Whither *Dr. Miles*?

by

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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."[2] Failing to heed that advice was the U.S. Supreme Court, which in June of 2007 overruled the ninety six year old *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*,[3] in the 5-4 decision of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[4] Indeed, the Court replaced *Dr. Miles*' bright-line holding with confusion and uncertainty.

In its 1911 *Dr. Miles* decision, the Supreme Court held that it was per se[5] illegal price fixing for a for a manufacturer to dictate a product's final price at retail.[6] Few would question that *Dr. Miles* was an imperfect decision; written at the dawn of antitrust, it referenced theories and concepts that have long since been abandoned (or at least ignored) by the mainstream of the doctrine.[7] But its per se rule against price

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[2] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (2d ed. 1790).

[3] *Dr. Miles Medical Co. v. John D. Parks & Sons Co*., 220 U.S. 373 (1911).

[4] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 128 S.Ct. 2705 (2007).

[5] 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. *State Oil Co. v. Khan*, 522 U.S. 3 14-15 (1997). Under the "rule of reason," a court examines and balances competitive factors to determine whether a restraint on trade is "unreasonably restrictive of competitive conditions." Id.

[6] *Dr. Miles* at 408-09.

[7] *See e.g. Dr. Miles* at 404 (comparing price fixing between a manufacturer and retailer to general restraints on alienation in property law).

fixing remained good law. Indeed, *Dr. Miles* was cited by the Supreme Court itself dozens of times over the years,[8] and by lower courts hundreds of times.[9]

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.[10] The Supreme Court majority suggested its decision might have a procompetitive impact on the economy,[11] while the dissent made a "safe prediction" that prices at retail will increase.[12] Who will prove to be right is anyone's guess at this point. But this essay will review these issues and conclude that the Supreme Court acted rashly because the eventual outcome is speculative and unknown.

Part II of this essay will review the *Dr. Miles* decision and its close cousin, *U.S. v. Colgate & Co.*,[13] which limited the impact of *Dr. Miles* and gave 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, which

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[8] *See e.g.* State Oil Co. v. Khan, 522 U.S. 3, 17 (1997); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341-43 (1987); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 348 (1982); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-02 (1980); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977); Simpson v. Union Oil Co., 377 U.S. 13, 17-18 (1964); United States v. Parke, Davis & Co., 362 U.S. 29, 47 (1960); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386 (1951); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720-21 (1944); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99-100 (1920); United States v. Colgate, 250 U.S. 300 (1919).

[9] *Leegin* at 2731 (Breyer, J. dissenting).

[10] *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); *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.).

[11] *Leegin* at 2714-15.

[12] *Leegin* at 2736.

[13] *U.S. v. Colgate & Co.,* 250 U.S. 307 (1919).

overruled *Dr. Miles*, its flaws, and Congressional reaction. Part IV concludes with some likely outcomes.

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.[14]

In 1882, during an era when patent remedies were popular,[15] Dr. Franklin Miles of Elkhart, Indiana invented Nervine, a "calmative compound," and began selling it to druggists for resale.[16] Dr. Miles prescribed Nervine for a variety of illnesses, including nervous exhaustion; headaches and insomnia; epilepsy; and pains, spasms and backaches.[17] Unlike many of the snake oil salesmen of the time,[18] Dr. Miles' Nervine

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[14] The Official Website of Falls City, Oregon, Falls City News, Woman Finally Recovers from Nervous Breakdown, Aug. 8, 1914, http://www.fallscity.org/history/zunck/fcnews/08081914.html.

[15] 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, http://ssrn.com/abstract=959425 (visited Aug. 11, 2007).

[16] *See* Bioanalytical Systems, Inc., Miles Laboratories, http://www.bioanalytical.com/info/calendar/99/06miles.htm (visited Aug. 11, 2007). *See also*Time.com, *For That Great Feeling*, April 23, 1965, http://www.time.com/time/printout/0,8816,833668,00.html; Indiana Historical Society, Bayer Corporation, http://www.indianahistory.org/HBR/business_pdf/BAYER.pdf (last visited Aug. 11, 2007).

[17] Indiana Historical Society, Bayer Corporation, http://www.indianahistory.org/HBR/business_pdf/BAYER.pdf (last visited Aug. 11, 2007).

[18] These products primarily boasted of the therapeutic value of a secret ingredient, which was often alcohol. Peritz at 2. Some of these products had genuine therapeutic value and continue to be sold today. *See e.g.* U.S. Federal Trade Commission, *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 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

included bromides, the precursor to modern tranquilizers, and did have a therapeutic (if mildly toxic) effect.[19]

Because the costs of market entry were low, and the products were easy to replicate, new home remedies attracted a host of competitors.[20] While competition generally enhances consumer welfare, it can also lead to free riding.[21]

Although there are many variations on free riding, the theory is that one producer or retailer will invest in product development, new technology, customer service or creating the proper ambience for purchasing the product. Then another producer or retailer will benefit from the demand and consumer education that the first producer created, and sell its product at a discount, free riding off of the work of the first producer.[22] In addition to its inherent unfairness, free riding may make firms reluctant to invest in research, customer service or advertising if a competitor can then offer a similar product at a lower price.[23]

b. Dr. Miles: The case

AMERICAN MEDICINE SHOW 167 (1991). And others, like Coca-Cola, had their more controversial ingredients removed at some point. Peritz at 2-3; ARMSTRONG & ARMSTRONG at 161 (Coca-Cola was originally made with coca leaves, and included at least some amount of cocaine).

