The End of the Road for *Dr. Miles:* *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

*By Robert T. Miller**

When Robert Bork published *The Antitrust Paradox* in 1978, he could argue that in antitrust law "the general movement has been away from legislative decision by Congress and toward political choice by courts, away from the ideal of competition and toward the older idea of protected status for each producer, away from concern for general welfare and toward concern for interest groups, and away from the ideal of liberty toward the ideal of enforced equality."[1] Bork was then a leader of the Chicago School of antitrust analysis, which insisted that the exclusive goal of antitrust adjudication should be the maximization of consumer welfare as determined by the most rigorous economic analysis practically available. In the fifteen years following the publication of that book, the United States Supreme Court has adopted the Chicago School arguments with a rapidity and thoroughness that has astonished even the Chicagoans themselves. By 1993, when Bork was writing a new introduction to the book, he could with complete justice speak about a "sea-change" and even a "revolution" in antitrust jurisprudence.[2] Moreover, all this happened largely without ideological rancor. Justices conventionally thought of as liberal as well as those conventionally thought of as conservative adopted Chicago School ideas in antitrust. Antitrust has become one of the least ideological areas of Supreme Court jurisprudence.

The only significant exception to the triumph of the Chicago School, Bork noted in 1993, related to resale price maintenance (RPM).[3] RPM agreements are agreements between a manufacturer and its dealers in which the dealers promise not to resale the manufacturer's products to consumers, except at certain agreed-upon prices. If dealers agree not to resale the manufacturer's products for *more than* a specified price, there is a price ceiling or *maximum* RPM. If dealers agree not to resale the manufacturer's products for *less than* a specified price, there is a price floor or *minimum* RPM. Although the Chicago School argued that RPM, whether maximum or minimum, was always or at least usually efficient, both were illegal *per se* in the pre-modern era of antitrust jurisprudence. In another victory for the Chicago School, the Supreme Court in 1997 overturned a twenty-nine year old precedent to reverse the rule related to maximum RPM.[4] Minimum RPM had been *per se* illegal under the Sherman Act since the Supreme Court's 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[5] Well known to generations of antitrust students, and regularly excoriated by Chicago School law professors and economists, *Dr. Miles* was the last of the really bad—from the Chicago School point of view—Supreme Court precedents. Its demise had been regularly predicted by Chicagoans at least since Frank Easterbrook did so in 1984.[6]

Last year the Supreme Court granted *certiorari* in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* on the sole question of whether minimum RPM should continue to be illegal *per se* as *Dr. Miles* held, or whether *Dr. Miles* should be overruled.[7] Everyone in the antitrust community recognized that *Leegin* would probably be one of the most important antitrust cases in a decade. Because of the nearly universal view in academia that *Dr. Miles* was wrongly decided and that RPM is at least often pro-competitive, and because of the nearly unbroken string of triumphs for Chicago School ideas in antitrust over the last thirty years, and especially because of the additions to the Court of presumptive Chicagoans Chief Justice John Roberts and Justice Samuel Alito, the antitrust community almost universally believed that *Leegin* would finally overrule *Dr. Miles*.

As the case played out, this conviction grew stronger. Ted Olson, the former Solicitor General, represented Leegin in the Supreme Court and argued that *Dr. Miles* should be overruled. The United States, as amicus curiae, took the same view and filed an amicus brief in support of Leegin. A group of very highly regarded antitrust economists, eight of whom had served as either Director of the Bureau of Economics at the Federal Trade Commission or Deputy Assistant Attorney General for Economic Analysis at the Antitrust Division of the Department of Justice (the highest-ranking economists at the respective agencies), filed amicus briefs to the same effect. Even William S. Comanor and Frederic M. Scherer, two of the most respected economists with serious reservations about RPM, filed an amicus brief arguing that some kinds of RPM should be treated under the rule of reason. The stars were aligned: it was the end of the road for *Dr. Miles*.

Speculation about the outcome of the case was largely confined to the question of whether the Court would be unanimous (generally thought unlikely), whether Justice Stevens would dissent (generally thought very likely), and whether any other justices would join Justice Stevens in dissent (opinions varied, but many people thought Justice Souter might dissent; fewer that other justices would do so). The oral argument changed little. Most observers agreed that Justice Stevens would almost certainly dissent, and the odds that one or more justices would join him seemed to rise significantly. That the Court would overrule *Dr. Miles*, however, still seemed a sure thing.

And then something very strange happened. The term wore on and on, and the Court announced no decision in *Leegin*. A few observers panicked and started saying that the Court would actually uphold *Dr. Miles*. Finally, on June 28, in the last group of decisions announced in the 2006 term, the Supreme Court issued its opinion in *Leegin*. The majority opinion by Justice Kennedy was exactly what the antitrust community expected: the ninety-six year-old precedent was overruled. Henceforth, RPM would not be illegal per se, it would be judged under the rule of reason, and so be legal or illegal in particular cases depending on whether it enhanced or impaired consumer welfare. The arguments in Justice Kennedy's

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majority opinion were no surprise either; they were the same arguments that had appeared in Chicago School literature for upwards of forty years.[8]

The surprise, however, was that the decision was split five-to-four along the Court's conventional conservative-liberal divide: Justice Kennedy's majority opinion was joined by Chief Justice Roberts, as well as Justices Scalia, Thomas, and Alito, while Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg. Such things had not generally happened in antitrust cases. Many recent antitrust cases had been unanimous,[9] and even when the decisions have been split, the split has not generally been along the usual ideological lines.[10] The most curious aspect, therefore, of the *Leegin* case is why what almost everyone thought should be a non-controversial, non-ideological case in fact split the Court on ideological lines.

In Part I below, I review Justice Kennedy's majority opinion and argue that it fully reflects the broadly shared conclusions in the academic literature. In Part II, I turn to Justice Breyer's dissent and argue that it is surprisingly weak, ignoring well-known results in the economic literature that had been cited to the Court and even falling into an occasional economic fallacy. In Part III, I conclude with some general observations about the case and some speculation as to why it led to such a contentious division on the Court.

