

# *FEATURE ARTICLES*

## **Whither *Dr. Miles*?**

By Mark D. Bauer\*

### **I. Introduction**

Commenting on the French Revolution, Edmund Burke wrote “it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.”<sup>1</sup> The U.S. Supreme Court recently failed to heed that admonition, overruling the ninety-six year old precedent of *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*<sup>2</sup> In the 5-4 decision of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>3</sup>, the Court replaced *Dr. Miles*’ bright-line holding with confusion and uncertainty.

In its 1911 *Dr. Miles* decision, the Court held that it was *per se*<sup>4</sup> illegal for a manufacturer to dictate a product’s final price at

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<sup>1</sup> EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (2d ed. 1790).

<sup>2</sup> *Dr. Miles Med. Co. v. John D. Parks & Sons Co.*, 220 U.S. 373 (1911).

<sup>3</sup> *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>4</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Under the “per se rule,” inherently anticompetitive restraints on competition, such as price fixing, are conclusively deemed unlawful without any inquiry into their alleged reasonableness. *Id.* at 150. Under the “rule of reason,” a court examines and

retail.<sup>5</sup> Few scholars and practitioners would argue that *Dr. Miles* was a perfect decision. Written at the dawn of antitrust regulation, it relied on theories and concepts that have long since been abandoned by mainstream antitrust law.<sup>6</sup> Yet, until *Leegin*, the Court's *per se* rule against price fixing remained good law. Indeed, the Court has cited *Dr. Miles* in dozens of opinions over the years<sup>7</sup> and lower courts, moreover, have cited the decision on hundreds of occasions.<sup>8</sup>

Opinions regarding the significance of *Dr. Miles* vary widely. Some commentators have argued that the entire discount retail sector (including Wal-Mart and Target) would not exist but for *Dr. Miles* and its progeny.<sup>9</sup> In *Leegin*, however, the Court suggested its decision essentially to scrap *Dr. Miles* might have a procompetitive impact on the economy,<sup>10</sup> while the dissent made a "safe prediction" that prices at retail will increase.<sup>11</sup> Which side will prove to be right is anyone's guess at this point. This essay reviews these issues and concludes, nevertheless, that the Court acted rashly

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balances competitive factors to determine whether a restraint on trade is "unreasonably restrictive of competitive conditions." *Id.*

<sup>5</sup> *Dr. Miles*, 220 U.S. at 408.

<sup>6</sup> See, e.g., *Dr. Miles*, 220 U.S. at 404 (comparing price fixing between a manufacturer and retailer to general restraints on alienation of property law).

<sup>7</sup> See, e.g., *State Oil Co.*, 522 U.S. at 11; *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 67-68 (1977); *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 28 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 38 (1960); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 96-100 (1920); *United States v. Colgate & Co.*, 250 U.S. 300, 306 (1919).

<sup>8</sup> *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting).

<sup>9</sup> See, e.g., *id.* at 2735 (Breyer, J., dissenting); *Supreme Court Decision on Retail Price Setting: Hearing Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 110th Cong. (2007) (opening statement of Sen. Kohl, Chair) [hereinafter *Kohl Statement*]; *Supreme Court Decision on Retail Price Setting: Hearing Before the Senate Subcommittee on Antitrust, Competition Policy And Consumer Rights*, 110th Cong. (2007) (statement of Marcy Syms, Chief Executive Officer, Syms Corp.) [hereinafter *Syms Statement*].

<sup>10</sup> *Leegin*, 127 S. Ct. at 2714-15.

<sup>11</sup> *Leegin*, 127 S. Ct. at 2737.

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in eliminating a very useful precedent in favor of speculative assumptions.

Part II of this essay looks at the history of this legal issue. It first reviews the *Dr. Miles* decision and its close cousin, *U.S. v. Colgate & Co.*<sup>12</sup> *Colgate* limited the impact of *Dr. Miles* by giving resolute businesses a circuitous roadmap to circumvent it. This section will also detail efforts to legislatively nullify *Dr. Miles* through the Miller-Tydings Act and Fair Trade legislation, and then discuss acts of Congress to restore and preserve *Dr. Miles* by repealing Miller-Tydings. Part III of this essay discusses the *Leegin* decision, its flaws, and Congressional reaction. Part IV suggests likely outcomes resulting from *Leegin*.

## II. *Dr. Miles* and the Per Se Rule: Creation, Circumvention, and Restoration

### A. *Dr. Miles*: The Salesman

WOMAN FINALLY RECOVERS FROM NERVOUS BREAKDOWN . . . . If you are troubled with loss of appetite, poor digestion, weakness, inability to sleep, if you are in a general run down condition, and unable to bear your part of the daily grind of life, you need something to strengthen your nerves. You may not realize what is the matter with you, but that is no reason why you should delay treatment. *Dr. Miles' Nervine* has proven its value in nervous disorders for thirty years, and merits a trial, no matter how many other remedies have failed to help you.<sup>13</sup>

In 1882, during an era when patent remedies were popular,<sup>14</sup> Dr. Franklin Miles of Elkhart, Indiana, invented *Nervine*, a “calmative compound,” and began selling it to druggists for resale.<sup>15</sup>

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<sup>12</sup> *Colgate & Co.*, 250 U.S. at 307.

<sup>13</sup> *Woman Finally Recovers from Nervous Breakdown*, FALLS CITY NEWS (OR), Aug. 8, 1914, available at <http://www.fallscity.org/history/zunck/fcnews/08081914.html> (last visited Oct. 17, 2007).

<sup>14</sup> The term “patent medicine” was a misnomer because very few of these remedies were actually patented. Rudolph J.R. Peritz, *'Nervine' and Knavery: The Life And Times Of Dr. Miles Medical Company*, NYLS Legal Studies Research Paper No. 06/07-21, Social Science Research Network, available at <http://ssrn.com/abstract=959425> (last visited Oct. 17, 2007).

<sup>15</sup> See Bioanalytical Systems, Inc., Miles Laboratories, <http://www.bio>

Dr. Miles recommended Nervine for a variety of illnesses, including nervous exhaustion, headaches and insomnia, epilepsy, and pains, spasms, and backaches.<sup>16</sup> Unlike many of the snake-oil salesmen of the time,<sup>17</sup> Dr. Miles' Nervine included bromides, the precursor to modern tranquilizers, and did have a therapeutic (if mildly toxic) effect.<sup>18</sup>

Because the costs of market entry were low, and the products were easy to replicate, new home remedies, such as Dr. Miles', attracted a host of competitors.<sup>19</sup> While competition generally enhances consumer welfare, it can also lead to free riding.<sup>20</sup>

Although there are many variations on free riding, the theory is that one producer or retailer will invest in product development,

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analytical.com/info/calendar/99/06miles.htm (last visited Oct. 17, 2007); *See also* Time.com, *For That Great Feeling*, April 23, 1965, <http://www.time.com/time/printout/0,8816,833668,00.html> (last visited Oct. 17, 2007); Indiana Historical Society, Bayer Corporation, [http://www.indianahistory.org/HBR/business\\_pdf/BAYER.pdf](http://www.indianahistory.org/HBR/business_pdf/BAYER.pdf) (last visited Oct. 17, 2007).

<sup>16</sup> Indiana Historical Society, *supra* note 15.

<sup>17</sup> These products primarily boasted of the therapeutic value of a secret ingredient, which was often alcohol. Peritz, *supra* note 14, at 2. Some of these products had genuine therapeutic value and continue to be sold today. *See, e.g.*, Press Release, U.S. Fed. Trade Comm'n, FTC Charges Marketers of Doan's Pills with Making Deceptive Back-Pain Relief Claims (June 26, 1996) <http://www.ftc.gov/opa/1996/06/doans.shtm>. Some, such as Dr. Miles' Compound Extract of Tomato, found their way into America's kitchens. Peritz, *supra* note 13, at 2 (the ingredients for this Dr. Miles compound were likely taken from bottles of Heinz Ketchup). *See also* JAMES YOUNG, *THE TOADSTOOL MILLIONAIRES* 165-66 (1961); DAVID ARMSTRONG & ELIZABETH ARMSTRONG, *THE GREAT AMERICAN MEDICINE SHOW* 167 (1991). And others, like Coca-Cola, had their more controversial ingredients removed at some point. Peritz, *supra* note 14, at 2-3; ARMSTRONG & ARMSTRONG, *supra*, at 161 (Coca-Cola was originally made with coca leaves, and included at least some amount of cocaine).

<sup>18</sup> Indiana Historical Society, *supra* note 15; James W. Jefferson, *Old Versus New Medications: How Much Should Be Taught?*, 29:2 ACAD. PSYCHIATRY 162 (2005). Although bromides were commonly used in psychiatric hospitals during the Nineteenth Century, they were later discarded because of toxicity. *Id.* at 163.

<sup>19</sup> Peritz, *supra* note 14. The problem was somewhat ameliorated by the Trademark Act of 1905 and the Pure Food & Drug Act of 1906; the Trademark Act protected against dilution, and the Pure Food & Drug Act eliminated the more dangerous concoctions. *See* Peritz, *supra* note 14; Trademark Act, ch. 592, § 5, 33 Stat. 724 (1905); Pure Food & Drug Act, Pub. L. No. 59-384, 34 Stat. 768-70 (1906) (repealed 1938).

<sup>20</sup> *See generally* Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86 (1960).