[19] Indiana Historical Society, Bayer Corporation, http://www.indianahistory.org/HBR/business_pdf/BAYER.pdf (last visited Aug. 11, 2007); James W. Jefferson, *Old Versus New Medications: How Much Should Be Taught?* 162 ACADEMIC PSYCHIATRY 29:2 (May-June 2005). Although bromides were commonly used in psychiatric hospitals during the Nineteenth Century, they were later discarded because of toxicity. Jefferson at 163.

[20] Peritz at 2. 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 at 2; 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).

[21] *See generally* Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & ECON. 86 (1960).

[22] For a detailed explanation of free riding, *see* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 456-60 (3rd ed. 2005). *See also* RICHARD POSNER, ANTITRUST LAW 172-173 (2d ed. 2001)

[23] STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 225-26 (1993).

Free riding set the stage for a showdown between Dr. Miles and discounter John D. Park & Sons.[24] 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 benefit from Dr. Miles' advertising to draw traffic to its stores.[25] Finally, Dr. Miles required all retailers to agree to resell its products at a predetermined price that it fixed.[26] 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.[27]

Thirteen years earlier, the Supreme Court decided *U.S. v. Addyston Pipe & Steel Co.*, which made it clear that any direct restraint on trade was per se unlawful, and no inquiry into its reasonableness was justified.[28] Applying the *Addyston Pipe* standard, the Supreme Court found that Dr. Miles' attempt to consign drugs to wholesalers and retailers was subterfuge[29] and its true intent was to fix prices with wholesalers and retailers.[30] Although criticized for equating (and confusing) horizontal cartel activity

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[24] Miles prevailed in three earlier suits that upheld resale price maintenance: Miles Medical Co. v. Platt, 142 F. 606 (607 (N.D. Ill. 1906) (Miles had a lawful monopoly to set prices at retail based on its intellectual property); Miles Medical Co. v. Goldthwaite, 133 F. 794, 795 (C.C.D. Mass. 1904) (resale price maintenance was a lawful property right of intellectual property monopolists); Miles Medical Co. v. Platt, World's Dispensary Medical Ass'n v. Same, Hartman v. Same, 142 F. 606 (N.D. Ill. 1906) (intellectual property rights are outside rules against restraints of trade).
[25] *See* Peritz at 11; *Dr. Miles* at 374.
[26] *Dr. Miles* at 374-375.
[27] *Dr. Miles*, 164 F. 803, 804 (6th Cir. 1908). The formalism of consignment over sale continued to betwixt the Supreme Court through U.S. v. General Electric Co. (272 U.S. 476 (1926) (agents were not purchasers and title passed from manufacturer to consumer) and Simpson v. Union Oil, 377 U.S. 13 (1964) (General Electric holding limited to patented products).
[28] U.S. v. Addyston Pipe & Steel Co., 175 U.S. 211, 237 (1899).
[29] Dr. Miles Medical Co. v. John D. Park & Sons Co., 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.
[30] 220 U.S. at 408.

with vertical price fixing,[31] *Dr. Miles* instituted an iron-clad per se rule against minimum vertical resale price maintenance ("RPM").[32]

c. The *Colgate* Doctrine exception

Eight years after *Dr. Miles* was decided, the Supreme Court created a loophole in the law of vertical price restraints in *U.S. v. Colgate & Co*. [33]

In *Colgate*, the Supreme Court held that imposing RPM was lawful, provided that the seller did so unilaterally.[34] While a manufacturer may not enter into an agreement with a reseller on price, "he may announce in advance the circumstances under which he will refuse to sell."[35] The result, called the "*Colgate* Doctrine," 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 who deviated.[36] Not every producer desired to reign in its sales force and risk potentially contentious relationships with customers by exercising the *Colgate* Doctrine, but the case provided a roadmap for firms dedicated to RPM.[37]

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[31] *See e.g.* ROBERT BORK, THE ANTITRUST PARADOX 33 (Free Press 1978); STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 225-26 (1993)..

[32] 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.

[33] 250 U.S. 300 (1919). Interestingly, the opinion in *Dr. Miles* was written by 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.

[34] *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) (*Colgate* Doctrine upheld)

[35] *Id.*

[36] *See supra* note 20, at 465-66.

[37] Manufacturers may be loathe 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*, 110th Cong. (2007) (written testimony of Richard M. Brunell, American Antitrust Institute).