I: Majority Opinion of Justice Kennedy

The facts in *Leegin* are entirely straightforward. Leegin manufactured leather goods and distributed them throughout the United States, mostly through independently owned retail establishments, including one owned by PSKS.[11] At least on appeal, Leegin did not dispute that it had entered into minimum RPM agreements with its distributors.[12] When Leegin discovered that PSKS had been marking down its products below the agreed upon prices, Leegin stopped selling to PSKS. PSKS sued, alleging, among other things, that Leegin had violated the antitrust laws by entering into agreements with retailers to charge only those prices fixed by Leegin.[13] Leegin lost in the trial court, and the Court of Appeals for the Fifth Circuit, noting it was bound by *Dr. Miles*, affirmed.[14] The Supreme Court granted certiorari "to determine whether vertical minimum resale price maintenance agreements should be treated as *per se* unlawful."[15]

After recounting these facts, Justice Kennedy divides his majority opinion into three main parts. In the first, he summarizes the law concerning which contractual restraints should be treated as per se illegal and which should be evaluated under the rule of reason. In the second, he considers the economics of RPM and concludes that RPM agreements should be evaluated under the rule of reason. In the third, he considers the stare decisis issues related to overruling *Dr. Miles* and concludes that *Dr. Miles* should be overruled.

A. Rule of Reason Analysis and Per Se Illegality

Justice Kennedy begins his consideration of the relationship between rule of reason analysis and rules of per se illegality by noting that although Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,"[16] the Court has for many decades understood Section 1 to outlaw only *unreasonable* contractual restraints on trade.[17] Following the Chicago School, antitrust analysis in the modern era understands *reasonability* in this context exclusively in terms of the challenged agreement's effect on consumer welfare.[18] As Justice Kennedy puts it, the law "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[19] Inquiries into whether a particular restraint is anticompetitive or procompetitive are called rule of reason analyses. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[20]

But not all restraints are subject to the rule of reason. Rule of reason inquiries tend to be long, complex, and difficult, and so once courts have enough experience with a particular kind of restraint[21] to be able to "predict with confidence that [such restraints] would be invalidated in all or almost all instances under the rule of reason,"[22] the Court will declare such restraints illegal per se. The justification for having per se rules is essentially one of administrative convenience. "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonability of an individual restraint in light of the real market forces at work."[23] That is, a class of restraints should be subject to *per se* condemnation only if courts know with a high degree of certainty that almost all such restraints are anti-competitive. Thus, because it is well-known that horizontal agreements among competitors to fix prices or to divide markets are almost inevitably anti-competitive, such agreements are *per se* illegal.[24] Conversely, when courts cannot be sure that a kind of restraint is almost always anti-competitive, they review such restraints under the rule of reason. Justice Kennedy thus quotes from *Khan* to the effect that the Court has "expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."[25]

Dr. Miles had made illegal per se a vertical agreement between a manufacturer and its distributors to set minimum resale prices. The primary issue in *Leegin*, therefore, is whether the conclusion of *Dr. Miles* was correct, *i.e.*, whether courts know with a high degree of certainty that minimum RPM agreements are always or almost always anticompetitive.

B. The Economics of Resale Price Maintenance

As Justice Kennedy recounts, in *Dr. Miles* the Dr. Miles Medical Co. sold its patent medicines to distributors who agreed to resell them to consumers only at set prices. In finding that the RPM agreements between Dr. Miles and its distributors were illegal per se, Justice Hughes writing for the Court (Justice Holmes dissented) relied on two separate arguments. First, Justice Hughes noted that restraints on the alienation of chattels were generally invalid at common law.[26] Second, he argued that a vertical agreement among Dr. Miles and its distributors regarding resale prices would have the same effect on retail prices as a horizontal agreement among the distributors themselves. Since such a horizontal price-fixing agreement would be illegal per se, so too must the vertical RPM agreement be illegal per se.

Justice Kennedy makes very quick work of the first argument. Noting that it relies on "'formalistic' legal doctrine" rather than "demonstrable economic effect,"[27] Justice Kennedy says, "The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here."[28] This is perfectly true, of course, and considerably gentler than Bork's pointed comment to the same effect, which was that it "is hardly reassuring to learn that the sole basis for antitrust's answer to a modern business problem is the solution given three or four hundred years ago by an English judge who was talking about something else."[29]

For all the fun that has been made of the restraint on alienation rationale in *Dr. Miles*, it is worth remembering that the free alienation of property is generally supported by sound economic reasoning. For, when one party values a property right more than the current owner, it is efficient for that party to purchase the right, and a restraint on alienation can impede this efficient transfer. There is thus slightly more economic substance to the old argument in *Dr. Miles* than might meet the eye. But not enough, of course, to support the holding in the case, for if the efficiency of the rule against restraints on alienation were a sufficient reason to prohibit RPM, it would be a sufficient reason to prohibit *all* restraints on alienation, including all manner of vertical agreements. This, of course, it clearly is not. The economic point is that splitting the bundle of property rights in unusual ways—which is what RPM contracts do—may well be efficient in particular circumstances, and ancient common law rules against splitting up bundles of property rights should not be applied blindly. *Dr. Miles* treated the rule against such restraints "formalistically" precisely because it used the rule to forestall inquiry into whether the restraint was efficient in the particular circumstances in which it was being used.

As to Justice Hughes's argument that RPM agreements have the same effect as horizontal price-fixing agreements among retailers, Justice Kennedy confines himself to the observation that the Court's cases over the last thirty years or so "formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements."[30] This observation is, of course, correct. But why it is correct—and why, equivalently, Justice Hughes's argument in *Dr. Miles* was wrong—turns out to be quite important in understanding one of the disagreements between the majority and the dissent in *Leegin*.