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new technology, customer service, or the creation of the proper ambience for purchasing the product. After initial investment, other producers or retailers benefit from the growing demand and consumer recognition. These followers generally sell their product at a discount, “free riding” off of the work of the first producer.<sup>21</sup> In addition to its inherent unfairness, free riding may make firms reluctant to invest in research, customer service, or advertising if a competitor can subsequently offer a similar product at a lower price.<sup>22</sup>

### **B. Dr. Miles: The Case**

Free riding set the stage for a showdown between Dr. Miles and discounter John D. Park & Sons.<sup>23</sup> While Dr. Miles attempted to maintain premium prices for Nervine and other remedies, and to differentiate its brand from competitors, Park & Sons sought to expand its discount drug business and draw traffic to its stores by taking advantage of Dr. Miles’ advertising.<sup>24</sup> Finally, Dr. Miles required all retailers to agree to resell its products at a predetermined price.<sup>25</sup> Dr. Miles’ sales contract purported to make the wholesaler a consigner, although the contract had many features inconsistent with the creation of an agency or consignment.<sup>26</sup>

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<sup>21</sup> For a detailed explanation of free riding, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 456-60 (3d ed. Thompson/West, 2005); See also RICHARD POSNER, ANTITRUST LAW 172-173 (2d ed. Univ. of Chicago, 2001).

<sup>22</sup> STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 225-26 (Foundation Press 1993).

<sup>23</sup> Miles prevailed in two earlier suits that upheld resale price maintenance: See *Dr. Miles Med. Co. v. Platt*, 142 F. 606, 610-11 (N.D. Ill. 1906) (determining intellectual property rights are outside rules against restraints of trade) and *Miles Med. Co. v. Goldthwaite*, 133 F. 794, 795 (C.C.D. Mass. 1904) (determining that resale price maintenance was a lawful property right of intellectual property monopolists); *World’s Dispensary Medical Ass’n v. Same*, *Hartman v. Same*, 142 F. 606 (N.D. Ill. 1906) (holding that intellectual property rights are outside rules against restraints of trade).

<sup>24</sup> See *Peritz*, *supra* note 14; *Dr. Miles*, 220 U.S. at 374.

<sup>25</sup> *Dr. Miles*, 220 U.S. at 374-75.

<sup>26</sup> *Dr. Miles*, 164 F. 803, 804-05 (6th Cir. 1908). The formalism of consignment over sale continued to be an issue for the Supreme Court through *United States v. Gen. Elec. Co.*, 272 U.S. 476, 490 (1926) (determining agents were not purchasers and title passed from manufacturer to consumer), and *Simpson v. Union Oil*, 377 U.S. 13, 22-23 (1964) (limiting General Electric holding to patented

Thirteen years earlier, the Court decided *United States v. Addyston Pipe & Steel Co.*, which rendered *per se* unlawful any direct restraint on trade without any inquiry into its reasonableness.<sup>27</sup> Applying the *Addyston Pipe* standard, the Court found that Dr. Miles' attempt to consign drugs to wholesalers and retailers was subterfuge<sup>28</sup> and its true intent was to fix prices with wholesalers and retailers.<sup>29</sup> Although criticized for equating (and confusing) horizontal cartel activity with vertical price fixing,<sup>30</sup> *Dr. Miles* instituted an iron-clad *per se* rule against minimum vertical resale price maintenance ("RPM").<sup>31</sup>

### C. The *Colgate* Doctrine Exception

Eight years after the *Dr. Miles* decision, the Court's holding in *Colgate* created a loophole in the law of vertical price restraints.<sup>32</sup>

In *Colgate*, the Court held that imposing RPM was lawful, provided that the seller did so unilaterally.<sup>33</sup> While a manufacturer may not enter into an agreement with a reseller on price, the Court stated, "he may announce in advance the circumstances under which he will refuse to sell."<sup>34</sup> The result, called the "*Colgate* Doctrine,"

products).

<sup>27</sup> *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211, 237-38 (1899).

<sup>28</sup> *Dr. Miles*, 220 U.S. at 397-400. *Dr. Miles* also argued that its property rights in its trade secrets allowed it to dictate prices to resellers. *Id.* at 382-83. The Supreme Court responded that whatever right there might be, a restraint on alienation is invalid. *Id.* at 404.

<sup>29</sup> *Id.* at 408.

<sup>30</sup> See, e.g., ROBERT BORK, *THE ANTITRUST PARADOX* 33 (Free Press 1978); ROSS, *supra* note 22, at 225-26.

<sup>31</sup> *Dr. Miles*, 220 U.S. at 408. See also *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). The term "RPM" will be used throughout this essay to describe minimum resale price maintenance; other forms, including maximum resale price maintenance, will be described separately.

<sup>32</sup> *Colgate & Co.*, 250 U.S. 300 (1919). Interestingly, the opinion in *Dr. Miles* was written by then-Associate Justice Charles Evans Hughes. Hughes resigned from the Supreme Court to run, unsuccessfully, for the Republican candidate for president in 1916, and then successfully represented *Colgate* as a private attorney.

<sup>33</sup> *Id.* at 307. *Colgate* had engaged in a number of practices intended to influence the resale price of its products. *Id.* at 303. See also *Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256 (8th Cir. 1983) (upholding *Colgate* Doctrine).

<sup>34</sup> *Colgate & Co.*, 250 U.S. at 307.

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meant that producers wishing to engage in RPM were required to announce the required retail price before an order was placed, and then terminate—without any discussion—any reseller that deviated.<sup>35</sup> Not every producer desired to reign in its sales force and risk potentially contentious relationships with customers by exercising the *Colgate* Doctrine, but *Colgate* did provide a roadmap for firms dedicated to implementing RPM.<sup>36</sup>

The distinction between *Dr. Miles* and *Colgate* may be very technical—and even an artificial legal fiction unrelated to economic analysis<sup>37</sup>—but it remained the law until *Leegin*. Countless enterprises used these two cases as templates for business models.<sup>38</sup>

#### D. Legislative Reaction to *Dr. Miles*

The Great Depression created new challenges for antitrust laws. Small family businesses had trouble surviving, and the antitrust laws seemed to support big business at the expense of small business.<sup>39</sup> Chain stores such as A&P, Woolworth's, and J.C. Penney entered small towns and were accused of unethical business practices, including selling loss leaders, buying at discounts unavailable to smaller stores, and sucking money out of local communities into distant big cities.<sup>40</sup>

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<sup>35</sup> See Peritz, *supra* note 14, at 5-6.

<sup>36</sup> Manufacturers may be loath to cut off non-complying retailers, their only choice under *Colgate*; furthermore, manufacturers might face additional claims under state dealer-protection laws in addition to antitrust risks. *Supreme Court Decision on Retail Price Setting: Hearing before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 110<sup>th</sup> Cong. (2007) (written testimony of Richard M. Brunell, American Antitrust Institute) [Hereinafter *Brunell Statement*].

<sup>37</sup> ANDREW GAVIL, WILLIAM KOVACIC & JONATHAN BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 363 (West 2002).

<sup>38</sup> In fact, the Supreme Court refused at least one previous invitation by the U.S. Department of Justice to overrule *Dr. Miles*. *Monsanto*, 465 U.S. at 761 n.7; See also *Parke, Davis & Co.*, 362 U.S. at 29.

<sup>39</sup> Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005).

<sup>40</sup> *Id.* at 1013, 1019-25, 1058-59. Many of these same arguments are made against Wal-Mart today. *Id.* at 1089.

One response of Congress was to pass the Miller-Tydings Act in 1937.<sup>41</sup> Miller-Tydings allowed states to enact so-called “Fair Trade” laws, which circumvented *Dr. Miles* by permitting RPM in individual states if the state passed an enabling act.<sup>42</sup>

RPM was popular with small retailers during the deflation of the Great Depression, because it set a baseline price for retail that could not be undersold.<sup>43</sup> Without RPM, businesses argued, “ruinous competition” would ensue, resulting in public harm.<sup>44</sup> Small businesses in particular argued that they were entitled to receive a “fair price” or a “just profit.” It was even suggested—perhaps inexplicably by today’s standards for economic analysis—that with RPM consumers would no longer be “gypped by the predatory cut-rater . . . and suckered by loss leaders.”<sup>45</sup> Not surprisingly, with the Great Depression creating pressure to do almost anything to help the economy by the late 1930s the majority of states had legislatively overruled *Dr. Miles* and legalized RPM by enacting state Fair Trade laws.<sup>46</sup>

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<sup>41</sup> Miller-Tydings Act, ch. 690, tit. 8, 50 Stat. 673, 693 (1937). The constitutionality of Miller-Tydings was established one year earlier in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193 (1936) (states have power to delegate to individuals the power to fix prices for their own property). The same year Congress passed *Miller-Tydings*, Congress also passed the Robinson-Patman Act, which inter alia prohibited discriminatory discounts to large buyers under certain circumstances. Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. 13-13b, 21a (2007)).

<sup>42</sup> See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390-394 (1951). After *Schwegmann*, Congress passed the McGuire Act which overruled the case and it made it abundantly clear that Congress permitted the states to enact Fair Trade laws. 66 Stat. 632 (1952), 15 U.S.C.A. §45 (Supp. 1953).

<sup>43</sup> Schragger, *supra* note 39, at 1064.