The distinction between *Dr. Miles* and *Colgate* may be very technical – and even an artificial legal fiction unrelated to economic analysis[38] – but it remained the law until 2007. Countless enterprises used these two cases as templates for business models.[39]

d. Legislative reaction to Dr. Miles

The Great Depression created new challenges for the antitrust laws. Small family businesses had trouble surviving, and the antitrust laws seemed to support big business at the expense of small business.[40] Chain stores such as A&P, Woolworth's and J.C. Penney entered small towns and were accused of selling loss leaders, buying at discounts unavailable to smaller stores, and sucking money out of local communities and transferring it to distant big cities.[41]

One response of Congress was to pass the Miller-Tydings Act in 1937.[42] 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.[43]

RPM was popular with small retailers during the deflation of the Great Depression because it set a baseline price for retail which could not be undersold.[44] Without RPM,

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[38] ANDREW GAVIL, WILLIAM KOVACIC & JONATHAN BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 363 (West 2002).

[39] In fact, the Supreme Court refused at least one previous invitation by the U.S. Department of Justice to overrule *Dr. Miles*. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 n.7 (1984). *See also* U.S. v. Parke, Davis & Co., 362 U.S. 29 (1960).

[40] 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).

[41] *Id.* at 1013, 1019-25, 1058-59. Many of these same arguments are made against Wal-Mart today. *Id.* at, 1089.

[42] 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 Distributing 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)).

[43] *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).

[44] Schragger at 1064.

businesses argued, "ruinous competition" would ensue, resulting in public harm.[45] 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."[46] 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.[47]

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. While little empirical research has been done on RPM even today,[48] some believe that one consequence has been the rise of discount stores. These commentators argue that the creation of discount stores such as Wal-Mart and Target is directly related to the vitality of *Dr. Miles'* per se rule against RPM. Some experts in the field also believe that the enormous expansion of discount stores was made possible only by the

[45] Schragger 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." *Id.* at 1065-66. Neither the Sherman Act nor federal antitrust jurisprudence (and certainly not the Chicago School) recognize that competition can ever be ruinous.
[46] Schragger 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.
[47] *See* Schragger 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, *Frontiers Of Legal Thought I: A Counter-History Of Antitrust Law*, 1990 DUKE L. J. 263, 298 (1990); Terry Calvania and Andrew G. Berg, *Resale Price Maintenance After Monsanto: A Doctrine Still At War With Itself*, 1984 DUKE L.J. 1163, 1175 (1984).
[48] *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).

repeal of Miller-Tydings[49] in 1975 by the Consumer Goods Pricing Act ("CGPA"), outlawing state Fair Trade laws and restoring *Dr. Miles* as the law of the land.[50]

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.[51] Miller-Tydings provided an exemption whereby stores that were open only to members could in fact sell at a discount to the manufacturer's suggested list price.[52] 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. [53]

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.[54] Kay's Kloset has been in business for

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[49] Amicus Brief of Consumer Federation of America at 8-9, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 128 S.Ct. 2705 (2007); 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 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) (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 (1982 Part 3) (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.

[50] Leegin at 2724-25.

[51] Popular membership stores today include Costco, Sam's Club and B.J.'s Wholesale Club. It is yet unknown what effect a return to RPM may have on their operations.

[52] *See* Ch. 690, tit. 8, 50 Stat. 673, 693 (1937).

[53] 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).

[54] The business is incorporated as PSKS, Inc.

eighteen years and Leegin manufactures one of its more popular product lines, the "Brighton" brand of women's handbags, wallets, watches, jewelry and accessories.[55] 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.[56]

In 1997, Leegin instituted a policy banning sales to retailers selling below Leegin's suggested prices.[57] According to the Supreme Court, 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."[58]

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.[59] Leegin requested that Kay's Kloset cease discounting[60] and when it refused, Leegin stopped selling it products.[61]

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[55] Leegin sells its Brighton line through thousands of independent retailers, as well as through stores directly owned or controlled by Leegin.

[56] Plaintiff's First Amended Complaint at ¶ 7, PSKS, Inc. v. Leegin Creative Leather Products, Inc., 2003 WL 24080760 (E.D. Tex.); 127 S. Ct. 2705, 2711 (2007).

[57] 127 S. Ct. 2705, 2711 (2007). 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 in a quality manner." Id. Leegin fails to mention, however, that it sells its products at Nordstrom. See n. 151 infra; Leegin, Brighton, *Press Release*, Feb. 10, 2005, http://www.brighton.com/retail/privacy/press_release1.htm (last visited August 24, 2007).

[58] *Id.*

[59] *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.*

[60] 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.

