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Alan J. Meese  
*William & Mary Law School, ajmees@wm.edu*

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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.

* Ball Professor of Law and Cabell Research Professor of Law, William and Mary Law School. The William and Mary Law School provided a summer research grant in support of this project.
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.

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

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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. 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. 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-

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3. See Leegin, 551 U.S. at 881.
manufacturer’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-
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

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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 inter-state 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).
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”).
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 sug-
gested 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 rea-
son” 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 prevail-
ing economic theory. 18

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

Just six weeks before Standard Oil, the Court applied the di-
rect/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 differ-
ent 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 conse-
quences 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 compe-
tition 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 prob-
lems 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. In this way, Dr. Miles sought to limit intrabrand competition, that is, competition between various dealers selling its own products, thereby leaving competition with other products—interbrand competition—unscathed.

The case began as a tort action in federal court premised on diversity of citizenship. Dr. Miles alleged that the defendant, an unapproved retailer, had induced approved retailers and consignees to sell Dr. Miles’s product below contractually specified prices. Dr. Miles sought to enjoin the practice, claiming that the defendant had tortiously interfered with the price-setting agreements by intentionally inducing breach. The defendant sought to avoid liability by claiming that the contract directly restrained interstate commerce contrary to Section 1.

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.” The Court assumed that dealers, and not Dr. Miles, were the primary beneficiaries of higher retail prices. 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. But such an agreement, the Court said, would contravene numerous Sherman Act and common law decisions banning naked horizontal price fixing. In short, the Court equated minimum RPM

22. Id. at 380.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{34} By 1926, then, the Court had approved two different means of circumventing _Dr. Miles_.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{38}

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

\textsuperscript{(1893)}. One of these decisions, it should be noted, involved minimum RPM. See _W.H. Hill Co._, 127 N.W. at 804.

\textsuperscript{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.”); _RIICHARD 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.”).


\textsuperscript{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”).


\textsuperscript{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

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).
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. 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, neoclassical 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. As a result, agreements that reached beyond the firm to constrain trading partners were necessarily suspect, because they reduced rivalry without any possible benefits. 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.

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. In particular, courts condemned numerous non-standard

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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. 287, 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).
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
claim with Dr. Miles’s equation of minimum RPM with a dealer cartel.\textsuperscript{60} The Court also banned maximum RPM, which assured consumers lower prices than dealers might charge.\textsuperscript{61}

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

\section*{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{68} Moreover, while Coase did not explicitly say so, his insight al-

\begin{itemize}
\item \textsuperscript{60} See supra notes 23-32 and accompanying text.
\item \textsuperscript{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).
\item \textsuperscript{63} See supra notes 35, 54-58 and accompanying text (explaining how Colgate, General Electric, and Schwinn limited the \textit{per se} rule to instances of actual agreement between manufacturer and dealer regarding product whose title had passed).
\item \textsuperscript{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).
\item \textsuperscript{65} See R.H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937).
\item \textsuperscript{66} Id. at 390-91.
\item \textsuperscript{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”).
\item \textsuperscript{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”).
\end{itemize}
so suggested a non-technological explanation for partial integration, that is, contractual integration that stood somewhere between “firm” and “market.”

However, as Coase himself has admitted, his work was “much cited and little used.” 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. 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. 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. The prospect of such free riding, he said, might deter dealers from making such investments. 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. 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.

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.

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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).
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).
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. 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. Moreover, Bork did not limit his analysis to vertical restraints, but applied the same reasoning to some horizontal restraints. 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.

Other scholars soon embraced and elaborated upon the Telser-Bork line of argument. Among these scholars was Oliver Williamson, who, like Coase, would later win the Nobel Prize for his work articulating the transaction cost paradigm. While a special employee at the Department of Justice, Williamson had objected to the government’s brief in Schwinn. Eight years later, Williamson suggested that vertical integration was presumptively an effort to minimize transaction costs. 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


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.


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. 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. 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.

As Williamson would later explain, these developments reflected a genuine scientific revolution in industrial organization theory. Moreover, this revolution had implications far beyond the law of vertical restraints or, for that matter, antitrust. Indeed, scholars have employed transaction cost reasoning to problems as varied as international security arrangements, company towns, sharecropping, and marriage. 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).


88. See Williamson, 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).

89. 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).


92. See Williamson, supra note 48, at 35-38.


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

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. 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. 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.