<sup>44</sup> *Id.* at 1065. The Fair Trade movement asserted that price fixing would prevent ruinous competition, and that some cartels or monopolies “could rationalize business and prevent injuries to producers and consumers.” Schragger, *supra*, at 1065-66. Neither the Sherman Act nor federal antitrust jurisprudence (and certainly not the Chicago School) recognize that competition can ever be ruinous.

<sup>45</sup> *Id.* at 1066. While consumers today rarely complain about paying too low a price, there are related arguments that inexpensive items, particularly sold at discount stores such as Wal-Mart, hurt American prosperity by exporting jobs (and capital) to lower cost foreign producers.

<sup>46</sup> *Id.* at 1065. There is some debate as to the exact number of states because some passed Fair Trade laws and then repealed them; others passed Fair Trade laws but failed to enforce them. See H.R. REP. NO. 382 at 3 (1937); 120 CONG. REC. 37,770 (1974) (remarks of Sen. Edward W. Brooke); See also Rudolph J. Peritz,

By legalizing RPM in certain states, the United States embarked on a great economic experiment, but one with few controls or mechanisms to determine its success, failure, or consequences. Few scholars have performed empirical research on RPM even today.<sup>47</sup> Some believe, however, that one consequence of *Dr. Miles' per se* rule against RPM has been the rise of discount stores like Wal-Mart and Target. These experts also believe that the repeal of Miller-Tydings<sup>48</sup> in 1975 by the Consumer Goods Pricing Act ("CGPA"), which outlawed state Fair Trade laws and restored *Dr. Miles* as the law of the land,<sup>49</sup> made possible the enormous expansion of discount stores in the U.S. economy.

Another consequence of Fair Trade and RPM may be businesses such as Costco and Sam's Club. As with many distortions to the economy, the Fair Trade laws had an effect that probably few anticipated; in the case of Fair Trade, it led to the creation of membership stores.<sup>50</sup> Miller-Tydings provided an exemption

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*Frontiers Of Legal Thought I: A Counter-History Of Antitrust Law*, 1990 DUKE L. J. 263, 298 (1990); Terry Calvani & Andrew G. Berg, *Resale Price Maintenance After Monsanto: A Doctrine Still At War With Itself*, 1984 DUKE L.J. 1163, 1175 (1984).

<sup>47</sup> See, e.g., Richard Posner, ANTITRUST LAW 151 (1976); Frank H. Easterbrook, *Antitrust Law Enforcement in the Vertical Restraints Area: Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 151 (1984); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J. L. & ECON. 263, 293 (1991); THOMAS R. OVERSTREET, *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* 1 (1983).

<sup>48</sup> Brief for Consumer Federation of America as Amici Curiae Supporting Respondent at 8-9, *Leegin*, 127 S.Ct. 2705 (2007) (No. 06-480); S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small Town America*, 14 ANTITRUST L. & ECON. REV. 81, 81-83 (1982); RICHARD VEDDER & WENDELL COX, *THE WAL-MART REVOLUTION: HOW BIG BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY* 179 (American Enterprise Institute 2006); See also *Kohl Statement supra* note 9 (stating Kohl's Department Store was only able to grow because of the per se rule against RPM, and this may stop "the next Sam Walton"); See also S. Robson Walton, *Antitrust, RPM, and The Big Brands: Discounting In Small-Town America*, 14 ANTITRUST L & ECON. REV. 81, 85-86 No. 3 (1982) (stating that the General Counsel of Wal-Mart stated that if RPM were permitted, Wal-Mart would likely be forced to carry secondary brands and more imports as a way to avoid it). Some economists have credited Wal-Mart, because of its enormous sales and low prices, as having held down inflation for the entire country. Steven Greenhouse, *Wal-Mart a Nation Unto Itself*, N.Y. TIMES, Apr. 17, 2004, at 7.

<sup>49</sup> *Leegin*, 127 S. Ct. at 2724-25.

<sup>50</sup> Popular membership stores today include Costco, Sam's Club and B.J.'s

whereby stores that were open only to members could in fact sell at a discount to the manufacturer's suggested list price.<sup>51</sup> The first of such stores, E.J. Korvette's, opened in New York City in 1948; its founder gave out free membership cards to anyone who asked.<sup>52</sup>

### III. The *Leegin* Decision

#### A. The Case and Decision

Kay and Phil Smith own "Kay's Kloset," a boutique in suburban Dallas selling women's handbags, belts, and accessories.<sup>53</sup> Kay's Kloset has been in business for eighteen years and Leegin manufactures one of its more popular product lines, the "Brighton" brand of women's handbags, wallets, watches, jewelry, and accessories.<sup>54</sup> From 2000 to 2003, Kay's Kloset made approximately \$1.5 million in retail sales of Brighton goods, and was the key Brighton seller in the area.<sup>55</sup>

In 1997, Leegin instituted a policy banning sales to retailers selling below Leegin's suggested prices.<sup>56</sup> According to the Court,

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Wholesale Club. It is yet unknown what effect a return to RPM may have on their operations.

<sup>51</sup> See Ch. 690, tit. 8, 50 Stat. 673, 693 (1937).

<sup>52</sup> LAURA ROWLEY, ON TARGET 115 (2003); "I, myself, paid \$1.00 to become a member of a discount house so that they could try to go through the sham that it wasn't really an ordinary retail operation." Remarks of Rep. John F. Seiberling, *Congress Makes Laws; The Executive Should Enforce Them*, 32nd Annual [Antitrust] Spring Meeting, 53 ANTITRUST L.J. 175 (1984).

<sup>53</sup> The business is incorporated as PSKS, Inc.

<sup>54</sup> *Leegin*, 127 S. Ct. at 2711. Leegin sells its Brighton line through thousands of independent retailers, as well as through stores directly owned or controlled by Leegin.

<sup>55</sup> Plaintiff's First Amended Complaint at ¶ 7, PSKS, Inc. v. Leegin Creative Leather Prod., Inc., 2003 WL 24080760 (E.D. Tex.); *Leegin*, 127 S. Ct. at 2711.

<sup>56</sup> *Leegin*, 127 S. Ct. at 2711. The policy contained an exception for products not selling well. Leegin wrote to its retailers: "[i]n this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc. . . . We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis . . . . We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products

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Leegin adopted this policy to provide retailers with sufficient margins to provide appropriate customer service, and to avoid discounting that “harmed Brighton’s brand image and reputation.”<sup>57</sup>

In December 2002, Leegin learned that Kay’s Kloset had marked down the Brighton line by twenty percent. Kay’s Kloset told Leegin that it had done so in order to compete with nearby retailers also discounting the Brighton line.<sup>58</sup> Leegin requested that Kay’s Kloset cease discounting.<sup>59</sup> When it refused, Leegin stopped selling its products to Kay’s Kloset.<sup>60</sup> Leegin was responsible for forty to fifty percent of Kay’s Kloset’s profits, so the loss of the Brighton line was significant.<sup>61</sup>

At trial and on appeal to the U.S. Court of Appeals for the Fifth Circuit, Leegin asked to introduce expert testimony detailing the procompetitive effects of its pricing policy,<sup>62</sup> ordinarily forbidden under the *per se* rule. The Supreme Court granted certiorari to determine whether vertical minimum resale price maintenance agreements should remain *per se* illegal under *Dr. Miles*. In addition to briefs from the parties, the Court accepted amicus briefs from eleven groups.<sup>63</sup>

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in a quality manner.” *Id.* Leegin fails to mention, however, that it sells its products at Nordstrom. *See infra* note 151; Leegin, Brighton, *Press Release*, Feb. 10, 2005, [http://www.brighton.com/retail/privacy/press\\_release1.htm](http://www.brighton.com/retail/privacy/press_release1.htm) (last visited Oct. 4, 2007).

<sup>57</sup> *Leegin*, 127 S. Ct. at 2711.

<sup>58</sup> *Id.* Previously, Leegin had introduced a premium retail program called “Heart Stores.” *Id.* Kay’s Kloset was expelled from the Heart Store program after a Leegin employee visited the store and found it “unattractive.” *Id.*

<sup>59</sup> *Id.* Arguably, at this point Leegin violated both *Dr. Miles* and *Colgate* by attempting to enter into an agreement to fix prices with a reseller. Under the *Colgate* Doctrine, the pricing policy must be stated in advance by the manufacturer, and retailers deviating from the policy must be terminated without discussion or agreement.

<sup>60</sup> *Leegin*, 127 S. Ct. at 2711.

<sup>61</sup> *Id.* at 2711-12.

<sup>62</sup> *Id.* at 2712. *See* PSKS, Inc. v. Leegin Creative Leather Products, Inc., 2004 WL 5254322 (E.D.Tex. Aug. 17, 2004), *aff’d*, 171 Fed.Appx. 464 (5th Cir. 2006).

<sup>63</sup> The briefs were from: Attorneys General, antitrust chiefs, or other state officials from thirty seven states, Anderson Economic Group, Consumer Federation of America, Burlington Coat Factory, American Antitrust Institute (all in support of maintaining the *per se* rule); and American Petroleum Institute, Wireless Association, the United States (written by the U.S. Department of Justice and FTC), PING, and a group of economists (all against the *per se* rule). An addition

In June 2007, in a decision written by Justice Kennedy, the Court overruled *Dr. Miles*, subjecting future RPM cases to the Rule of Reason.<sup>64</sup> Justice Breyer wrote a spirited dissent signed by three other justices.<sup>65</sup>

## B. Key Arguments

Books, articles, empirical studies, and newspaper opinion pieces likely will be written on *Leegin* and its aftermath. This section endeavors to summarize and question the Court's key holdings in the case.