Justice Hughes's contention that RPM agreements setting minimum resale prices would have the same effect as horizontal agreements among retailers setting the same prices was right to this limited extent: in both cases, prices paid by consumers would rise from the pre-agreement prices to the agreed-upon minimum prices. It is easy, but fallacious, to conclude that an agreement that raises prices must be anti-competitive. An inference from higher prices to an anti-competitive effect is correct only if *everything else remains the same*. This is almost always what happens in cases of horizontal price fixing. The product being sold remains what it always was and the marginal cost curves of the various cartel members remain what they always were, but the prices paid by consumers rise, and so the effect is anti-competitive. If, however, *not everything else remains the same* when prices increase, the effect may be pro-competitive or anti-competitive. If, for example, the increase in price is accompanied by an increase in quality of the product, it could well turn out that consumers will willingly pay the higher price for the higher quality product and may in the aggregate buy more of the product than before the price increase. In such cases, the change has manifestly increased consumer welfare.

When Justice Hughes argued in *Dr. Miles* that the effect of vertical RPM agreements would be the same as that of horizontal agreements setting the same price, he was thus implicitly assuming that there would be no change in the product being sold. The general argument in favor of RPM in the Chicago School has always been that the increase in retail price allows dealers to provide additional sales services to consumers such as demonstrations, explanations, attractive retail locations, large inventories, etc. If this is correct, then the product being sold—which is not just the physical object but the combination of the physical object and the sales services provided by the dealer—has in fact changed since before the RPM agreement was implemented. The inference from higher prices post-agreement to an anti-competitive effect is thus fallacious. This explanation of the fallacy in Justice Hughes's opinion has been well-known in the literature for a very long time.[31] As we shall see below, a form of the fallacy appears in Justice Breyer's dissent.

Having concluded that the reasoning in *Dr. Miles* is insufficient to support a per se rule of illegality for minimum RPM, Justice Kennedy goes on to the essential question of whether courts can know with a high degree of certainty that minimum RPM is always or almost always anti-competitive. He then states that the "economics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance," and backs up this assertion with an overwhelming string of citations.[32] Although certainly true, this is a much stronger assertion than Justice Kennedy needs to make in order to support the conclusion that RPM agreements ought to be reviewed under the rule of reason. The issue is not whether we know that RPM is generally pro-competitive; the issue is whether we know that RPM is always or almost always anti-competitive. Hence, if we know that RPM is generally or often pro-competitive, then *a fortiori* we do *not* know it is always or almost always anticompetitive, but it is only this much weaker claim that Justice Kennedy needs.[33] For example, if we really had no idea at all whether RPM was generally pro-competitive or anti-competitive, this should suffice to review RPM agreements under the rule of reason.

In this regard, the brief of the amici economists summarizes the state of the economics literature very aptly:

> In the theoretical literature, it is essentially undisputed that minimum RPM can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects. The disagreement in the literature relates principally to the relative frequency with which procompetitive and anticompetitive effects are likely to ensue. The critical issue is the boundaries of that dispute. Some believe that minimum RPM is almost always benign and thus should basically be ignored by antitrust law except when it is part of a cartel case. Others believe that RPM has been demonstrated to be anticompetitive in some cases and thus merits serious antitrust consideration. *The position absent*

from the literature is that minimum RPM is most often, much less invariably, anticompetitive.[34]

In other words, there are a variety of views about the effects of minimum RPM, but everyone agrees that it is sometimes pro-competitive and sometimes anti-competitive; the disagreement is about whether minimum RPM is almost always pro-competitive or only often pro-competitive. What virtually no one believes is that minimum RPM is always or almost always anti-competitive. Moreover, even if this latter position *were* represented in the literature, as long as there remained significant disagreement among economists as to the relative frequency of pro-competitive and anti-competitive effects, it would be impossible to say that the Court *knows* that minimum RPM is always or almost always anti-competitive, and so applying a rule of per se illegality would still be wrong. Unless the economic literature were dominated by the view that minimum RPM is always or almost always anti-competitive, the rule of reason is the correct one, and, as the Economists Brief states, this view, so far from dominating the literature, is not even represented in it.

Justice Kennedy then turns to the economic literature to explain in detail why minimum RPM can be pro-competitive, and in doing so he follows the Economists Brief closely. As the economists explain, given a fixed wholesale price, manufacturers generally want retail margins to be low, for they "want[] the retailing function to be performed as efficiently as possible, with competing retailers, in turn, passing on to consumers the lowest price consistent with retailers' providing desired services and continuing business."[35] At first blush, it is thus unclear why manufacturers would in effect raise retail prices and increase dealer margins by requiring that dealers resell their products only at certain minimum prices. In real-world markets, however, "the incentives facing retailers may be out of alignment with those of manufacturers, to the detriment of the manufacturer's ability to compete effectively with the products of competing manufacturers."[36] That is, although total sales of the manufacturer's product will be maximized by having dealers offer consumers the right mix of price and sales-related services (such as size and quality of retail staff, product demonstrations and explanations, attractiveness and convenience of retail locations, dealer advertising, etc.), nevertheless market conditions may be such that individual dealers will maximize their individual profits by selling at a lower retail price and offering fewer services. In such cases, "minimum RPM can help to align these incentives [of dealers with those of manufacturers] and enhance competitiveness of a manufacturer's product, thereby benefiting consumers."[37] As Justice Kennedy puts it, "Absent vertical restraints, the retail services that enhance interbrand competition might be underprovided."[38]

Justice Kennedy provides some of the most well-known examples of the under-provision of dealer services, starting with the free-rider problem first identified by Lester Telser.[39] "Consumers might learn… about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees," or else decide to buy a product "because they see it in a retail establishment that has a reputation for selling high-quality merchandise."[40] As the Economists Brief points out, this phenomenon is likely to be most significant for products that are differentiated and thus sold on the basis of both features and quality as well as price—*e.g.,* complex technological products like digital cameras or fashion items like women's accessories.[41] Although the services that retailers offer in connection with such products enhance consumer welfare, they are susceptible to free-riding by discounting dealers. "If the consumer can… buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider."[42]

As the Economists Brief also points out, however, there is some dispute in the literature about how commonly and under what circumstances RPM can eliminate or ameliorate free-riding problems.[43] In some well-known instances, the services a manufacturer would want a dealer to provide cannot easily be free-ridden. Thus, in *Adolph Coors Co. v. FTC*, Coors wanted its retailers to properly refrigerate its beer, and it is quite impossible that a dealer who let the beer assume room temperature could free-ride on the refrigeration provided by another more conscientious dealer.[44] Hence, although the literature does not suggest that eliminating or ameliorating free-riding problems is a rare or aberrational effect of RPM, combating free-riding cannot explain all instances of RPM.