[61] *Id.*

Leegin was responsible for forty to fifty percent of Kay's Kloset's profits, so the loss of the Brighton line was significant.[62]

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,[63] ordinarily forbidden under the per se rule. The Supreme Court granted certiorari to determine whether vertical minimum resale price maintenance agreements should remain illegal per se under *Dr. Miles*. In addition to briefs from the parties, the Court accepted amicus briefs from eleven groups.[64]

On June 28, 2007, in a decision written by Justice Kennedy, the Court overruled *Dr. Miles*, subjecting future RPM cases to the Rule of Reason.[65] Justice Breyer wrote a spirited dissent signed by four other justices.[66]

b. Key Arguments

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

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[62] *Id.* at 2711-12.
[63] *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).
[64] 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 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 Commission 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.
[65] *Id.* 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 to apply the Rule of Reason. See id at 2737 (Breyer, J., dissenting).
[66] Justices Stevens, Souter and Ginsburg joined Justice Breyer.

i. RPM's 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."[67]

The phrase "almost or almost always," however, places inappropriate and unprecedented emphasis on the how often the challenged conduct is likely to occur, rather than also focusing on the enormity of the damage.[68] In justifying a per se rule against RPM, Professors Areeda and Hovenkamp wrote

> 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 . . . ."[69]

Echoing Areeda and Hovenkamp, the Supreme Court held in another case "[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

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[67] 127 S. Ct. 2717, quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988).

[68] 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.* Continental 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 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 Associates, Inc., 405 U.S. 596, 609-610 (1972)).

[69] 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1632b, at 292 (2d ed. 2004) (emphasis added). *See also Supreme Court Decision On Retail Price Setting: Hearing Before the Senate Subcommittee on Antitrust, Competition Policy And Consumer Rights*, 110th Cong. (2007) (written testimony of Richard M. Brunell, American Antitrust Institute). Arguably, the existing *Colgate* Doctrine offered a legal alternative to an RPM agreement.

a practice *and the severity of those consequences* must be balanced against its procompetitive consequences."[70]

There has been very little disagreement that overruling *Dr. Miles* will lead to at least some increase in prices.[71] "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."[72] The Court should have analyzed the magnitude of these price increases, and determined whether their size provided continued justification for a per se approach to RPM.

In other contexts, the Court has already 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."[73] "Price," according to the Court, is the "central nervous system of the economy."[74] Absent predation, "low prices benefit consumers regardless of how those prices are set, and . . . do not threaten competition."[75] Justice Kennedy's emphasis on the frequency of anticompetitive effects short shrifted discussion of the magnitude of the anticompetitive harm from price increases and a corresponding loss in allocative efficiency and consumer welfare.[76]

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[70] Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16 (1977) (emphasis added).
[71] 8 AREEDA & HOVENKAMP ¶ 1604b at 40 (RPM "Tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point."); Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 160 (1983). 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* at 2718 (quoting Overstreet at 160).
[72] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 373 (2d. Ed. 2006).
[73] State Oil v. Kahn, 522 U.S. 3, 15 (1997).
[74] National Society of Professional Engineers v. U.S., 435 U.S. 679, 696 (1978).
[75] Weyerhaseuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1075 (2007).
[76] 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 LAWRENCE

The *Leegin* majority, dismissing cause for concern, suggested higher prices for consumers were irrelevant unless anticompetitive conduct was also demonstrated.[77] 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:[78] No.
> 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 . . . .[79]

Justice Scalia seemed to be echoing an argument made many years earlier by Robert Bork.[80] Bork posited that RPM and vertical price fixing causes output to expand

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A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 12 (2d. Ed. 2006).

[77] *Leegin* 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.

[78] Theodore B. Olson, former Solicitor General of the United States, argued on behalf of Leegin.

[79] Transcript of United States Supreme Court at 15, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[80] 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, www.amc.gov/comments/bork.pdf (last visited Aug. 19, 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.*

and the higher margins promote enhanced consumer welfare and efficiency.[81] 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 was eventually sold.[82]

This theory, however, is not universally accepted. Not all consumers want ambience and not all retailers offer it.[83] Many consumers seek, and many retail outlets offer, low price and low price alone. RPM promotes inefficiency by requiring all stores – beautiful or dismal -- falling within its ambit to charge the same RPM-mandated non-discounted price.[84] This is potentially a net transfer from consumers to some retailers and does not advance consumer welfare.[85]

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 hearkens a race to the bottom where consumers pay more and get less.[86] Indeed, the trend towards

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[81] Brief of William S. Comanor & F.M. Scherer as Amici Curiae at 4, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 128 S.Ct. 2705 (2007) (citing ROBERT BORK, THE ANTITRUST PARADOX 290 (1978).

[82] *See* Bork at 296. "[T]hat consumers are better off because their psychic utility has been enhanced by the amount of the premium . . . [] is the kind of silly reasoning that gives economists a bad name among people of common sense." *Foreword: Antitrust and the Discounters' Case against Resale Price Maintenance*, 14 ANTITRUST L & ECON. REV. 1, 8 (1982 Part 3).

[83] 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 (1982 Part 3). 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 at 2717.

[84] Leegin suggested that when consumers pay more for a product, they feel better about it. *Leegin* brief at 3. Just as much 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.

[85] *But see Leegin* 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.").