### 1. Anticompetitive Effects Will Result in Increased Prices for Consumers

In overruling *Dr. Miles*, Justice Kennedy stated that a *per se* rule was appropriate when the conduct "always or almost always tends to restrict competition and decrease output."<sup>66</sup>

The phrase "always or almost always," however, places inappropriate and unprecedented emphasis on how often the challenged conduct likely is to occur, rather than also focusing on the enormity of the damage.<sup>67</sup> In justifying a *per se* rule against RPM, Professors Areeda and Hovenkamp wrote:

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brief was authored by Professors Comanor and Scherer, two experts on RPM who purported to support neither side. While the Court may have received additional correspondence from interested individuals, one that was made public was a letter from FTC Commissioner Pamela Jones Harbour to the Court, indicating the reasons for her disagreement with the FTC's decision to support eliminating the *per se* rule. See Federal Trade Commission, *An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour*, Feb. 26, 2007, <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf> (last visited Oct. 3, 2007).

<sup>64</sup> *Leegin*, 127 S. Ct. at 2712, 2725. The five in the majority were Justices Kennedy, Roberts, Scalia, Thomas and Alito. The majority, however, left it to the lower courts to figure out exactly how to apply the Rule of Reason. See *id.* at 2737 (Breyer, J., dissenting).

<sup>65</sup> *Id.* at 2725 (Justices Stevens, Souter, and Ginsburg joined Justice Breyer).

<sup>66</sup> *Id.* at 2717 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

<sup>67</sup> Another problem with the statement is that it is not a standard that has been used consistently to provide a rationale for a *per se* rule in antitrust. See, e.g., *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, n.16 (1977) ("Per se rules thus require the Court to make broad generalizations about the social utility of

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It is thus not enough to suggest that [RPM] is sometimes or even often beneficial or harmful. The critical questions are always ones of frequency *and magnitude* relative to the business and legal alternatives. Thus . . . we must still ask whether . . . gains [from RPM] are large enough to overcome the detriments that consumers may suffer as a result . . . ”<sup>68</sup>

Echoing Areeda and Hovenkamp, the Court held in another case that “[p]er se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice *and the severity of those consequences* must be balanced against its procompetitive consequences.”<sup>69</sup>

There has been very little disagreement that overruling *Dr. Miles* will lead to at least some increase in prices.<sup>70</sup> “When minimum retail prices are set, the consumer will pay a higher price for the brand subject to the price restraint, raising the specter of misallocated resources or wealth transfers injurious to consumers.”<sup>71</sup> The Court should have analyzed the magnitude of these price increases and

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particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.”) (citing *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Topco Assocs, Inc.*, 405 U.S. 596, 609-610 (1972)).

<sup>68</sup> PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 292 (Aspen Law & Business ed., 2d ed. 2004) (emphasis added). See also *Brunell Statement*, *supra* note 36. Arguably, the existing *Colgate* doctrine offered a legal alternative to an RPM agreement.

<sup>69</sup> *Cont'l T.V., Inc.*, 433 U.S. at 50, n.16 (emphasis added).

<sup>70</sup> AREEDA & HOVENKAMP, *supra* note 68, at 292 (suggesting RPM “Tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point.”); Overstreet, *supra* note 47. Justice Kennedy even acknowledged “‘price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold.’ Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct.” *Leegin*, 127 S. Ct. at 2718 (quoting Overstreet *supra* at 160). Of course some who are not strict adherents to the Chicago School may believe that a non-transitory increase in prices is anticompetitive on its face.

<sup>71</sup> LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 373 (Thomson/West 2d ed., 2006).

determined whether their size provided continued justification for a *per se* approach to RPM.

In other contexts, the Court already has suggested or implied that price increases always or almost always restrict competition and decrease output. For example, RPM prohibits price cutting, and “cutting prices in order to increase business often is the very essence of competition.”<sup>72</sup> “Price,” according to the Court, is the “central nervous system of the economy.”<sup>73</sup> Absent predation, “low prices benefit consumers regardless of how those prices are set, and . . . do not threaten competition.”<sup>74</sup> Justice Kennedy’s emphasis on the frequency of anticompetitive effects overshadowed discussion of the magnitude of the anticompetitive harm from price increases, and a corresponding loss in allocative efficiency and consumer welfare.<sup>75</sup>

The *Leegin* majority, dismissing cause for concern, suggested that higher prices for consumers were irrelevant unless anticompetitive conduct was also demonstrated.<sup>76</sup> During oral arguments, Justice Scalia seemed particularly unimpressed by arguments that consumers might pay more for goods without the protections of *Dr. Miles*:

JUSTICE SCALIA: . . . . Is it the object of the—is the sole object of the Sherman Act to produce low prices?

MR. OLSON:<sup>77</sup> No.

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<sup>72</sup> *State Oil*, 522 U.S. 3 at 15 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 75 U.S. 574, 594 (1986)).

<sup>73</sup> *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 696 (1978) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940)).

<sup>74</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1075 (2007) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

<sup>75</sup> Allocative efficiency is the most efficient distribution of society’s limited resources, avoiding unnecessary transfers to those with market power, and thus maximizing consumer welfare. See SULLIVAN & GRIMES, *supra* note 71, at 12.

<sup>76</sup> *Leegin*, 127 S. Ct. at 2718. Justice Kennedy also suggested that future courts considering RPM under the Rule of Reason would also have to consider whether the alleged conduct was committed by a firm with market power. *Id.* at 2709.

<sup>77</sup> Transcript of Oral Argument of Theodore B. Olson on Behalf of the Petitioner at 13, *Leegin Creative Leather Products, Inc.*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 967030.

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JUSTICE SCALIA: I thought it was consumer welfare.

MR. OLSON: Yes, yes, it is.

JUSTICE SCALIA: And I thought some consumers would prefer more service at a higher price.

MR. OLSON: Precisely.

JUSTICE SCALIA: So the mere fact that it would increase prices doesn't prove anything. It doesn't prove that it's serving consumer welfare. If, in fact, it's giving the consumer a choice of more service at a somewhat higher price, that would enhance consumer welfare, so long as there are competitive products at a lower price, wouldn't it?

MR. OLSON: That's—that's absolutely correct.

JUSTICE SCALIA: So I don't know why, why we should have to focus our entire attention on whether it's going to—going to produce higher prices or not . . . .<sup>78</sup>

Justice Scalia seemed to be echoing an argument made many years earlier by Robert Bork.<sup>79</sup> Bork posited that RPM and vertical price fixing causes output to expand and the higher margins promote enhanced consumer welfare and efficiency.<sup>80</sup> To support his position, Professor Bork viewed the manufacturer's product as a composite of the product itself, combined with the décor and ambience of the retail establishment where it eventually was sold.<sup>81</sup>

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<sup>78</sup> *Id.* at 15.

<sup>79</sup> Whether Judge Bork was currently in favor of overruling *Dr. Miles* is unknown. In 2002 he wrote to the Antitrust Modernization Commission that the "antitrust laws are performing well, in fact better than at any time in the past seventy-five years . . . there is very little need for 'modernization.'" Robert H. Bork, Memorandum to the Antitrust Modernization Commission on Comments on the Status of the Antitrust Laws, *available at* <http://www.amc.gov/comments/bork.pdf> (last visited Oct. 3, 2007). Judge Bork did state that he hoped Robinson-Patman would be repealed, but he did not mention *Dr. Miles*, RPM or the per se rule. *Id.*

<sup>80</sup> Br. of William S. Comanor & F.M. Scherer as Amici Curiae Supporting Neither Party at 4, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (citing BORK, *supra* note 30, at 290).

<sup>81</sup> See BORK, *supra* note 30, at 296. "[T]hat consumers are better off because their psychic utility has been enhanced by the amount of the premium. . . . [] is the

This theory, however, is not universally accepted. Not all consumers want ambience and not all retailers offer it.<sup>82</sup> Many consumers seek, and many retail outlets offer, low price and low price alone. RPM promotes inefficiency by requiring all stores—beautiful or dismal—to charge the same RPM-mandated non-discounted price.<sup>83</sup> This potentially is a net transfer from consumers to some retailers and does not advance consumer welfare.<sup>84</sup>

When ordered by a manufacturer, there is a possibility RPM may deter free riding. But when RPM is instituted by individual power buyers—or a cartel—it prompts a race to the bottom where consumers pay more and get less.<sup>85</sup> Indeed, the trend towards larger and more powerful retail outlets<sup>86</sup> may prompt these retailers to

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kind of silly reasoning that gives economists a bad name among people of common sense.” Charles E. Mueller et al., *Foreword: Antitrust and the Discounters’ Case against Resale Price Maintenance*, 14 ANTITRUST L. & ECON. REV. 1, 8. No.3 (1982).

<sup>82</sup> According to one retailer, “Maybe the best service I can give you is to sell you something you couldn’t have afforded otherwise.” Leonard S. Mattioli, *Resale Price Fixing and The ‘Hi-Tech’ Discounter: Consumer Electronics in Madison*, 14 ANTITRUST L. & ECON. REV. 11, 17. No.3 (1982). The strongest procompetitive argument made by the Court may have been that the limited empirical evidence on RPM “does not suggest efficient uses of [RPM] are infrequent or hypothetical.” *Leegin*, 127 S. Ct. at 2717.