The Court conceded that non-price restraints necessarily reduced intrabrand competition, that is, competition between dealers. 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. Instead, such restraints also had to lack redeeming virtues to merit such outright condemnation. 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. Most famously, the Court asserted that such agreements could encourage

96. See generally Thomas S. Kuhn, The Structure of Scientific Revolutions (1962).
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).
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.
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

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”).
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’

124. Id. at 882-84 (detailing the history and content of the restraint).
125. Id. at 884-85 (detailing lower court proceedings).
126. Id.
128. See id. at 892-94.
129. Id. at 892.
130. Id. at 889 (“Economics 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{137} Each of these explanations was an application of TCE, which predicts that unconstrained dealers may behave opportunistically, imposing costs on manufacturers and consumers.\textsuperscript{138} Each also depended upon the assumption, articulated in \textit{Sylvania} and subse-

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

\textsuperscript{134} \textit{Id.} at 890-91 (Minimum RPM “can increase interbrand competition by facilitating market entry for new firms and brands.”).

\textsuperscript{135} \textit{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.”).

\textsuperscript{136} \textit{Id.} The Court also opined that this strategy would allow manufacturers to rely upon dealer “initiative and experience in providing valuable services.” \textit{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, \textit{Property Rights and Intrabrand 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, \textit{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, \textit{Exclusive Dealing}, 25 J.L. \& ECON. 1, 2 (1982).

\textsuperscript{138} See supra notes 85-88 and accompanying text.
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, \textit{Dr. Miles} was a long-standing precedent.\(^{142}\) Nonetheless, invoking \textit{Sylvania} and other decisions, the Court explained that the doctrine of \textit{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 \textit{Dr. Miles}, namely, that minimum RPM is economically indistinguishable from naked horizontal price fixing between dealers.\(^{145}\) Indeed, retaining \textit{Dr. Miles} would call \textit{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.\(^{147}\)

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

\(^{140}\) \textit{See id.} at 894 (“Although empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical.”).


\(^{143}\) \textit{See Leegin}, 551 U.S. at 899 (“\textit{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.”).

\(^{144}\) \textit{Id.} at 900-02 (“The Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints.”).

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

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

\(^{147}\) \textit{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. \textit{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. 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*. Some members of Congress introduced bills that would do just that, i.e., amend the Sherman Act to codify *Dr. Miles*. The Senate Judiciary Committee approved one such bill in November 2011, after receiving testimony from low-cost retailers critical of *Leegin*. Others have invoked “antitrust federalism” and advocated state legislation banning minimum RPM. 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.


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

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Indeed, as explained earlier, Congress has sometimes even imposed anticompetitive restraints against parties’ will.\textsuperscript{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.\textsuperscript{160} They may also ban conduct that would be wealth-creating and thus lawful under the Sherman Act.\textsuperscript{161}

However, \textit{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 \textit{Leegin} “got it wrong” when applying basic antitrust principles animating the rule of reason. Moreover, legislation proposed in 2011 that would have codified \textit{Dr. Miles} was premised upon a finding that \textit{Leegin} “incorrectly interpreted the Sherman Act.”\textsuperscript{162} For those who resist \textit{Leegin}, then, a Congressional or state \textit{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 \textit{Leegin} have made for restoring \textit{Dr. Miles}. Each argument, it is seen, rejects TCE, basic antitrust principles, or both. As a result, one cannot characterize restoration of \textit{Dr. Miles} as a bona fide application of \textit{Standard Oil}’s rule of reason. Instead, reimposition of the ban on minimum RPM would constitute a rejection of the “more accurate economic conceptions”\textsuperscript{163} that should drive antitrust doctrine and thus be akin to a welfare-reducing special interest exemption from basic antitrust principles.

\section*{IX. Refuting the Resistance}

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


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.

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170. See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (*Per se* treatment is appropriate *‘[on]ce 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.

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 benefits.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”).


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. Such logic, of course, applied with equal force to non-price restraints, impelling the Schwinn Court to condemn such agreements, as well.

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. 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. 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. 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.