[86] The trend towards larger and more power 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 retails sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share." 127 S. Ct. at 2733 (Breyer, J., dissenting).

larger and more power retail outlets[87] may prompt these retailers to demand RPM from manufacturers, rather than the other way around. With RPM as a shield for these stores, they can cut service and ambience, but charge the same high price, increasing 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."[88] Indeed, quoting from a Consumers Union editorial during the debate to repeal Miller-Tydings, Senator Brooke 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."[89] 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.[90]

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.[91] Specifically, "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases,

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[87] See e.g. 8 Areeda & Hovenkamp ¶1604d3 at 48-49; William S. Comanor, The Two Economics of Vertical Restraints, 21 S.W. 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 Street Journal A8 (June 29, 2007); 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 August 25, 2007).

[88] 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).

[89] Statement of Senator Brooke, 121 CONG. REC. 38,050 (Dec. 2, 1975).

[90] *See e.g.* Monsanto v. Spray-Rite Servs. Co., 465 U.S. 752, 761 (1984) (citing U.S. v. Colgate & Co., 250 U.S. 300, 307 (1919)). 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. Leonard S. Mattioli, *Resale Price Fixing and the 'Hi-Tech' Discounter: Consumer Electronics in Madison*, 14 ANTITRUST L & ECON. REV. 11, 21 (1982 Part 3).

[91] *Leegin* at 2725 (citing T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 6 (1983)).

ever employed [resale price maintenance] in any single year in the [United States]."[92] Even if that is true, the cost to the American economy in 2007 will be $300 billion, "or an average of roughly $750 to $1000 annually for an American family of four."[93] How such a departure from allocative efficiency – transferring $300 billion annually from consumers to manufacturers -- could improve consumer welfare was not explained by the Court.[94]

During the Miller-Tydings era, Fair Trade laws failed to increase consumer welfare.[95] When Congress repealed Miller-Tydings in 1975,[96] 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.[97] In states that had repealed Fair Trade laws, prices declined as much as forty percent.[98] Numerous studies reviewed by Congress at the time

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[92] *Id.*
[93] Leegin at 2736 (Breyer, J., dissenting).
[94] The majority never mentioned or discussed whether *Dr. Miles* should be overruled because it hurt consumer welfare.
[95] "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." Brief of Thirty Seven States as Amici Curiae at 7, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 128 S.Ct. 2705 (2007) (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.
[96] Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1 45(a)); *see* 2 U.S.C.C.A.N. 1569 (legislative history).
[97] EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTIRUST LAWS AND OTHER RELATED STATUTES 958 (1982); *Quality Stabilization: Hearings Before a Subcomm. of the Senate Comm. on Commerce*, 88th Cong. 6 (1963) (statement of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice). *See also* Act to Repeal Enabling Legislation for Fair Trade Laws, Senate Comm. on the Judiciary, S. REP. NO. 94-466, at 3 (1975) (repealing the Miller-Tydings Resale Price Maintenance Act, Pub. L. 314, ch. 690, Title III, 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* Thomas K. McCraw, *Competition and Fair Trade: History and Theory*, 16 RES. ECON. HIST. 185 (1996).
[98] *Id.* 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 Aug. 18, 2007).

estimated that RPM cost Americans from $3 billion to $6.5 billion annually – in 1975 dollars.[99]

By the time Miller-Tydings was repealed by Congress, many states had already repealed their Fair Trade laws, finding the experiment a failure.[100] In fact, states with Fair Trade laws had a 55% higher rate of business failure than states that fully banned RPM.[101] 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.[102]

ii. RPM's procompetitive effects are infrequent and speculative

[99] *Id.* at 958. *See also supra* note 66, at 40; F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PE6RFORMANCE 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. U.S. Federal Trade Commission, *Record Companies Settle RTC Charges of Restraining Competition In CD Music Market,* http://www.ftc.gov/opa/2000/05/cdpres.shtm (last visited Aug. 15, 2007). Many other antitrust regimes ban RPM. The European Union ("EU") treats minimum RPM as presumptively unlawful, equivalent to American per se illegal. Commission Regulation (EC) 2790/1999, 1999 O.J. (L336) 21. EU member states France, Germany and the United Kingdom treat minimum RPM similarly in purely domestic manners. II ABA Section of Antitrust Laws, Competition Laws Outside The United States 42, 33, 56 (2001). Canada treats RPM as a criminal offense. See e.g. 83 Antitrust & Trade Reg. Rep. (BNA) 410 (Oct. 25, 2002). Most Organization for Economic Co-operation and Development ("OECD") nations ban RPM. *See* OECD, Resale Price Maintenance 10 (1998) at http://www.oecd.org/dataoecd/35/7/1920261.pdf. *See also* Australian Competition & Consumer Commission, News Release, *Topfield distributor penalized $238 000 for resale price maintenance,* Dec. 13, 2006, http://www.accc.gov.au/content/index.phtml/itemId/773132 (noting Australia's treatment of RPM).

[100] Terry Calvani & Andrew G. Berg, *Resale Price Maintenance After Monsanto: A Doctrine Still At War With Itself*, 1984 DUKE L.J. 1163, 1177 (1984). Some states also found RPM unconstitutional under their state constitution. 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).