<sup>83</sup> *Leegin* suggested that when consumers pay more for a product, they feel better about it. Br. of William S. Comanor & F.M. Scherer, *supra* note 80, at 3. Just as this can promote competition to offer the best customer service in order to attract customers when there is no price competition, it can also lead to a race to the bottom where all retailers end up offering inadequate service.

<sup>84</sup> *But see Leegin*, 127 S. Ct. at 2718 (“The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be increased in the course of promoting procompetitive effects.”).

<sup>85</sup> The trend toward larger and more powerful retail outlets may prompt these retailers to demand RPM from manufacturers rather than the other way around. The increased concentration in retailing “may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.” *Leegin*, 127 S. Ct. at 2733 (Breyer, J., dissenting).

<sup>86</sup> *See, e.g., AREEDA & HOVENKAMP, supra* note 68, at 48-49; William S. Comanor, *The Two Economics of Vertical Restraints*, 21 SW. U. L. REV. 1265, 1276-81 (1992); *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 930 (7th Cir. 2000); Kris Hudson, *States Target Big-Box Stores*, WALL ST. J., June 29, 2007, at A8; Deloitte, *2007 Global Powers of Retailing* at 2-G8, available at <http://www.deloitte.com/dtt/article/0,1002,cid%253D135347,00.html> (last visited

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demand RPM from manufacturers, rather than the other way around. With RPM as a shield for these stores, they can cut service and neglect ambience, but charge the same high price to increase profit margins.

Denying retailers the ability to sell goods “because they are aggressive in pricing (and perhaps more efficient as well) hardly seems to be a service to consumers, or a vote of confidence in the competitive process.”<sup>87</sup> Indeed, quoting from a Consumers Union editorial during the debate to repeal Miller-Tydings, Senator Brooke (R) of Massachusetts said “[t]he crux of the problem of resale price maintenance, is whether the consumer should reap the benefits of the most efficient forms of retailing or . . . should be forced to pay more in order to make retailing . . . a more comfortable occupation.”<sup>88</sup> Furthermore, the *Colgate* Doctrine already provided a producer concerned with prestige the ability to safeguard the image of its products by refusing to do business with discounters.<sup>89</sup>

In addition, still focusing on the frequency rather than the magnitude of harm, Justice Kennedy noted that during the Miller-Tydings era “no more than a tiny fraction of manufacturers ever employed” RPM.<sup>90</sup> Specifically, “no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [US].”<sup>91</sup> Even if that is true, the cost to the American economy in 2007 will be \$300 billion, “or an average of roughly \$750 to \$1,000 annually for an American family of four.”<sup>92</sup> The Court did not explain how such a departure from allocative efficiency—transferring \$300 billion annually from consumers to manufacturers—could improve consumer welfare.<sup>93</sup>

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Oct. 2, 2007).

<sup>87</sup> Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1493 (1983).

<sup>88</sup> 121 CONG. REC. 38,050 (daily ed. Dec. 2, 1975) (statement of Sen. Brooke).

<sup>89</sup> See, e.g., *Monsanto*, 465 U.S. at 761 (citing *Colgate & Co.*, 250 U.S. at 307). At least one discounter has suggested that RPM prevents discounters from becoming more powerful and popular in the eyes of the public than the manufacturer. Mattioli, *supra* note 82, at 21.

<sup>90</sup> *Leegin*, 127 S. Ct. at 2725 (citing T. Overstreet, *supra* note 47, at 6).

<sup>91</sup> *Leegin*, 127 S. Ct. at 2725.

<sup>92</sup> *Id.* at 2735-36 (Breyer, J., dissenting).

<sup>93</sup> The majority never mentioned or discussed whether *Dr. Miles* should be

During the Miller-Tydings era, Fair Trade laws failed to increase consumer welfare.<sup>94</sup> When Congress repealed Miller-Tydings in 1975,<sup>95</sup> it noted evidence that many consumer goods sold at prices as much as twenty seven percent higher in states which had enacted Fair Trade laws.<sup>96</sup> In states that had repealed Fair Trade laws, prices declined as much as forty percent.<sup>97</sup> Numerous studies reviewed by Congress at the time estimated that RPM cost Americans from \$3 billion to \$6.5 billion annually, in 1975 dollars.<sup>98</sup>

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overruled because it hurt consumer welfare. *See Leegin*, 127 S. Ct. at 2705-26.

<sup>94</sup> “The retailers lobbying for [Miller-Tydings and Fair Trade laws] did not argue that increased prices and profits would promote consumer welfare by, for example, making manufacturers’ distribution networks more efficient. Instead, they argued that vigorous competition – and falling consumer prices – were generally bad for the economy and small businesses.” Br. for Thirty Seven States as Amici Curiae Supporting Respondent at 7, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (citing Thomas K. McCraw, *Competition and Fair Trade: History and Theory*, 16 RES. ECON. HIST. 185, 208-09 (1996)). It goes without saying that the Fair Trade laws did nothing to help the average consumer.

<sup>95</sup> Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a)); *see* S. REP. NO. 94-466, (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1569 (Leg. Hist.).

<sup>96</sup> EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND OTHER RELATED STATUTES* 958 (Chelsea House Publishers 1982) (1975); *Quality Stabilization: Hearings Before a Subcomm. of the S. Comm. on Commerce*, 88th Cong. 6 (1963) (statement of Lee Loevinger, Asst. Att’y Gen., Antitrust Div., Dept. of Justice) *cited in* Brief for Thirty Seven States, *supra* note 94, at 8; *See also* Act to Repeal Enabling Legislation for Fair Trade Laws, S. REP. NO. 94-466, at 3 (1975) (repealing the Miller-Tydings Resale Price Maintenance Act, Pub. L. 314, ch. 690, 50 Stat. 693, 15 U.S.C. § 1, and the McGuire-Keogh Fair Trade Enabling Act, Pub. L. 543, ch. 745, 66 Stat. 631, 15 U.S.C. § 45); *See generally* McCraw, *supra* note 94.

<sup>97</sup> KINTNER, *supra* note 96, at 978. When Levi Strauss stopped requiring minimum RPM on its men’s blue jeans, retail prices plummeted, saving consumers \$200 million in eighteen months. William S. Comanor, F.M. Scherer & Robert L. Steiner, *Vertical Antitrust Policy as a Problem of Inference: The Response of the American Antitrust Institute* 8 (AAI Working Paper No. 05-04, 2005), *available at* <http://www.antitrustinstitute.org/archives/files/408.pdf> (last visited Oct. 2, 2007).

<sup>98</sup> KINTNER, *supra* note 96, at 958; F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 548-49 (Houghton Mifflin 3d ed. 1990). More recently, actions of the five major record companies to engage in RPM for CDs cost consumers as much as \$480 million from 1997 to 2000. Press Release, U.S. Fed. Trade Comm’n, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market (May 10, 2000) *available at* <http://www.ftc.gov/opa/2000/05/cdpres.shtml> (last visited Oct. 2, 2007). Many other antitrust regimes ban RPM. The European Union (“EU”) treats minimum

By the time Congress repealed Miller-Tydings, many states had already repealed their Fair Trade laws, having found the experiment a failure.<sup>99</sup> In fact, states with Fair Trade laws had a 55 percent higher rate of business failure than states that fully banned RPM.<sup>100</sup> According to then-FTC chair Lewis Engman, the Fair Trade laws actually stifled market entry by new retail businesses seeking to compete by offering lower prices.<sup>101</sup>

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RPM as presumptively unlawful, which is equivalent to American per se illegal. Commission Regulation 2790/1999, 1999 O.J. (L 336) 21 (EC). EU member states France, Germany and the United Kingdom treat minimum RPM similarly in purely domestic manners. 2 ABA SECTION OF ANTITRUST LAW, *Chapter 6 France*, in COMPETITION LAWS OUTSIDE THE UNITED STATES Fr.1, Fr.42 (H. Stephen Harris, Jr. ed., 2001); 2 ABA SECTION OF ANTITRUST LAW, *Chapter 7 Germany*, in COMPETITION LAWS OUTSIDE THE UNITED STATES F.R.G.1, F.R.G.33 (H. Stephen Harris, Jr. ed., 2001); 2 ABA SECTION OF ANTITRUST LAW, *United Kingdom*, in COMPETITION LAWS OUTSIDE THE UNITED STATES U.K.1, U.K.56 (H. Stephen Harris, Jr. ed., 2001). Canada treats RPM as a criminal offense. *See, e.g., Price Fixing: Record Canadian Fine is Levied in Resale Price Maintenance Case*, 83 A.T.R.R. 410 (2002). Most Organizations for Economic Co-operation and Development (“OECD”) nations ban RPM. *See OECD, Roundtable on Resale Price Maintenance* (1998), <http://www.oecd.org/dataoecd/35/7/1920261.pdf> (last visited Oct. 2, 2007); *See also* Press Release, Australian Competition & Consumer Commission, Topfield Distributor Penalised \$238 000 for Resale Price Maintenance, (Dec. 13, 2006) *available at* <http://www.accc.gov.au/content/index.phtml/itemId/773132> (last visited Oct. 2, 2007) (noting Australia’s treatment of RPM).

<sup>99</sup> Calvani & Berg, *supra* note 46, at 1177. Some states also found RPM unconstitutional under their state constitutions. *Id.* There is some debate about the number of states that enforced their statutes by 1975. *See* Rudolph J. Peritz, *Frontiers of Legal Thought I: A Counter-History Of Antitrust Law*, 1990 DUKE L.J. 263, 298 n. 148 (1990).

