade.”); *Kellogg v. Larkin*, 3 Pin. 123, 139-41 (Wis. 1851) (same).

337. See *Standard Oil*, 221 U.S. at 51-59.

338. *Id.* at 58-59; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 47-48 (1966).

339. See *Standard Oil*, 221 U.S. at 55-57, 64.

340. *Id.* at 63-64 (stating that courts should employ “the light of reason” to determine whether a challenged agreement offends the “public policy embodied in the statute”).

341. See Bork, *supra* note 338, at 47-48.

342. *Standard Oil*, 221 U.S. at 55; see *id.* at 59.

343. 131 U.S. 88 (1889).

344. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898), *aff'd as modified* by 175 U.S. 211 (1899).

ter passage of the Sherman Act and before *Dr. Miles*, sometimes relying upon *Fowle*.³⁴⁵

Perhaps *Standard Oil*, *Dr. Miles*, and various more recent decisions embraced an incorrect approach to *stare decisis*.³⁴⁶ Perhaps the 1890 Congress that passed the Sherman Act expected that courts would simply adhere to their own precedents indefinitely, no matter how much subsequent learning and doctrinal developments undermined the factual premises of such decisions. However, the Supreme Court has repeatedly taken a different approach. One cannot invoke *stare decisis* as a rationale for steadfast adherence to *Dr. Miles*, no matter how wrong, while simultaneously abandoning numerous other precedents that *require* the Court to jettison decisions whose factual premises have proven false.

X. CONCLUDING OBSERVATIONS: WHY RESISTANCE IS BOTH MISGUIDED AND FUTILE

The rule of reason requires courts to discern whether challenged conduct will produce monopoly or its consequences. Courts performing this role must rely upon what *Standard Oil* called “accurate economic conceptions” when articulating antitrust doctrine.³⁴⁷ An antitrust regime that ignored theoretical developments would not be based on “reason.”

Dr. Miles and subsequent bans on non-price restraints rested upon the best theory courts could muster, theory that equated vertical restraints on dealers with analogous naked horizontal agreements *between* dealers. TCE, however, exploded this assumption, demonstrating that vertical restraints can reduce the cost of transacting by minimizing market failures. *Leegin*’s detractors have failed to offer a convincing alternative rationale for a *per se* ban on minimum RPM. Instead, these detractors have advanced arguments that question TCE, basic antitrust principles, or both.

Nothing prevents Congress or the states from ignoring advances in economic learning and banning conduct that often creates wealth. The rule of reason binds federal courts, not Congress or the states. However, restoration of *Dr. Miles* would not be a “correction” of *Leegin*. To be sure, reimposition of *Dr. Miles* would make some markets

345. See, e.g., *Grogan v. Chafee*, 105 P. 745, 747 (Cal. 1909) (invoking *Fowle*); *Garst v. Harris*, 58 N.E. 174, 174 (Mass. 1900) (same); *John D. Park & Sons v. Nat’l Wholesale Druggists’ Ass’n*, 67 N.E. 136, 141 (N.Y. 1903) (Parker, C.J., concurring) (same). See also *Garst v. Charles*, 72 N.E. 839, 840 (Mass. 1905) (enforcing such an agreement without invoking *Fowle*).

346. See *supra* note 327 and accompanying text (detailing various decisions holding that courts may reverse prior decisions in light of changed economic understandings).

347. *Standard Oil*, 221 U.S. at 54.

appear more “competitive.”³⁴⁸ However, competition for its own sake has never been the objective of the Sherman Act; some limitations on rivalry improve market outcomes and thus economic welfare.³⁴⁹ Reimposition of *Dr. Miles* would create antitrust doctrine divorced from the very economic theory that Congress expected courts to apply in fashioning antitrust doctrine. At the same time, it seems unlikely that reimposition of a *per se* ban on minimum RPM would induce the Supreme Court to abandon decisions like *Sylvania* and its progeny. The result would therefore be an arbitrary distinction between price and non-price restraints, encouraging parties to elect non-price restraints for reasons unrelated to wealth creation.