[101] S. REP. 94-466, *Act To Repeal Enabling Legislation For Fair Trade Laws* 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." Statement of Senator Brooke, 121 Cong. Rec. 38,050 (Dec. 2, 1975). See also Rudolph J. Peritz, *Frontiers Of Legal Thought I: A Counter-History Of Antitrust Law*, 1990 DUKE L.J. 263, 298 (1990).

[102] *See* H. REP. 94-341, Consumer Goods Pricing Act of 1975 at 4-5 (1975). See also Rudolph J. Peritz, *Frontiers of Legal Thought I: A Counter-History Of Antitrust Law*, 1990 DUKE L.J. 263, 298 (1990). But see Leegin at 2716 ("Resale price maintenance . . . can increase . . . market entry for new firms and brands.").

Justice Kennedy wrote "there is now widespread agreement that resale price maintenance can have procompetitive effects."[103] To support this statement, he cited to an amicus brief from a group of economists.[104] 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."[105] Justice Kennedy, however, did not include this closely related point in the majority's opinion.

The Court made *Leegin* the law of the land without any clear consensus as to what the results will be to the American economy and to consumers. There has been little empirical research in this area and there continues to be spirited debate.[106]

To illustrate the debate and to provide common sense examples of why he disagreed with the majority, Justice Breyer in his dissent provided examples of how RPM could promote inefficiency and anticompetitive effects. With respect to retailers, Justice Breyer

[103] *Leegin* at 2721. *See also* Frank H. Easterbrook, *Vertical Agreements and the Rule of Reason*, 53 ANTITRUST L. J. 135, 156 (1984). The Supreme Court has long held that there mere existence of some procompetitive benefit to a naked price restraint does not justify it. *See e.g.* U.S. v. Trenton Potteries, 273 U.S. 392, 397-98 (1927); U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 (1940); Goldfarb v. Virginia 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. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n. 16 (1977).

[104] Brief for Economists as Amici Curiae at 16. Justice Kennedy failed to mention that the economists limited their sweeping statement to a survey of "the theoretical literature." *Id.* But "the basic reason the per se rule continues to be accepted is that those & 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).

[105] Brief for Economists as *Amici Curiae* 16.

[106] *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).

noted that RPM agreements can diminish or eliminate intrabrand competition, much like horizontal price fixing.[107] It could prevent retailers from cutting prices in response to demand, or it could prompt dealers to pour money and attention into service, at the expense of price competition.[108] Lawful RPM may even discourage efficient sellers that would ordinarily grow by passing cost savings on to customers in the form of lower prices.[109]

With regard to manufacturers, Justice Breyer noted that RPM may encourage collusion by making price cutting easier to observe.[110] 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 – and therefore unlikely to happen.[111] None of this increases consumer welfare.

iii. *Leegin* was contrary to the intent of Congress

The Supreme 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.[112] 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 . . . ."[113] Inexplicably in *Leegin*, however, the Court said that since the CGPA did not codify per se illegality for RPM, the courts were free to articulate

[107] Leegin at 2727.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Leegin at 2724-25.
[113] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n. 18 (1977).

governing principles of common law.[114] This ignores both the legislative history[115] and actions of Congress in the intervening years.

By its own terms, and by the plain meaning of the text of the law, the CGPA was an "Act to amend the Sherman Antitrust Act to provide lower prices for consumers."[116] The bill was so popular that Congress was "unable to find anyone willing to take a stand" against repealing Miller-Tydings.[117] 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.[118]

Dr. Miles was already sixty four years old in 1975. 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.

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[114] *Id.* "[A] rule of reason for RPM would clearly undermine Congress' intent." HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 394 (3rd ed. 2005).

[115] 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. U.S., 401 F. 3d 36 (Scalia, concurring). "The 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 degree 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 n. 116 infra.

[116] Pub. L. No. 94-145, 89 Stat. 801 (1975). *See also* S. REP. No. 466, at 1 (1975) ("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 *supra* note 66.

[117] Eileen Shannon, *No Defenders of "Fair Trade" are Found at Repeal Hearing*, N.Y. TIMES, Feb. 19, 1975, at 72.

[118] The American Presidency Project, *Gerald R. Ford Signing Statement on the Consumer Goods Pricing Act of 1975*, Dec. 12, 1975, http://www.presidency.ucsb.edu/ws/index.php?pid=5432 (last visited August 24, 2007).

In 1984, 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.[119] Congress responded by passing appropriations bills in 1983, 1985, 1986 and 1987 that specifically prohibited the DOJ from using any funds to advocate against *Dr. Miles*.[120] Finally 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.[121]

Justice Kennedy's *Leegin* opinion not only suggests that the plain meaning of the CGPA was not enough, the subsequent acts of Congress were not enough,[122] and the ongoing enforcement actions of the U.S. Department of Justice and FTC were not enough,[123] but that in order to retain the vitality of *Dr. Miles*, Congress would have to vote to support it every year.[124]

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[119] 465 U.S. 752, 761 n.7 (1984). 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 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 loath to overturn cases where Congress, by its positive inaction, has evinced endorsement)

[120] 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, 101 Stat. 1329-38 (1987).