<sup>100</sup> S. REP. NO. 94-466, at 3 (1975); “It has been established by a U.S. Department of Justice study prepared by Dr. Leonard Weiss in 1969 that stores in fair trade States almost universally have a significantly lower volume of retail sales than stores in free trade areas . . . sales volume per store is systematically lower under fair trade.” 121 CONG. REC. 38,050 (daily ed. Dec. 2, 1975) (statement of Sen. Brooke). *See also* Peritz, *supra* note 99, at 298.

<sup>101</sup> *See* H.R. REP. NO. 94-341, at 4-5 (1975); *see also* Peritz, *supra* note 99, at 298; *but see* Leegin, 127 S. Ct. at 2716 (stating “Resale price maintenance . . . can increase . . . market entry for new firms and brands.”).

## 2. RPM's Procompetitive Effects are Infrequent and Speculative

Justice Kennedy wrote “there is now widespread agreement that resale price maintenance can have procompetitive effects.”<sup>102</sup> To support this statement, he cited to an amicus brief from a group of economists.<sup>103</sup> Few—including the *amici* economists—would dispute that RPM *can* theoretically have procompetitive effects; the real issue is *how often* it has anticompetitive effects. And to that, the same *amici* economists also said “[t]he disagreement in the literature relates principally to the relative frequency with which procompetitive and anticompetitive effects are likely to ensue.”<sup>104</sup> Justice Kennedy, however, did not include this point in the majority’s opinion.

The Court made *Leegin* the law of the land without any clear consensus as to how the decision would affect the US economy and consumers. There has been little empirical research in this area, and there continues to be spirited debate.<sup>105</sup>

To better explain his disagreement with the majority, Justice Breyer, in his dissent, provided examples of how RPM could promote

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<sup>102</sup> *Leegin*, 127 S. Ct. at 2721; *See also* Easterbrook, *supra* note 47, at 156. The Supreme Court has long held that the mere existence of some procompetitive benefit to a naked price restraint does not justify it. *See, e.g.*, *United States v. Trenton Potteries*, 273 U.S. 392, 397-98 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 (1940); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 782 (1975). The Court has also held that “cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. *Cont'l T.V., Inc.*, 433 U.S. at 50 n.16.

<sup>103</sup> Br. for Economists as Amicus Curiae Supporting Petitioner at 16, *Leegin*, 127 S. Ct. 2705 (No. 06-480). Justice Kennedy failed to mention that the economists limited their sweeping statement to a survey of “the theoretical literature.” Br. for Economists, *supra*. But “the basic reason the *per se* rule continues to be accepted is that those ... who would argue against it [] have not made their case outside of an economic laboratory.” Sanford M. Litvack, *The Future Viability of the Current Antitrust Treatment of Vertical Restraints*, 75 CAL. L. REV. 955, 956 (1987). Regardless of economic theory, common sense also suggests that RPM would lead to higher prices. Howard P. Marvel & Stephen McCafferty, *The Political Economy of Resale Price Maintenance*, 94 J. POL. ECON. 1074, 1075 (1986).

<sup>104</sup> Br. for Economists, *supra* note 103, at 50 n.16.

<sup>105</sup> *See, e.g.*, POSNER, *supra* note 47; Easterbrook, *supra* note 47, at 151; Ippolito, *supra* note 47, at 293; Overstreet, *supra* note 47, at 1.

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inefficiency and anticompetitive effects. With respect to retailers, Justice Breyer noted that RPM agreements can diminish or eliminate intrabrand competition, much like horizontal price fixing.<sup>106</sup> RPM can prevent retailers from cutting prices in response to demand, Justice Breyer wrote, or prompt dealers to pour money and attention into service, at the expense of price competition.<sup>107</sup> Lawful RPM may even discourage efficient sellers that ordinarily would grow by passing cost savings on to customers in the form of lower prices.<sup>108</sup>

With regard to manufacturers, Justice Breyer noted that RPM may encourage collusion by making price cutting easier to observe.<sup>109</sup> An efficient manufacturer would only be able to stimulate additional customer demand by cutting resale prices, as well as wholesale prices, potentially causing an undesired price war amongst its horizontal competitors. Thus, such price cutting is unlikely to happen.<sup>110</sup> None of this increases consumer welfare.

### 3. *Leegin* was Contrary to the Intent of Congress

The Court was well aware that in 1975 Congress passed the CGPA, which outlawed state Fair Trade laws and restored *Dr. Miles*' *per se* rule against RPM.<sup>111</sup> The Court even acknowledged this when it wrote in an earlier decision "Congress recently has expressed its approval of a *per se* analysis of vertical price restraints by repealing Miller-Tydings"<sup>112</sup> In *Leegin*, however, the Court inexplicably said that since the CGPA did not codify *per se* illegality for RPM, the courts were free to articulate governing principles of common law.<sup>113</sup> This ignores both the legislative history<sup>114</sup> and actions of Congress in the intervening years.

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<sup>106</sup> *Leegin*, 127 S. Ct. at 2727.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Leegin*, 127 S. Ct. at 2724-25.

<sup>112</sup> *Cont'l T.V., Inc.*, 433 U.S. at 51 n.18.

<sup>113</sup> *Id.* "[A] rule of reason for RPM would clearly undermine Congress' intent." HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 448 (3d ed. 2005).

<sup>114</sup> Justice Scalia's hostility to legislative history is well known. See e.g. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998); *Zedner v. United States*, 401 F.3d 36 (Scalia, J., concurring); "The

By its own terms, and by the plain meaning of the text of the law, the CGPA was an “[a]ct to amend the Sherman Antitrust Act to provide lower prices for consumers.”<sup>115</sup> The bill was so popular that Congress was “unable to find anyone willing to take a stand” against repealing Miller-Tydings.<sup>116</sup> On signing the bill, President Ford wrote:

I am today signing into law [a bill] which will make it illegal for manufacturers to fix the prices of consumer products sold by retailers. This new legislation will repeal laws enacted in 1937 and 1952 which amended the Federal antitrust laws so States could authorize otherwise illegal agreements between manufacturer.<sup>117</sup>

Since RPM was *per se* illegal at the time under *Dr. Miles*—save for the Miller-Tydings exception that allowed states to get around *Dr. Miles*—repeal of Miller-Tydings meant Congress restored *Dr. Miles’ per se* rule and made it effective throughout the country.

In 1983, the U.S. Department of Justice (“DOJ”) filed an amicus brief in *Monsanto Co. v. Spray-Rite Serv. Corp.*, asking the Supreme Court to reconsider the entire *per se* rule for vertical arrangements.<sup>118</sup> Congress responded by passing appropriations bills

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law *is* what the law *says*,” according to Justice Scalia, “and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.” *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (emphasis in original). But to discern the intent of the Consumer Goods Pricing Act of 1975 does not require a background in psychoanalysis. The intent of Congress was obvious in the text of the bill, and in actions taken by Congress in the years following 1975. *See infra* note 115.

<sup>115</sup> Act of Dec. 12, 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (Act amending Sherman Antitrust Act). *See also* S. REP. No. 94-466, at 1 (1975) (stating “The purpose of the proposed legislation is to repeal Federal antitrust exemptions which permit States to enact fair trade laws [which are] legalized price fixing . . . . Without these exemptions the agreements they authorize would violate the antitrust laws”). There is ample evidence that a return to RPM will raise prices, thus violating the text of the act. *See Leegin*, 127 S.Ct. at 2717-20.

<sup>116</sup> Eileen Shanahan, *No Defenders of “Fair Trade” are Found at Repeal Hearing*, N.Y. TIMES, Feb. 19, 1975, at 72.

<sup>117</sup> Gerald Ford, *Statement on the Consumer Goods Pricing Act of 1975* (Dec. 12, 1975) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=5432> (last visited Oct. 2, 2007).

<sup>118</sup> *Monsanto*, 465 U.S. at 761 n.7. In a concurrence, Justice Brennan wrote that *Dr. Miles* “has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to

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in 1983, 1985, 1986 and 1987 that specifically prohibited the DOJ from using any funds to advocate against *Dr. Miles*.<sup>119</sup> In 1989, Assistant Attorney General James F. Rill, speaking for the DOJ's antitrust division, promised to enforce *Dr. Miles* and not to advocate that it be overruled.<sup>120</sup>

Justice Kennedy's *Leegin* opinion not only suggests that the plain meaning of the CGPA was not enough, that the subsequent acts of Congress were not enough,<sup>121</sup> and that the ongoing enforcement actions of the DOJ and FTC were not enough,<sup>122</sup> but that in order to retain the vitality of *Dr. Miles*, Congress would have to vote to support it every year.<sup>123</sup>

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overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act. *Id.* at 769 (Brennan, J., concurring); *See also* *Flood v. Kuhn*, 407 U.S. 258 (1972) (Supreme Court loathes to overturn cases where Congress, by its positive inaction, has evinced endorsement).

<sup>119</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, § 510, Pub. L. No. 98-166, 97 Stat. 1102-03 (1983); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, § 605, Pub. L. No. 99-180, 99 Stat. 1169-71 (1985); Continuing Appropriations for Fiscal Year 1987, § 605, Pub. L. No. 99-500, 100 Stat. 1783-73 (1986); Continuing Appropriations, Fiscal Year 1988, § 605, Pub. L. No. 100-202, 101 Stat. 1329-38 (1987).