Other instances can be explained, Justice Kennedy points out, by the desire to provide incentives to dealers to facilitate market entry for new firms and brands.[45] Manufacturers entering new markets "can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."[46] "New products and new brands," he continues, "are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect."[47]

In a final paragraph of the section of the opinion dedicated to pro-competitive justifications for RPM, Justice Kennedy argues that RPM can also increase inter-brand competition by encouraging dealer services that would not be provided even absent free riding.[48] This is really the fundamental point about RPM, and it deserves larger treatment than Justice Kennedy affords it. As noted above, total sales of the product in question will be maximized at a certain combination of price and dealer-provided sales services, and dealers may have incentives to provide mixes of price and services that depart from the optimum. For example, if there are both consumers knowledgeable about the product who do not need sales services and will tend to select a vendor on the basis of price alone and consumers who are not knowledgeable about the product and will tend not to purchase it at all unless the dealer provides educative services about the product, then under some market conditions an individual dealer might maximize its individual profits by concentrating on attracting the knowledgeable consumers and forgoing sales to the unknowledgeable ones by cutting retail prices and reducing sales services. This might be the case even though total sales by all dealers would be maximized if all dealers charged more and provided more services. By setting an RPM price at the optimum price and calibrating the wholesale price to dealers properly, manufacturers can align the dealers' incentives in such a way that the optimum quantity of services is elicited. Following an influential argument by Klein and Murphy, if monitoring dealer services is difficult, a manufacturer's threat to terminate a non-performing dealer and so deprive such dealer of the quasi-rents available from sales of the RPM product may be sufficient to elicit from the dealer the desired level of services.[49]

If all this is correct, then all the other pro-competitive rationales for RPM—combating free riding, facilitating market entry, maintaining large inventories, etc.—can all be seen as special cases of the general phenomenon of aligning dealers' incentives to provide the optimum mix of price and services. As the Economists Brief puts it, "With minimum RPM, retailers' choice of value-added services are determined and disciplined by market competition with other retailers. By eliminating intrabrand price competition among dealers, minimum RPM effectively shifts intrabrand competition to the non-price arena—that is, retailers compete to find the service package that best drives sales of the product."[50]

After acknowledging that there may be anti-competitive reasons for using RPM, including the familiar theories of RPM as a facilitating device in manufacturer or dealer cartels,[51] Justice Kennedy concludes that "[n]otwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output. Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."[52] And agreements with such divergent properties are, of course, exactly the kind that ought to be reviewed under the rule of reason.

C. Stare Decisis and Overruling Dr. Miles

Having determined that "were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints,"[53] Justice Kennedy concedes that the Court does "not write on a clean slate, for the decision in *Dr. Miles* is almost a century old" and so "there is an argument for its retention on the basis of *stare decisis* alone."[54] Justice Kennedy divides his treatment of this argument into two parts. In the first, he considers the reasons in favor of overruling *Dr. Miles*, and in the second he rebuts the reasons against doing so.

As to the reasons in favor of overruling *Dr. Miles*, Justice Kennedy begins by noting that, although stare decisis can sometimes justify the retention of a rule later seen to be legally erroneous, the essential point is that stare decisis "is not as significant in this case… because the issue before us is the scope of the Sherman Act,"[55] which the Court has always treated "as a common law statute."[56] Hence, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act,[57] and so just "as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions."[58] This is correct, but slightly imprecise as applied to minimum RPM. What has changed since 1911 is not, generally speaking, economic conditions, as if RPM was always or almost always anticompetitive in 1911 but often pro-competitive in 2007. What has changed, rather, is our understanding of economic reality as embodied in the Chicago School revolution in antitrust jurisprudence.

Justice Kennedy then marshals the arguments in favor of overturning *Dr. Miles* understood as a common law precedent. After noting that the argument to this point has shown that the decision in *Dr. Miles* is wrong on the merits, and that "both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that th[e] Court replace the per se rule with the traditional rule of reason,"[59] Justice Kennedy comes to one of the most jurisprudentially important rationales for overruling *Dr. Miles*. That is, the Supreme Court has overruled its precedents "when subsequent cases have undermined their doctrinal underpinnings."[60]

This has happened to the holding in *Dr. Miles* in several distinct ways. First, as noted above, the arguments used in *Dr. Miles* itself have been discredited by the general acceptance of Chicago School methods and conclusions in the modern era of antitrust jurisprudence.[61] Second, in *United States v. Colgate & Co.*,[62] just eight years after *Dr. Miles* was decided, the Court "reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them."[63] This rule, known as the *Colgate* doctrine, essentially allowed manufacturers to achieve the economic result that RPM would achieve if the manufacturer could do so without in fact *agreeing* with the dealers on resale prices. The reasoning here was that a contract, combination or conspiracy is a necessary element of any Section 1 violation, and so absent a vertical agreement to fix prices there would be no violation of the per se rule in *Dr. Miles.*

This end-run around *Dr. Miles* spawned a large and formalistic body of law (as well as a very active antitrust practice for the bar, with its attendant costs to manufacturers and dealers and thus to consumers) concerning whether the relationship between a manufacturer and a dealer amounted to an agreement within the meaning of Section 1.[64] For example, in 1984 in *Monsanto Co. v. Spray-Rite Service Corp.*, the Court held that antitrust plaintiffs alleging a Section 1 vertical price-fixing conspiracy must present evidence tending to exclude the possibility that the manufacturer and dealer acted independently.[65] Four years later, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court held that the *per se* rule of *Dr. Miles* applied only to agreements over price levels, not to agreements between a manufacturer and a dealer to terminate another dealer that was selling at lower prices.[66] Hence, a manufacturer could announce the resale prices it wanted its dealers to adhere to, receive a complaint from a dealer threatening to discontinue its relationship with the manufacturer because another dealer was discounting below the manufacturer's desire price, and then agree with the complaining dealer that, if the dealer continued to sell the manufacturer's products, the manufacturer would terminate its relationship with the discounting dealer—and all this was perfectly legal. It was also perfectly legal if both manufacturer and dealer expected that the dealer would subsequently continue to sell at the manufacturer's desired prices. But if the manufacturer and the dealer "agreed" that the dealer would sell at the prices the manufacturer desired—even if the agreement was only implied in fact, and even if it was not intended to be legally enforceable—this was per se illegal under *Dr. Miles* and could expose the manufacturer to an action for treble damages.