[121] James F. Rill, Assistant Attorney General, 57 Antitrust & Trade Reg. Rep. (BNA) 671 (Nov. 9. 1989).

[122] 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), http://www.amc.gov/pdf/meetings/Single-FirmConduct.pdf (last visited August 25, 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 at http://www.amc.gov/pdf/meetings/050113_Meeting_Transcript_reform.pdf (last visited August 25, 2007).

[123] *See e.g.* AAI Brief at 27 n.12 (list of recent FTC and DOJ bringing cases under *Dr. Miles* against RPM conduct); States brief at 4 (list of recent cases brought by states under *Dr. Miles* against RPM conduct).

[124] 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.[125]

iv. 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. The Supreme 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 have scrupulously followed the same procedures for decades, it will likely subject firms to more litigation and at greater expense.[126]

Rule of reason cases require proof that a defendant possesses market power; that its exercise of market power led to an unreasonable outcome, such as an increase in prices or a decrease in output; and then the plaintiff must rebut the defendant's justifications for its conduct. Such cases can take years to litigate and "are extremely expensive."[127]

Lower courts will now be forced to puzzle out how the rule of reason applies to RPM, without any clear guidance from the Supreme Court.[128] Some businesses will be more likely to engage in RPM because of *Leegin*, some probably less because of the

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[125] *Supreme Court Decision On Retail Price Setting: Hearing Before the Senate Subcommittee on Antitrust, Competition Policy And Consumer Rights*, 110th Cong. (July 31, 2007).

[126] "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." Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16 (1977). "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 at 2730 (Breyer, J., dissenting) (internal citations omitted). *But see* Leegin at 2718 ("Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.").

[127] 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.*

[128] Leegin 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).

uncertainty *Leegin* created, but all this means is more fees paid to attorneys for counseling (and litigation). The Supreme Court has long recognized that per se rules can be a more efficient means of deterring unlawful conduct.[129]

One possible result of *Leegin* is balkanization of the antitrust laws. Some pro-consumer states[130] may very well codify a per se rule against RPM, creating an untenable and expensive situation where manufacturers must apply different rules to retailers in different states. Whether litigated in federal courts under a rule of reason, or in state courts under what is likely to be a hodgepodge of different standards, the *Leegin* decision is likely to raise costs for businesses and, in the end, consumers.

v. The red herring of free riding

Leegin argued that without RPM, "free-rider problems may diminish retailers' incentives to provide [] services."[131] The Supreme Court agreed, stating "Absent 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 services and then capture some of the increased demand those services generate."[132] 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

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[129] *See e.g.* Northern Pacific Railway v. U.S., 356 U.S. 1, 5 (1958) (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 Medical Society, 457 U.S. 322, 344 (1982) (per se rules benefit business certainty and litigation efficiency).
[130] Or at least states that consider an increase in prices to be "anti-consumer."
[131] Petitioner's Brief at 19-20.
[132] *Leegin* at 2715.

> riding' problem is serious enough significantly to deter dealer investment.[133]

Free riding may indeed by a problem, but neither the majority, the petitioner nor the economic literature suggest that is widespread or common.[134] Indeed, *Dr. Miles* only prohibited agreements to fix prices; *Colgate* permitted a manufacturer determined to stem free riding to announce a suggested retail price and then terminate any reseller engaged in discounting.[135]

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."[136] "No matter how large a margin is created by resale price maintenance, there appears to be no incentive for competitive free-riding retailers to supply the desired [] services."[137] In sum, if retailers are given any chance to discount prices, some will always 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

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[133] *Leegin* at 2729.

[134] *See Leegin* 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 and Frederic M. Scherer as Amici Curiae at 6-7 (expressing skepticism about how often it occurs); Scherer & Ross 551-555 (noting "severe limitations" of the free-rider justification for PRM); Pitofsky, *Why Dr. Miles Was Right*, 8 REGULATION, No. 1, pp. 2, 29-30 (Jan./Feb. 1984) (same).

[135] 250 U.S. at 307.

[136] Benjamin Klein and Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. LAW & ECON. 265, 266 (1988).

[137] *Id.*

competing on price places undue and inefficient emphasis on just one component of retailing.[138]

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.[139] In another case, a dying electronics company wanted to find retailers who would feature the company's products over the competition.[140]

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. This, however, 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.[141]

IV. CONCLUSION

The Supreme Court's experiment with the American economy defies easy predictions as to the eventual outcome. Major discount stores refused to carry RPM-mandated goods during the Miller-Tydings era and are unlikely to do so now. Wal-Mart and similar stores will likely carry more secondary brands, more private-label goods, and rely more heavily

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[138] *Leegin* 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).
[139] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 756 (1984).
[140] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 38 (1977).
[141] No where does the majority opinion discuss the decision's potential impact on internet sellers and that entire segment of the American economy.

on imports.[142] Each of these choices will have consequences for the American economy, consumers and consumer welfare.