<sup>120</sup> James F. Rill, Assistant Attorney Gen., Speech at the 23rd New England Antitrust Conference (Nov. 9, 1989), in 57 ANTITRUST & TRADE REG. REP. (BNA) 671.

<sup>121</sup> The bipartisan Antitrust Modernization Commission declined to study *Dr. Miles*, noting there was "a relatively low level of controversy on the subject." Memorandum from the Antitrust Modernization Commission on Single-Firm Conduct Working Group (Dec. 21, 2004), available at <http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf> (last visited Oct. 2, 2007). The Antitrust Modernization Commission also noted "Congressional support year in, year out for maintenance of the Per se rule." Transcript of January 13, 2005 Meeting, Antitrust Modernization Commission 130 available at [http://www.amc.gov/pdf/meetings/050113\\_Meeting\\_Transcript\\_reform.pdf](http://www.amc.gov/pdf/meetings/050113_Meeting_Transcript_reform.pdf) (last visited Oct. 2, 2007).

<sup>122</sup> *See, e.g.*, Br. for AAI as Amicus Curiae Supporting Respondent at 27 n.12, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (listing recent FTC and DOJ bringing cases under *Dr. Miles* against RPM conduct); Br. for the States as Amici Curiae Supporting Respondent at 4, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (listing recent cases brought by states under *Dr. Miles* against RPM conduct).

<sup>123</sup> Or at least amend the Sherman Act yet again—a cumbersome process at best—to enshrine the per se rule in the United States Code.

That actually may come to pass. Less than one month after the *Leegin* decision, the Senate Judiciary subcommittee on Antitrust, Competition Policy and Consumer Rights began hearings on the matter.<sup>124</sup>

#### 4. Overruling *Dr. Miles* Greatly Increases Business Costs

Regardless of its imperfections, *Dr. Miles* created a bright-line *per se* rule that lasted ninety six years. With *Leegin*, the Court did not make RPM *per se* lawful—it instead opened this area of law to the rule of reason. This not only creates uncertainty for businesses that scrupulously have followed the same procedures for decades, it likely also will subject firms to more litigation and greater expenses.<sup>125</sup>

Rule of reason cases require proof that a defendant possessed market power, and that its exercise of market power led to an unreasonable outcome, such as an increase in prices or a decrease in output. The plaintiff then must rebut the defendant's justifications for its conduct. Such cases can take years to litigate and "are extremely expensive."<sup>126</sup>

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<sup>124</sup> *Supreme Court Decision On Retail Price Setting: Hearing Before the S. Subcomm. on Antitrust, Competition Policy And Consumer Rights*, 110th Cong. (2007).

<sup>125</sup> "Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials." *Cont'l T. V., Inc.*, 433 U.S. at 50, n.16. "The Court's invitation to consider the existence of 'market power,' for example, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs." *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting) (internal citations omitted). *But see Leegin*, 127 S. Ct. at 2718 (stating "[a]ny possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.").

<sup>126</sup> Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489 (1983). Also, "it is very difficult for a plaintiff (either the government or a private party) to win a rule of reason case." *Id.* Most alleged antitrust violations are analyzed under the Rule of Reason, save price fixing, horizontal territorial or customer divisions, group boycotts and some tying arrangements. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 255 (Thompson/West 3d ed. 2005).

Additionally, lower courts will now be forced to puzzle out how the rule of reason applies to RPM, without any clear guidance from the Court.<sup>127</sup> Some businesses will be more likely to engage in RPM because of *Leegin*, while others will be less likely to do so because of the uncertainty it created. What this means, however, is that more fees are paid to attorneys for counseling and litigation. The Court has long recognized that *per se* rules can be a more efficient means of deterring unlawful conduct.<sup>128</sup> By wiping away this long-held and very useful *per se* rule, the Court likely has squandered the significant deterrent effect of *Dr. Miles*.

One possible result of *Leegin* is balkanization of the antitrust laws. Some pro-consumer states may now codify a *per se* rule against RPM, creating an untenable and expensive situation where manufacturers must apply different rules to retailers in different states.<sup>129</sup> Whether litigated in federal courts under a rule of reason, or in state courts under what likely is to be a patchwork of different standards, the *Leegin* decision is likely to raise costs for businesses and, ultimately, consumers.

## 5. The Red Herring of Free Riding

*Leegin* argued that without RPM, “free-rider problems may diminish retailers’ incentives to provide services.”<sup>130</sup> The Court agreed, stating “[a]bsent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish

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<sup>127</sup> *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting) (“How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*.”) (emphasis in original).

<sup>128</sup> *See, e.g.*, *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (stating *per se* rules are “more certain to the benefit of everyone concerned . . . [and] also avoids the necessity for an incredibly complicated and prolonged economic investigation . . . .”); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 322, 344 (1982) (stating *per se* rules benefit business certainty and litigation efficiency).

<sup>129</sup> Or at least states that consider an increase in prices to be “anti-consumer.” Antitrust suits may be brought under federal law or under the antitrust laws of many states. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 946 (Thomson/West 2d ed., 2006). While many state antitrust laws require interpretations to be consistent with federal case law where practicable, states would likely not be preempted from legislative or judicial endorsement of a *per se* rule against RPM. *See, e.g.*, Mass. Gen. Laws ch. 93 § 1 (2007).

<sup>130</sup> Brief for Petitioner at 19-20, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

services and then capture some of the increased demand those services generate.”<sup>131</sup> Justice Breyer responded in dissent:

There is a consensus in the literature that ‘free riding’ takes place. But ‘free riding’ often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a ‘free ride’ on investments that others have made in building a product’s name and reputation. The question is how often the ‘free riding’ problem is serious enough significantly to deter dealer investment.<sup>132</sup>

Free riding may indeed be a problem, but neither the majority, the petitioner, nor the economic literature suggest that it is widespread or common.<sup>133</sup> Indeed, *Dr. Miles* only prohibited agreements to fix prices. *Colgate*, however, permitted a manufacturer, determined to stem free riding, to announce a suggested retail price and then terminate any reseller engaged in discounting.<sup>134</sup>

Even lawful RPM may fail to deter a dedicated free rider. Two economists who joined an *amicus* brief asking that *Dr. Miles* be overruled wrote that free rider theory is “fundamentally flawed.”<sup>135</sup> “No matter how large a margin is created by resale price maintenance, there appears to be no incentive for competitive free-

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<sup>131</sup> *Leegin*, 127 S. Ct. at 2715.

<sup>132</sup> *Leegin*, 127 S. Ct. at 2729.

<sup>133</sup> See *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting) (“All this is to say that the ultimate question is not whether, but *how much*, ‘free riding’ of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain ‘sometimes.’”) (emphasis in original). See also Brief for William S. Comanor & Frederic M. Scherer as Amici Curiae Supporting Neither Party at 6-7, *Leegin*, 127 S. Ct. 2705 (No 06-480) (expressing skepticism about how often it occurs); FREDERIC M. SCHERER & DAVID R. ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 551-555 (Houghton Mifflin 1990) (1980). (noting “severe limitations” of the free-rider justification for PRM); Robert Pitofsky, *Why Dr. Miles Was Right*, 8 REGULATION 27, 29-30 (1984).

<sup>134</sup> *Colgate & Co.*, 250 U.S. at 307.

<sup>135</sup> Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. LAW & ECON. 265, 266 (1988).

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riding retailers to supply the desired services.”<sup>136</sup> In sum, if retailers are given any chance to discount prices, some always will do so. Those discounters may still free ride off retailers providing greater service, regardless of the profit they might earn by sticking to the suggested retail price.

Overruling *Dr. Miles* will not stop free riding, even if free riding is a common problem. And forcing retailers to compete on service and forbidding them from competing on price places undue and inefficient emphasis on just one component of retailing.<sup>137</sup>

In the Court’s previous ventures into the *per se* rule in vertical relationships, there were more reasons to be concerned with free riders. In one case, a company sold dangerous pesticides and sought to promote full service dealers who might properly train customers to use them.<sup>138</sup> In another case, a failing electronics company wanted to find retailers who would feature the company’s products over the competition.<sup>139</sup>

The *Leegin* majority suggests that RPM will result in retail stores plowing extra money into service so that supermarkets or drug stores will employ helpful sales personnel to explain and compare products. However, this approach may not happen universally. In reality, RPM will likely increase the prices of every day purchases at those same supermarkets or drug stores and only theoretically improve service and ambience for infrequently purchased big ticket items that call for greater service and sales assistance.<sup>140</sup>

#### IV. Conclusion

The eventual outcome of the Court’s experiment with the US economy defies easy predictions. Major discount stores refused to carry RPM-mandated goods during the Miller-Tydings era and are

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<sup>136</sup> *Id.*

<sup>137</sup> *Leegin*, 127 S. Ct. at 2727 (Breyer, J., dissenting). Further, suggesting that a multibrand outlet, such as a drugstore or a supermarket, will provide better service because certain products cannot be discounted makes little sense. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1493 (1983).

<sup>138</sup> *Monsanto*, 465 U.S. at 756.

<sup>139</sup> *Cont’l T.V., Inc.*, 433 U.S. at 38.