If the per se rule in *Dr. Miles* were really justified—if, that is, RPM agreements really were known to be always or almost always anticompetitive—then the decisions in *Monsanto* and *Business Electronics* are almost certainly unjustifiable. The text of Section 1 no doubt requires an agreement to establish a violation, but there would be no justification for the Court having made it so difficult, from an evidentiary point of view, to prove the existence of an illegal agreement.[67] Allowing this kind of evasion of *Dr. Miles*—an evasion that almost everyone has long agreed was motivated by misgivings about the economic soundness of the holding in *Dr. Miles*—"is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives."[68]

There is a final way in which the doctrinal underpinnings of *Dr. Miles* have been eroded. For, minimum RPM agreements are only one kind of vertical restraint, and the Court's treatment of other kinds of vertical restraints are clearly inconsistent, from an economic point of view, with the per se rule in *Dr. Miles*. For example, agreements between a manufacturer and a dealer according the dealer the exclusive right to sell the manufacturer's products in a given geographical area (a so-called "non-price" vertical restraint) generally have economic effects similar to those of RPM agreements.[69] An exclusive dealer of the manufacturer's products can, for instance, set the resale price at whatever level it chooses free from all intra-brand competition, both price competition and service competition. This is a more extreme form of dealer protection than minimum RPM, for minimum RPM insulates dealers only from price competition. Since the Court decided *GTE Sylvania* in 1977, however, non-price vertical restraints have been reviewed under the rule of reason, not a per se rule, precisely because the Court recognized that non-price vertical restraints are often pro-competitive in their effects.[70] Hence, the holding in *GTE Sylvania* is not economically consistent with that in *Dr. Miles*.

Justice Kennedy next turns to the arguments in favor of affirming the per se rule of *Dr. Miles*.[71] The primary argument here is based on the history of congressional action related to RPM since the time of *Dr. Miles*. In 1937, Congress passed the Miller-Tydings Fair Trade Act, which made RPM agreements legal within a state if the state had authorized such agreements by a so-called "fair trade" law.[72] In the McGuire Act of 1952, Congress expanded the Miller-Tydings Act to cover agreements between manufacturers and dealers that provided that, if one dealer in the state agreed to the manufacturer's terms, all dealers in the state would be bound by them.[73] Since at different times more than thirty states had enacted appropriate legislation, under the Miller-Tydings and McGuire Acts RPM agreements were legal throughout large parts of the United States for much of the twentieth century. Generally speaking, the purpose of both acts was to allow states to protect small retail establishments against large-volume discounters,[74] which, as Justice Kennedy notes, is a rationale profoundly at odds with consumer welfare and thus utterly foreign to the Sherman Act, at least as currently understood.[75] In 1975, however, Congress repealed both acts by passing the Consumer Goods Pricing Act, and since that time the per se rule of illegality in *Dr. Miles* has governed RPM agreements in the United States.[76] The plaintiff's argument was that such congressional action ratified the per se rule of *Dr. Miles*.[77]

In response, Justice Kennedy notes that the Consumer Goods Pricing Act did *not* enact the per se rule of *Dr. Miles*, but merely rescinded what amounted to a conditional statutory exemption from it, and rescinding this exemption is not logically equivalent to endorsing the rule. Rather, "Congress once again placed these restraints within the ambit of §1 of the Sherman Act. And, as has been discussed, Congress intended §1 to give courts the ability to develop governing principles of law in the common law tradition."[78] Hence, in Justice Kennedy's view, the Court is respecting the decision of Congress "by analyzing vertical price restraints, like all restraints, in conformance with traditional §1 principles, including the principle that our antitrust doctrines evolve with new circumstances and new wisdom."[79]

Although Justice Kennedy does not say so, it is worth noting in this regard that when Congress passed the Consumer Goods Pricing Act in 1975, the Chicago School revolution in antitrust had not yet begun. That remaking of antitrust law would begin two years later in 1977 with *GTE Sylvania*. Hence, whatever the intention of Congress in 1975, it was premised on an understanding of antitrust law that has now been thoroughly discredited and very largely replaced in the law by Chicago School principles. In my view, that fatally undermines any argument based on what Congress intended in 1975.

Arguments about what conclusions to draw from congressional actions are notoriously inclusive, and the reason for this is that the matter really turns on more general matters relating to a court's treatment of legislation and legislative intent. If a judge thinks he can ascertain with reasonable certainty what a legislative body intended—understanding intention as something that goes beyond what the body literally said or did in enacting the legislation in question—and if the judge is willing to give weight to that expansive intention in interpreting other statutes, then a judge might be impressed with the argument that in enacting the Consumer Goods Pricing Act Congress ratified the per se rule of *Dr. Miles*. If, however, a judge is skeptical about divining the intention of Congress understood in this expansive way, or else thinks that such expansive intentions ought to have no weight in interpreting statutes, then he will likely be unimpressed with such arguments. This kind of disagreement about the proper role of legislative intent in judicial decision-making will not be settled, of course, in anything as mundane as an antitrust case.