Thus, such a restoration of *Dr. Miles* would operate as an exemption from basic antitrust principles, preventing firms from adopting ordinary competitive practices that improve the competitive process. Like other antitrust exemptions, the resulting rule would potentially advantage some rent-seeking participants in the legislative process, particularly no-frills retailers and manufacturers with established brands, at the expense of others, such as smaller, innovative manufacturers hoping to break into the market by inducing established dealers to stock their products.³⁵⁰ Perhaps the closest analogy to such an exemption can be found in the Robinson-Patman Act, which, as explained earlier, deterred large, efficient chains from obtaining volume discounts that could ultimately benefit consumers.³⁵¹

In any event, state or Congressional nullification of *Leegin* will not be the “last word” on minimum RPM. Statutory exemptions from the Sherman Act are read narrowly, “with beady eyes and green eyeshades,” to minimize the impact of special interest influence in the legislative process.³⁵² Proponents of “reason” will still have many

348. Cf. S. 75, 112th Cong. § 2(a)(4) (2011) (finding that *Leegin* “substantially harms the ability of [some discounters] to compete”).

349. See *supra* notes 265-70 and accompanying text.

350. See Meese, *Rule of Reason*, *supra* note 51, at 165-66 (contending that availability of effective promotional strategies can enhance incentives to innovate). Cf. S. 75, 112th Cong. § 2(a)(4) (2011) (finding that repeal of *Leegin* will advantage discounters). See also *supra* notes 130-35 and accompanying text (explaining how minimum RPM can facilitate entry by upstart manufacturers).

351. See ANTITRUST MODERNIZATION COMM’N, *supra* note 156, at 312 (The Report treated the Robinson-Patman Act as an exception to free market competition because “[t]he Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law.”). See also Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 711 (1982) (“The Robinson-Patman Act is a small-business protection statute . . .”).

352. See *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 671-72 (7th Cir. 1992) (“Special interest laws do not have ‘spirits,’ and it is inappropriate to extend them to achieve more of the objective [than] the lobbyists wanted. . . . Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.”). See also *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (“[E]xemptions from the antitrust laws must be construed narrowly.”).

weapons at their disposal to mitigate the harmful impact of any codification of *Dr. Miles*.

For instance, federal enforcement agencies, which once simply declined to enforce the Robinson-Patman Act, may decline to challenge reasonable instances of minimum RPM, thereby replicating *Leegin* as a matter of enforcement policy.³⁵³ While private parties could still invoke a revitalized *Dr. Miles*, courts could minimize the impact of such “private attorneys general.” In particular, courts could invoke the doctrine of *in pari delicto*, which prevents parties from challenging an agreement they have voluntarily entered.³⁵⁴ While the Court waived this doctrine in the dealer-supplier context during the inhospitality era by claiming that such agreements are involuntary,³⁵⁵ TCE demonstrates that such agreements can be voluntary efforts to minimize transaction costs.³⁵⁶ Moreover, even if such suits proceed, plaintiffs would not be home free; the doctrine of antitrust injury limits private recoveries to those damages that flow from the anticompetitive impact, if any, of the challenged restraint.³⁵⁷ Thus, a terminated dealer could not, for instance, recover profits lost because minimum RPM prevented it from free riding on the promotional efforts of other dealers, given that the prevention of free riding is not a harmful impact of minimum RPM.³⁵⁸ As a result, even if Congress codifies the *per se* rule, courts can bar private challenges to efficient minimum RPM by finding that such agreements are voluntary or, in the alternative, limit the damages that aggrieved dealers can recover.³⁵⁹ State courts could invoke similar reasoning to block private suits under their own antitrust statutes.

What, though, about the merits of such litigation? Armed with the authority to read exemptions narrowly, courts can minimize the impact of a legislative ban on minimum RPM in a number of ways. First, courts can read the agency and consignment exceptions to the *per se* rule broadly, allowing firms to circumvent any *per se* ban by altering the form of the transaction between manufacturer and deal-

353. See Easterbrook, *supra* note 351, at 710-11 (approving the Carter Administration’s refusal to enforce the Robinson-Patman Act).