The *Leegin* decision is another step in the Supreme Court's continuing efforts 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.[143] The Court sought to end confusion as to the boundaries for lawful conduct in non-price restrictions;[144] *Dr. Miles'* simple holding created no similar confusion.

The journey continued in 1997 when the Court overruled a three decades old rule that imposed the per se standard on maximum RPM;[145] that rule was neither enforced nor retained continuing vitality.[146] *Dr. Miles*, however, was rigorously enforced by the federal government and states.[147]

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; the Court did not suggest that RPM was per se lawful. Undoubtedly we can anticipate a

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[142] *Foreword: Antitrust and the Discounters' Case Against Resale Price Maintenace*, 14 ANTITRUST L & ECON. REV. 1, 6 (1982 Part 3); S. Robson Walton, *Antitrust, RPM, and The Big Brands: Discounting In Small-Town America*, 14 ANTITRUST L & ECON. REV. 81, 85-86 (1982 Part 3).
[143] Continental TV, Inc. v. GTE Sylvania, 433 U.S. 36 (1977).
[144] U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). Schwinn was overruled because it created confusion as to which non-price restraints were lawful and which were not. *Id.* at 47-48.
[145] *State Oil Co. v. Khan,* 522 U.S. 3 (1997).
[146] Albrecht v. Herald Co., 390 U.S. 145 (1968). One reason Albrecht was overruled was that it had "little or no relevance to ongoing enforcement of the Sherman Act." *Khan*, 522 U.S. at 18.
[147] *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).

great deal of litigation to figure out precisely what that means. Second, the early reactions of Congress and many states 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, but undoubtedly many will analyze the *Leegin* Court's test for stare decisis, [148] including Justice Breyer's challenge to Justice Scalia to explain how overruling *Dr. Miles* fits within the standards articulated in other cases.[149]

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.[150] Leegin even misrepresented that its business model was to sell products through small boutiques focused on service; Leegin also sells its products at Nordstrom and on the internet.[151]

Leegin itself had some difficulty explaining how its RPM would benefit consumers. It suggested that RPM would allow it more particularized sales expertise, more effective signaling of product quality and a more ideal shopping experience.[152] 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 Supreme Court:

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[148] *Leegin* at 2721-23.
[149] *Leegin* at 2734 (Breyer, J., dissenting). *See also* Federal Election Commission v. Wisconsin Right To Life, Inc., 127 S. Ct. 2652, 2684-2687 (Scalia, J., concurring in part, dissenting in part).
[150] Leegin, Brief in Opposition to certiorari at 4. 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.
[151] This was noted a footnote in Leegin's expert's report, which was then excluded at trial. Leegin, Petition for certiorari, Appendix D at 50a n.44. *See also* Brighton, *Press Release*, Feb. 10, 2005, http://www.brighton.com/retail/privacy/press_release1.htm (last visited August 23, 2007).
[152] Brief for Petitioner at 3-4, 20-21, 22-24.

> . . . 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.[153]

All but forgotten today, the Dr. Miles Medical Co. existed as an independent company until the 1970s and did, to quote Commission Harbour create "technological wonders."[154] 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.[155]

During the 1920s, Dr. Miles researched turning Nervine into a modern tablet.[156] That led to experimentation with effervescence.[157] After observing that reporters at a local

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[153] Harbour Letter 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. Leonard S. Mattioli, *Resale Price Fixing And The 'Hi-Tech' Discounter: Consumer Electronics In Madison*, 14 ANTITRUST L & ECON. REV. 11, 31-32 (1982 Part 3). 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 (1982 Part 3).
[154] See n. 153 supra.
[155] Indiana Historical Society, Bayer Corporation, http://www.indianahistory.org/HBR/business_pdf/BAYER.pdf (last visited Aug. 11, 2007). 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 Aug. 12, 2007). A book distributed to maintain weather records noted that "Dr. Miles' Heart Cure does not contain any opium, morphine, cocaine, chloral, ether or choloroform in any form." Gary England, *Oklahoma's Meteorologist*, DAILY OKLAHOMAN, Mar. 6, 2002.
[156] Centaur Communications Ltd., *A Brand With A Sparkling Past*, Brand Heritage 32 (January 27, 1995).
[157] Id.

Indiana newspaper seemed to resist colds by drinking a mixture of aspirin and bicarbonate of soda, Dr. Miles invented Alka-Seltzer in 1931.[158] In 1977, Bayer AG purchased Dr. Miles for $253 million.[159]

Despite its initial Supreme Court setback in 1911, the Dr. Miles Medical Co. had a long and vital history. And despite its 2007 setback in the Supreme Court, it is likely that we have not heard the last of *Dr. Miles* or its per se rule against RPM.

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[158] Funding Universe, *Miles Laboratories Company History*, http://www.fundinguniverse.com/company-histories/MILES-LABORATORIES-Company-History.html (last visited Aug. 12, 2007). 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.* Miles also created Flintstone vitamins and Bactine antiseptic spray. *Id.*

[159] *Id.*