Persuasive though Justice Kennedy's arguments in this section of the opinion are, he omits what I think is the most important point, *viz.*, that the dominant theme of antitrust jurisprudence for the last thirty years has been the overturning, either expressly or by implication, of precedents from the pre-modern era. In the area of vertical restraints alone, before 1977 all three major kinds of vertical restraints—minimum RPM, maximum RPM and non-price restraints—were all illegal per se. Minimum RPM, of course, was illegal *per se* under *Dr. Miles*. Maximum RPM was illegal per se under *Albrecht v. Herald Co.*[80] Non-price vertical restraints were illegal per se under *United States v. Arnold, Schwinn & Co.*[81] In 1977, the Supreme Court overturned *Schwinn* in *GTE Sylvania.* In 1997, it overturned *Albrecht* in *Khan*. This was all part of a larger pattern in which Chicago School ideas triumphed over older theories of antitrust. Overturning *Dr. Miles* is thus just the final step in a revolution in antitrust thinking that began about thirty years ago. Unless someone were prepared to reject all of the Chicago School ideas, there is no substantial reason exempting *Dr. Miles* from the modernization of antitrust law along Chicago School lines. *Dr. Miles* is certainly old and venerable, but as the dissenting justice in *Dr. Miles* famously observed in another context, it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.[82]

II: Dissenting Opinion of Justice Breyer

Justice Breyer's long dissent is premised primarily on the idea that in overturning *Dr. Miles* the Court is "depart[ing] from ordinary considerations of *stare decisis* by pointing to a set of arguments well known in the antitrust literature for close to half a century."[83] For the reasons given above and as discussed more fully below, I find Justice Breyer's arguments quite unconvincing. Before turning to his arguments about stare decisis, however, I want to discuss two preliminary points. The first concerns Justice Breyer's understanding of the relationship between the rule of reason and per se rules. The second concerns some fairly clear-cut mistakes Justice Breyer makes concerning the economic effects of RPM.

A. Justice Breyer on the Rule of Reason and Per Se Rules

The usual understanding of the relationship between rule of reason analysis and per se rules is as Justice Kennedy stated it. That is, restraints are reviewed under the rule of reason unless the Court, because of their experience with a kind of restraint, can be highly confident that the restraint always or almost always has anti-competitive effects. This, apparently, was also Justice Breyer's understanding in 1998, for he then wrote that "certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive. An agreement of such kind is unlawful *per se*."[84] This is not the view he takes in *Leegin*.

Justice Breyer begins his discussion of per se rules by describing the law in an imprecise and potentially misleading way. After stating that courts "often" apply a rule of reason, he says, "sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few… that courts have departed from a pure 'rule of reason' approach. And sometimes this Court has imposed a rule of per se unlawfulness—a rule that instructs courts to find the practice unlawful all (or nearly all) the time."[85] While this is generally true, this description makes it sound as if there were a class of cases in which the Court has applied per se rules (*i.e.*, departed from the rule of reason) *other than* those cases in which the challenged restraint was known to be one that was always or almost always anti-competitive.[86] This is not correct, at least in the modern era. Justice Breyer's description of the law thus implicitly makes room for a new class of cases to which per se rules might be applied.

Justice Breyer explains his understanding of the relationship between rule of reason analysis and per se rules by referring to administrative concerns arising from the nature of the legal system.[87] Of course, in one clear sense, administrative concerns have always been relevant in distinguishing those restraints that should be reviewed under the rule of reason and those that should be per se illegal. That is, we have per se rules in order to save the time and expense of rule of reason inquiries when we know to a high degree of certainty that such inquiries are unnecessary because we know to a high degree of certainty that the restraint at issue is always or almost always anti-competitive. This is an administrative justification, to be sure. In order to justify a departure from the usual understanding of the relationship between the rule of reason and per se rules, however, Justice Breyer must mean something other than this.

In fact, Justice Breyer writes that "antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views," which in context seems to mean that the difference between per se illegality and rule of reason analysis is not simply whether courts know that, as a matter of economics, a certain kind of restraint is always or almost always anti-competitive.[88] Just how Justice Breyer would make the distinction is not yet clear. He next states that "law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients."[89] So far, this is unexceptional, but it still does not distinguish a position different from the usual one. That distinction finally begins to appear when Justice Breyer says that the administrative nature of the legal system implies that courts will "sometimes apply[] rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits."[90] Now, in one sense, this statement is perfectly in accord with the Court's existing antitrust jurisprudence. For, in the usual understanding, *per se* rules are applied to restraints that are known to be always *or almost always* anticompetitive, that is, to conduct that is *sometimes but almost never* procompetitive. Thus, it is true that the Court has in the past applied *per se* rules against restraints that are "sometimes" pro-competitive—if we understand "sometimes" to be the complement of "almost always," that is, in the sense of "sometimes but almost never." In this sense, horizontal price fixing, which is *per se* illegal, is *sometimes* pro-competitive, and Justice Breyer gives precisely this example.[91]

Justice Breyer, however, seems to understand the statement about per se rules being applied to practices that are "sometimes" procompetitive in quite a different sense. He writes, "How often, for example, will the benefits [of RPM] to which the Court points occur in practice? I can find no economic consensus on this point…. Sometimes [free riding on dealer services] must happen in reality. But does it happen often? … 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.'"[92] In the usual understanding of the relationship between the rule of reason and per se rules, saying that a restraint was pro-competitive in some undetermined percentage of cases that might (for all we currently know) amount to quite often would settle the matter: such a restraint would get rule of reason treatment. For, if we do not know how often the practice is pro-competitive and how often anti-competitive, then in particular we do *not* know the practice to be always or almost always anti-competitive—and hence a per se rule would not apply. Uncertainty implies rule of reason analysis. For Justice Breyer, however, it turns out to be just the reverse: uncertainty, at least with respect to minimum RPM, results in per se illegality. Because we do not know how often minimum RPM is procompetitive, how often anticompetitive, for reasons of administrative convenience, Justice Breyer wants to apply a per se rule and make minimum RPM illegal.