<sup>140</sup> *Leegin*, 127 S. Ct. at 2710-25. No where does the majority opinion discuss the decision’s potential impact on internet sellers and that entire segment of the American economy.

unlikely to do so now. Wal-Mart and similar stores will likely carry more secondary brands, more private-label goods, and rely more heavily on imports.<sup>141</sup> Consumers will be forced to buy lesser known products, pay higher prices, or both. All of these decisions significantly will affect the American economy, consumers, and consumer welfare.

The *Leegin* decision is another step in the Court's continuing effort to evaluate vertical restrictions and limit *per se* treatment. The journey began with the Court's decision in 1977 to overrule a decade old rule that imposed the *per se* standard on vertical non-price restrictions.<sup>142</sup> The Court sought to end confusion as to the boundaries for lawful conduct in non-price restrictions.<sup>143</sup> *Dr. Miles'* simple holding, however, was not the source of equal confusion.

The journey continued in 1997 when the Court overruled a three decades-old rule that imposed the *per se* standard on maximum RPM.<sup>144</sup> That rule was neither enforced nor did it retain significant vitality.<sup>145</sup> *Dr. Miles*, however, was rigorously enforced by the federal government and individual states.<sup>146</sup>

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<sup>141</sup> Charles E. Mueller, et al., *Foreword: Antitrust and the Discounters' Case Against Resale Price Maintenance*, 14 ANTITRUST L & ECON. REV. 1, 6 No.3 (1982); S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small-Town America*, 14 ANTITRUST L. & ECON. REV. 81, 85-86 No.3 (1982).

<sup>142</sup> *Cont'l T.V., Inc.*, 433 U.S. at 59.

<sup>143</sup> *Cont'l T.V. Inc.*, 433 U.S. at 47-48. *Schwinn* was overruled because it created confusion as to which non-price restraints were lawful and which were not. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

<sup>144</sup> *State Oil Co.*, 522 U.S. at 22.

<sup>145</sup> *Id.* at 18. One reason *Albrecht* was overruled was that it had "little or no relevance to ongoing enforcement of the Sherman Act." See *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

<sup>146</sup> See, e.g., *New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003); *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181 (S.D.N.Y. 2000); *Texas v. Zeneca, Inc.*, 1997-2 Trade Cas. (CCH) P 71,888 (N.D. Tex. 1997); *Missouri v. Am. Cyanamid Co.*, 1997-1 Trade Cas. (CCH) 71,712 (W.D. Mo. 1997); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *Pennsylvania v. Playmobil USA*, 1995-2 Trade Cas. (CCH) P 71,215 (M.D. Pa. 1995); *New York v. Keds Corp.*, 1994-1 Trade Cas. (CCH) P 70,549 (S.D.N.Y. 1994); *Maryland v. Mitsubishi Elecs. Am.*, 1992-1 Trade Cas. (CCH) 69,743 (D. Md. 1992); *New York v. Nintendo of Am.*, 775 F. Supp. 676 (S.D.N.Y. 1991); *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987).

Although *Leegin* eliminated the last *per se* rule in vertical relationships, it is safe to imagine that the ride is not over yet. First, the Court subjected RPM to the rule of reason and did not suggest that RPM was *per se* lawful. Undoubtedly, a great deal of future litigation will arise to determine precisely what that means. Second, the early reactions of Congress<sup>147</sup> and many states<sup>148</sup> suggest that even if *Dr. Miles* is gone, it may soon be codified at the federal or state level.

There were many other problems with *Leegin*, not the least of which was its dismissal of the value of *stare decisis* for *Dr. Miles*. Such a topic is beyond the scope of this essay. Undoubtedly, however, many scholars and practitioners will closely analyze the Court's test for *stare decisis* in *Leegin*,<sup>149</sup> including Justice Breyer's challenge to Justice Scalia to explain how overruling *Dr. Miles* fits within standards articulated in other cases.<sup>150</sup>

At best, *Leegin* was an imperfect candidate to overrule a ninety-six-year-old precedent. *Leegin* itself is not a purely vertical distributor; it operates seventy of its own retail stores that compete directly with approximately five thousand retailers, including Kay's Kloset.<sup>151</sup> *Leegin* even misrepresented that its business model was to sell products through small boutiques focused on service when in fact *Leegin* also sells its products at Nordstrom and on the Internet.<sup>152</sup>

*Leegin* had some difficulty explaining how its RPM would benefit consumers. It suggested that RPM would allow it to develop more particularized sales expertise, more effective signaling of

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<sup>147</sup> See *Hearing Before the Senate Subcomm.*, *supra* note 124.

<sup>148</sup> See Brief for Thirty Seven States, *supra* note 94.

<sup>149</sup> *Leegin*, 127 S. Ct. at 2721-23.

<sup>150</sup> *Id.* at 2734. (Breyer, J., dissenting). See also *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2684-87 (2007) (Scalia, J., concurring in part, dissenting in part).

<sup>151</sup> Br. of Petitioner in Opposition to Certiorari at 4, *Leegin*, 127 S. Ct. 2705. Indeed, had others litigated the case, *Leegin* might have been accused of horizontal price fixing between its retail stores and the independent distributors. Horizontal price fixing is (still) *per se* illegal.

<sup>152</sup> This was noted in a footnote in *Leegin's* expert's report, which was then excluded at trial. Br. of Petitioner for Certiorari, Appendix D at 50 n.44, *Leegin*, 127 S. Ct. 2705; see also Brighton, *Press Release*, Feb. 10, 2005, available at [http://www.brighton.com/retail/privacy/press\\_release1.htm](http://www.brighton.com/retail/privacy/press_release1.htm) (last visited Oct. 2, 2007).

product quality, and a more ideal shopping experience.<sup>153</sup> FTC Commissioner Pamela Jones Harbour, disagreeing with the FTC's endorsement of an *amicus* brief supporting overruling *Dr. Miles*, wrote in a letter to the Court:

... ladies handbags are not technological wonders requiring extensive operational expertise and consumer education. Ladies handbags do not require acoustically optimized demonstration rooms. Ladies handbags do not require extensive post-sales servicing, or inventories of repair and replacement parts. Ladies handbags do not require special climate-controlled storage to prevent health risks. The only real "service" at issue appears to be steering the customer to purchase Leegin's products, to the benefit of the manufacturer and the agreeing retailers. The benefit to consumers is not self-evident.<sup>154</sup>

All but forgotten today, the *Dr. Miles Medical Co.* existed as an independent company until the 1970s and did, to quote Commissioner Harbour, create "technological wonders."<sup>155</sup> Although requirements to list ingredients under the Pure Food & Drug Act put an end to the patent medicine era and most snake oil remedies, *Dr. Miles* found success by concentrating on *Nervine* and investing heavily in advertising. Its generous advertising budget included almanacs sent to rural customers, calendars distributed by druggists, and a series of books on health and housekeeping topics.<sup>156</sup>

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<sup>153</sup> Br. for Petitioner at 3-4, 20-21, 22-24, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (Jan. 22, 2007).

<sup>154</sup> Harbour Letter, *supra* note 63, at 17 (internal citations omitted). Indeed, even at discount electronics stores, at least one owner believes that customers will not return to a store unless the sales staff is sufficiently trained to explain the products being marketed. Mattioli, *supra* note 82, at 31-32. See also Michael Fitzgerald, *Antitrust, Discounting, and RPM in the Sporting-Goods Industry: A 'Chicago' Reply to Professor Baxter*, 14 ANTITRUST L. & ECON. REV. 43, 69-71 No.3 (1982).

<sup>155</sup> Harbour Letter, *supra* note 63, at 17.

<sup>156</sup> Indiana Historical Society, *supra* note 15. By 1893, Miles spent one hundred thousand dollars on advertising. *Id.* Between 1902 and 1942 the company issued more than one billion publications. Funding Universe, *Miles Laboratories Company History*, <http://www.fundinguniverse.com/company-histories/MILES-LABORATORIES-Company-History.html> (last visited Oct. 2, 2007). A book distributed to maintain weather records noted that "Dr. Miles' Heart Cure does not contain any opium, morphine, cocaine, chloral, ether or chloroform in any form."

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During the 1920s, Dr. Miles researched the possibility of turning Nervine into a modern tablet.<sup>157</sup> That led to experimentation with effervescence.<sup>158</sup> After observing that reporters at a local Indiana newspaper seemed to resist colds by drinking a mixture of aspirin and bicarbonate of soda, Dr. Miles invented Alka-Seltzer in 1931.<sup>159</sup> In 1977, Bayer AG purchased Dr. Miles Co. for \$253 million.<sup>160</sup>

Despite its setback in the Supreme Court in 1911, the Dr. Miles Medical Co. had a long and vital history. And, despite the most recent setback this year to the RPM doctrine, it is likely that we have not heard the last of *Dr. Miles* or its *per se* rule against RPM.

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Gary England, *Oklahoma's Meteorologist*, DAILY OKLAHOMAN, Mar. 6, 2002.

<sup>157</sup> Centaur Communications Ltd., *A Brand with A Sparkling Past*, Brand Heritage 32 (January 27, 1995).

<sup>158</sup> *Id.*

<sup>159</sup> Funding Universe, *supra* note 156. In 1974, the FDA called Alka-Selzer an "irrational" mixture of aspirin (a stomach irritant) and bicarbonate of soda (an antacid), and Ralph Nader-related consumer groups questioned its ability to settle upset stomachs. *Id.* Dr. Miles also created Flintstone vitamins and Bactine antiseptic spray. *Id.*

<sup>160</sup> *Id.*