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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186} Absent such interbrand competition, states could not immunize minimum RPM, regardless of whether such restraints produced benefits.\textsuperscript{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.\textsuperscript{188} In these circumstances, firms could enter minimum RPM agreements, even agreements that would produce economic harm and fail \textit{Leegin}’s rule of reason, with impunity, undeterred by any rule of reason scrutiny.\textsuperscript{189}

\begin{footnotesize}
\begin{enumerate}
\item[(184)] See Bates, \textit{supra} note 44, at 134 (reporting that ten state supreme courts had found non-signer provisions unconstitutional). See also \textit{supra} notes 39–44 and accompanying text.
\item[(185)] See \textit{supra} notes 39–44 and accompanying text.
\item[(187)] See, e.g., \textit{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). \textit{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).
\item[(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 \textit{Ann. Rep.} 60 (1947) (reporting that after \textit{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, \textit{supra} note 178, at 25-26 (noting that \textit{Eastman Kodak} was the only decision holding that there was insufficient competition to invoke the fair trade exemption).
\item[(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).
\end{enumerate}
\end{footnotesize}
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

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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).


perfect competition, they nonetheless generally retained most other assumptions of perfect competition when analyzing such markets.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{Dr. Miles} and declare non-price post-sale restraints unlawful.

\textsuperscript{195} See Friedrich A. Hayek, \textit{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 Kaysen & Donald F. Turner, \textit{Antitrust Policy: An Economic and Legal Analysis} 8 (1959) (“Though the model of [perfectly] competitive market structure is not usable as such in our definition of competition, other concepts of the model are.”); Meese, \textit{supra} note 89, at 469 & n.47 (collecting various authorities to this effect).

\textsuperscript{196} See Meese, \textit{supra} note 50, at 70-80.

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

\textsuperscript{198} See Kuhn, \textit{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, \textit{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, \textit{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*. 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. 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.

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. 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. 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. Three centuries later, these courts reversed course, announcing they would

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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.


201. *Id.* at 1433.


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. 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. 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.”

The Supreme Court has repeatedly explained that Congress expected courts to draw upon “common law tradition” when implementing the Sherman Act. 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.”

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

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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) (“[C]ongress] 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.”).

practices. 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. The Court cited no empirical evidence, citing instead a law review note and a monograph authored by a price theorist. The note cited only the same monograph for its conclusion. Despite this flimsy foundation, the Court repeated this nostrum for decades. 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. 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. 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.

The Court’s approach to non-price vertical restraints has been equally untethered to empirical support. The Schwinn Court, for in-
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 ori-
gins, while the latter could produce technological efficiencies. 220

A decade later, the Court, influenced by the teachings of TCE, re-
jected this distinction, pointing out, properly, that there was no eco-
nomic 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 treat-
ment 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 empir-
ical 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

219. See Meese, Intrabrand Restraints, supra note 51, at 38-49 (explaining price theo-
ry’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.
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) (ex-
pressing agreement with Sylvania’s rule of reason holding).
224. The Sylvania Court did refer to unspecified “decision[s] sustaining vertical re-
strictions 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 expla-
nation of the test these courts employed makes it difficult to evaluate this evidence.
bring to bear on antitrust problems. 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. 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. 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. Failing this, he says, manufacturers can rely upon non-price restraints such as territorial restraints that “close[]” distribution and thus encourage dealer promotion. 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.

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 dealership, 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-
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.  

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.

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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. 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. 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. 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

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

\textsuperscript{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, \textit{supra} note 223, at 477; Kirkwood, \textit{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 \textit{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, \textit{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, \textit{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.)

\begin{center}
\begin{tabular}{l|l|l}
 & Don’t Promote & Promote \\
\hline
F & 50, 50 & 25, 60 \\
O & Don’t Promote & 60, 25 \\
R & 60, 25 & 30, 30 \\
D & Don’t Promote & Promote \\
\end{tabular}
\end{center}

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. 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. 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. 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,


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.
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.\textsuperscript{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.\textsuperscript{257} For some, this evidence strengthens the case for \textit{per se} condemnation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{256} WILLIAMSON, supra note 48, at 48-49.

\textsuperscript{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).

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

\textsuperscript{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).

\textsuperscript{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).

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).
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 (intrabrand) 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 intrabrand 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.\(^\text{273}\) 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.\(^\text{274}\)

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.\(^\text{275}\) Such proof, therefore, would not by itself give rise to a prima facie case under the rule of reason.\(^\text{276}\) 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.\(^\text{277}\) In both cases "consistency" merely denotes the absence of falsification, that is, the failure to refute the proposed theory.\(^\text{278}\) Such a lack of falsification—consistency with observed data—merely

\(^\text{273}\) 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.