It is critically important to see how Justice Breyer equivocates on the meaning of the word *sometimes*. He began with the unobjectionable point that per se rules are applied against restraints that are *sometimes* pro-competitive in the sense that such restraints are known to be *sometimes but almost never* pro-competitive, and he concludes with the point that a restraint that is *sometimes, with some unknown frequency*, pro-competitive should be subject to a per se rule as well. Justice Breyer's example of the per se rule against horizontal price fixing is very illuminating here. We know that horizontal price fixing is almost always anti-competitive and only rarely ("sometimes") pro-competitive, and so we apply a per se rule. With vertical price fixing, we *do not know* how often the practice is anti-competitive, how often it is pro-competitive. Nevertheless, in a strange updating of Justice Hughes's conflation of the effects of horizontal pricing with those of vertical price fixing, Justice Breyer would apply a per se rule against vertical price fixing just as he would against horizontal price fixing.

Justice Breyer's application of per se rules against conduct that is sometimes, with some unknown frequency, pro-competitive would invert the relationship between the rule of reason and per se rules. The traditional view embodied, as it were, a presumption of legality: conduct would be reviewed under the rule of reason unless and until courts knew it to be always or almost always anti-competitive. Justice Breyer's position reverses this and subjects to per se condemnation both conduct known to be always or almost always anti-competitive and conduct the effects of which are generally unknown. This would create, in effect, a presumption of illegality. To avoid per se combination, an antitrust defendant would have to prove that the conduct in question was known to be at least often pro-competitive. Obviously, this is not a rule that any friend of economic liberty would find attractive.

Besides casting into confusion nearly a century of jurisprudence concerning the relationship between the rule of reason and per se rules, such an expansion of the scope of per se rules is wholly unnecessary. Courts have been well able to analyze horizontal restraints under the rule of reason and make intelligent determinations about which are pro-competitive, which anticompetitive.[93] Justice Breyer recounts all the well-known and acknowledged difficulties of rule of reason analyses,[94] but in order to get to his conclusion he has to give these a weight never before accorded them. He has to say that the costs of undertaking rule of reason analyses justify applying per se rules not only when we know that the restraint in question is always or almost always anti-competitive but even when we know little or nothing about the relative frequency of the restraint's being anti-competitive or pro-competitive. If administrative considerations are to determine such cases, presumably the correct view would be that we should save *all* the potential administrative costs related to RPM cases and just declare RPM *legal per se*. Then there would be no lawsuits at all about RPM, and the administrative costs of such suits would drop to zero.

B. Justice Breyer and the Economic Effects of RPM

There are two serious economic mistakes in Justice Breyer's opinion. The first concerns his understanding of the pro-competitive justifications for minimum RPM. The second concerns the relationship between retail prices and consumer welfare.

With respect to Justice Breyer's understanding of the pro-competitive justifications for minimum RPM, throughout the dissent Justice Breyer speaks as if the only such justification were eliminating or ameliorating the problem of discounting dealers free riding on the services provided by other dealers. Thus, after referring to "the majority's claim that even absent free riding, resale price maintenance may be the most efficient way to expand the manufacturer's [market] share,"[95] he states, "I do not understand how, in the absence of free-riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not 'expand' its 'market share' as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand."[96]

The truth is that Justice Breyer had seen the answer to this question, and the answer had been explained in a way that a generalist judge could understand. The argument, recounted above, is that maximizing overall sales of a manufacturer's product requires a particular retail price level and a particular level of dealer services, and that dealers may have incentives to depart from this mix (*e.g.*, can sometimes maximize their own individual profits by cutting prices and reducing services). Minimum RPM can allow manufacturers to set the retail price at the optimum price and then calibrate the level of dealer services by adjusting the wholesale price. It is true that Justice Kennedy does not make the argument very clearly, and he certainly does not make the argument in the detailed way I have here. But the argument was made at greater length in the Economists Brief,[97] and both Justice Kennedy and the Economists Brief cite the well-known articles by Klein and Murphy[98] and by Mathewson and Winter[99] from which the argument derives.

Justice Breyer's failure to appreciate this key argument about the pro-competitive justifications for RPM may have been a matter of inattention or oversight. His treatment of the effect of RPM on prices and its relationship to consumer welfare, however, is a matter of economic fallacy. Justice Breyer spends several paragraphs arguing that abolishing the per se rule against minimum RPM will result in higher prices to consumers, and he counts this as an argument tending to show that minimum RPM is anticompetitive.[100] He says, for example, that those "who express concern about the potential anticompetitive effects [of RPM] find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller-Tydings Fair Trade Act."[101] In other words, because minimum RPM raises prices, it tends to be anti-competitive.

This is simply fallacious. Of course *minimum* RPM raises retail prices. If the dealer would sell at or above the price prescribed in the RPM agreement, there would be no need for an agreement providing for a *minimum* resale price. The point, however, is that increasing retail prices is consistent with both pro-competitive and anti-competitive theories of RPM. Both theories predict that RPM will raise retail prices—the anti-competitive theory because RPM is facilitating either a manufacturer or a dealer cartel, for example, and the pro-competitive theory because RPM is providing dealers a higher margin that they are competing away in the form of added dealers services that consumers as an aggregate value more than the aggregate increase in the price of the product. In both the anti-competitive theory and the pro-competitive theory, therefore, retail prices rise, but in the anti-competitive theory output falls and consumer welfare is impaired, while in the pro-competitive theory output increases and consumer welfare is enhanced. To infer an anti-competitive effect from increased prices is simply erroneous. The error is analogous to the infamous one of inferring a price-fixing conspiracy from parallel pricing behavior. In both cases, there are plausible anti-competitive and pro-competitive explanations for the phenomenon, and the mistake, notorious in the history of antitrust, is merely to assume that the anti-competitive explanation is the correct one.