354. See *Blackburn v. Sweeney*, 53 F.3d 825, 829 (7th Cir. 1995) (invoking the doctrine to bar a challenge to a contract to which the plaintiff was a party).

355. See *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 140-41 (1968).

356. See Meese, *supra* note 88 (explaining how TCE implies that parties enter efficient non-standard contracts voluntarily).

357. See generally *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328 (1990) (holding that a dealer challenging maximum RPM imposed on rivals could not recover damages resulting from above-cost and thus procompetitive pricing).

358. See *id.* at 335-40; *Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987) (holding that terminated dealer could not recover profits it expected to derive from free riding off the efforts of full service retailers).

359. See *Blackburn*, 53 F.3d at 829-30 (holding that the doctrine of *in pari delicto* barred suit when both sides were equally responsible for the restraint).

er.³⁶⁰ Moreover, courts can strengthen the *Colgate* exception, refusing to condemn agreements absent an explicit agreement between manufacturer and dealer.³⁶¹ Finally, courts can read any such legislation so as not to penalize an agreement between a manufacturer and one dealer to terminate another, price-cutting dealer.³⁶²

To be sure, state courts are not bound to employ “reason.” Moreover, such courts do not “internalize” the full impact of doctrine they generate, which, like commerce itself, may stretch across state lines.³⁶³ Thus, these tribunals may be less willing to adopt the sort of doctrinal strategies necessary to minimize the impact of a (state-level) ban on minimum RPM. Nonetheless, states that adopt such wealth-destroying rules will do so at their own peril. For one thing, manufacturers can avoid the impact of a state ban on minimum RPM by terminating dealers in the state and integrating forward into distribution or simply withdrawing from the jurisdiction altogether.³⁶⁴ Moreover, such a ban could deprive a state’s citizens of the benefits of additional interbrand competition in those industries where minimum RPM is necessary to induce entry-facilitating promotion.³⁶⁵ Finally, airtight bans on minimum RPM may simply force manufacturers to employ more costly alternative means of inducing promotion, thereby increasing consumer prices.³⁶⁶ Indeed, these considerations may explain why more state legislatures have not responded to *Leegin* and why one state legislature recently rejected its own supreme court’s effort to ban minimum RPM.³⁶⁷

360. See, e.g., *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989) (finding that the airline’s price fixing agreement with travel agent did not offend *Dr. Miles*). But see *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986) (opining that sham agency agreements designed solely to circumvent *Dr. Miles* were void).

361. See *supra* notes 33-35 and accompanying text.

362. See generally *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (holding that such agreements are properly analyzed under a full-blown rule of reason).

363. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 231-32 (1899) (finding that the Sherman Act reached multistate cartel agreements because, absent federal regulation, each state might adopt rules that served “its own particular interest”).

364. See Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345, 356 n.39 (1985) (reporting termination of all 642 Jack-in-the-Box franchisees after a class action settlement prohibited the use of quality control tying contracts). Cf. William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 311-15 (1997) (explaining how a state that imposes onerous law on foreign corporations may drive investment from the jurisdiction).

365. See *supra* notes 130-35 and accompanying text (explaining how minimum RPM can facilitate new entry).

366. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 902 (2007).

367. See PLC Antitrust, *Kansas Law Reverses Kansas Supreme Court Decision on Resale Price Maintenance*, PRACTICAL LAW CO. (Apr. 19, 2013), <http://us.practicallaw.com/2-525-9093>. For a summary of the legislation, see *Kansas Restraint of Trade Act—Harmonization; Reasonable Restraints; Exceptions; Damages; SB 124*, KAN. LEGIS. RESEARCH DEPT., http://www.kslegislature.org/li/b2013_14/measure/documents/summary_sb_124_2013.pdf.

In short, a *per se* ban on minimum RPM would contravene the very economic theory that Congress expected courts to apply when fashioning antitrust doctrine. While legislatures are free to impose such rules, they should not be surprised if enforcers and courts seek to minimize the harm from such a departure from “reason.” Resistance to *Leegin* may thus be more than misguided. It may also be futile.