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

\(^\text{278}\) See Popper, supra note 198, at 265-66.
saves the theory from oblivion. It does not “prove” it. 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. 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. Under this test, plaintiffs must demonstrate that a restraint produces anticompetitive harm to establish a prima facie case. Failure to establish such harm entitles the defendant to judgment. 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.

Very rarely, however, courts employ a “quick look” rule of reason. 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”).


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.

“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).
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


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).


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

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 (endorse a 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

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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.


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


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. 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. 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. In fact, this assertion appeared in a finding in legislation proposed in 2011. 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. 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*. 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...
nonetheless compelled adherence to a wealth-destroying rule.\textsuperscript{321} Justice O’Connor acknowledged that \textit{stare decisis} generally has greater force in the statutory context and that Congress, and not the courts, should revise erroneous interpretations of statutes.\textsuperscript{322} Still, invoking several precedents, she explained that \textit{stare decisis} has less force in the antitrust context.\textsuperscript{323} Her reasoning is worth quoting in full:

\begin{quote}
But “\textit{stare 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.\textsuperscript{324}
\end{quote}

This unanimous account of antitrust \textit{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.”\textsuperscript{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.”\textsuperscript{326} Several other decisions, including of course \textit{Sylvania}, have adjusted or repudiated prior decisions in light of new understandings about the economic impact of challenged practices.\textsuperscript{327} Each of these decisions contradicts asser-
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.  

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.” Instead, TCE obliterated the central economic premise of Dr. Miles, namely, that vertically-imposed RPM is equivalent to a horizontal cartel between dealers. 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.” As the Court explained, Congress did not invent the term “restraint of trade,” but instead took the term from the common law. 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. 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. 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

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.


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.\textsuperscript{335} Several nineteenth-century state court opinions concurred.\textsuperscript{336}

\textit{Standard Oil} described this dynamic, common law approach with approval when articulating the meaning of the statute.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{339} To determine whether a challenged arrangement had the prohibited effect, the Court said, judges should apply their “reason.”\textsuperscript{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.”\textsuperscript{341} Finally, as explained earlier, \textit{Standard Oil} approved the common law practice of altering doctrine in light of “more accurate economic conceptions . . . .”\textsuperscript{342}

To pile irony on top of irony, \textit{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 \textit{Foule v. Park}, a case premised upon diversity of citizenship, enforced as reasonable an agreement setting minimum resale prices of patent medicine.\textsuperscript{343} William Howard Taft would cite this opinion with approval in his monumental \textit{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.”\textsuperscript{344} Moreover, some state courts enforced minimum RPM agreements af-

\begin{itemize}
\item[335.] See Gibbs v. Consol. Gas Co., 130 U.S. 396, 409 (1889).
\item[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).
\item[337.] See \textit{Standard Oil}, 221 U.S. at 51-59.
\item[339.] See \textit{Standard Oil}, 221 U.S. at 55-57, 64.
\item[340.] \textit{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”).
\item[341.] See Bork, \textit{supra} note 338, at 47-48.
\item[342.] \textit{Standard Oil}, 221 U.S. at 55; see \textit{id.} at 59.
\item[343.] 131 U.S. 88 (1899).
\item[344.] United States v. Addyston Pipe \\& Steel Co., 85 F. 271, 283 (6th Cir. 1898), \textit{aff'd as modified by} 175 U.S. 211 (1899).
\end{itemize}
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


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.”

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. 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. 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.

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. Proponents of “reason” will still have many


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

350. See Meese, Rule of Reason, supra note 51, at 163-66 (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 . . . .”). 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. 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. While the Court waived this doctrine in the dealer-supplier context during the inhospitality era by claiming that such agreements are involuntary, TCE demonstrates that such agreements can be voluntary efforts to minimize transaction costs. 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. 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. 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. 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-

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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).
356. See Meese, supra note 88 (explaining how TCE implies that parties enter efficient non-standard contracts voluntarily).
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. Moreover, courts can strengthen the Colgate exception, refusing to condemn agreements absent an explicit agreement between manufacturer and dealer. 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.

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. 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. 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. Finally, airtight bans on minimum RPM may simply force manufacturers to employ more costly alternative means of inducing promotion, thereby increasing consumer prices. 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.  

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.


363. See Addyson 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”).


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


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.