C. Justice Breyer and Stare Decisis

Justice Breyer writes that, abstracting from concerns of stare decisis, the question of whether minimum RPM agreements should be reviewed under the rule of reason or should be per se illegal is a difficult problem and "if forced to decide now, at most I might agree that the per se rule should be slightly modified to allow an exception for the more easily identifiable and temporary condition of 'new entry.'"[102] In saying this, he specifically refers to administrative concerns and so must have in mind his view that restraints whose economic effects are largely unknown or difficult to determine should be treated as per se illegal. But, Justice Breyer continues, "The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century."[103] He provides many arguments tending to show that the rule of *Dr. Miles* ought be affirmed, and the tone becomes heated. Justice Breyer is "not aware of any case in which [the] Court has overturned so well-established a statutory precedent" and does "not see how the Court can claim that ordinary criteria for overruling an earlier case have been met."[104]

Many of the arguments that Justice Breyer adduces follow the same pattern. He will argue that there is a certain kind justification that, if present, would counsel in favor of overturning a case, but that there is no such justification in connection with *Dr. Miles*; he then either states or implies that the conclusion is that *Dr. Miles* ought not to be overturned. For example, he argues that if there had been an important change in the American economy that made the effects of RPM other than what they once were, then overturning *Dr. Miles* might be justified, but that there has been no such change in the economy, and so *Dr. Miles* ought not to be overruled.[105] Arguments of this form, of course, embody the logical fallacy of denying the antecedent—the fallacy that argues from "If P, then Q" and "Not P" to "Not Q"—and so have no force at all. The fact that one potential argument for a conclusion fails does nothing to show that there is no good argument for the conclusion. (Compare the defense attorney who argues that his client ought not to be convicted because there are several people whom he did *not* murder.) For instance, to pursue Justice Breyer's argument, it is perfectly true that there has been no change in the American economy that makes the effects of RPM other than what they always were. In fact, in 1911 as in 2007, those effects are probably very largely pro-competitive, and the diminution in consumer welfare that results from making RPM illegal per se is an excellent reason for scrapping that rule.

The most important of Justice Breyer's arguments to follow this pattern of denying the antecedent is a generalized one that there has been no change—no change in economic circumstances, no change in our understanding of the economics of RPM, no other relevant kind of change—that would justify overturning *Dr. Miles*; hence, *Dr. Miles* ought to stay. In this particular case, however, the argument not only is logically fallacious but also suffers from the fact that its minor premise—that there has been no relevant change—is not only false but obviously and flagrantly so. For, as I noted above, between 1978 and 1993, there was, as Robert Bork put it, a "sea-change" and even a "revolution" in antitrust jurisprudence. One can argue about whether this change has been good or bad, but nobody denies that it occurred, and nobody denies that it amounted to a rather thorough implementation of Chicago School ideas, mostly through the overturning of cases that had established per se rules against conduct that the Chicagoans had argued were in fact at least often pro-competitive. In recent years, many observers have thought that days of the remaining per se rules, including that of *Dr. Miles*, were numbered. For example, many people thought that the per se rule against tying[106] would be overturned if the *Microsoft* case[107] ever reached the Supreme Court.[108] Thus, when Justice Breyer says that there has been no change in our understanding of antitrust economics that would justify overruling *Dr. Miles*, what he means is that there has been a revolutionary change in our understanding of antitrust economics over the last forty years that abundantly justifies overruling *Dr. Miles*, but that the Court did not get around to actually overruling *Dr. Miles* till now; in part, of course, because it was busy overruling other bad antitrust precedents. Some of these, such as *Khan*, which overruled the twenty-nine year old precedent in *Albrecht* that *maximum* RPM was illegal per se, Justice Breyer himself joined.

In a not especially subtle maneuver, Justice Breyer then turns to the factors related to overturning precedents that Justice Scalia discussed in his concurring opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*[109] and argues that they imply that *Dr. Miles* not be overruled.[110] Some the arguments Justice Breyer adduces here follow the fallacious pattern identified above. For example, Justice Breyer argues that if a case is constitutional and recently decided, it may more readily be overruled; but since *Dr. Miles* is not constitutional and not recently decided, it ought not to be overruled.[111] Or again, if a case creates an unworkable legal regime, this counsels in favor of overruling it, but since *Dr. Miles* did not create an unworkable regime, it ought not to be overruled.[112] Or yet again, if a case unsettles the law, this argues in favor of overruling it, but *Dr. Miles* did not unsettle the law; hence, it ought not to be overruled.[113] In each case we have the same fallacy of denying the antecedent.

Apart from arguments like these and the argument, discussed above, based on the intent of Congress in repealing the Miller-Tydings and McGuire Acts, Justice Breyer's primary argument is that businesses and consumers have come to rely on the per se rule of Dr. Miles and such reliance counsels against overruling the case. It is difficult to see, however, just what this reliance consists in. We are talking here of making legal conduct that in the past was illegal under the per se. This is not a case in which people could have counted on certain conduct being legal only to discover that the conduct is now illegal, thus frustrating their plans.

The reliance possible in this case would be of quite a different character. It would be reliance, probably by a dealer, that a manufacturer will not require RPM agreements of its dealers. We are talking about the reliance interest, that is, of discounting dealers. For example, Justice Breyer cites the brief of Burlington Coat Factory Warehouse Corp. as amicus curiae to the effect that it and similar businesses have financed, structured, and operated their businesses in part in reliance on the absence of minimum RPM.[114] This is very likely true. But whether or not this reliance interest ought weigh in the Court's determination as to whether it should overturn *Dr. Miles* depends, I think, on whether the conduct in question enhances consumer welfare or not. For, if the conduct in question impairs consumer welfare, the fact that certain businesses have relied on an inefficient rule of law in order to perpetuate inefficient conduct can hardly be a reason to keep in place a rule of antitrust law, for the exclusive goal of antitrust is efficiency. Now if the pro-competitive theories of minimum RPM are generally correct, then the conduct undertaken in reliance on the per se rule of *Dr. Miles* usually impairs consumer welfare; if the anti-competitive theories are generally correct, then it usually enhances consumer welfare. Hence, whether or not this reliance interest should be given weight in the decision to overturn *Dr. Miles* cannot be settled until we know whether minimum RPM is generally pro-competitive or generally anti-competitive. Probably, RPM is often pro-competitive. In any case, before this reliance interest could be a major factor in determining whether *Dr. Miles* ought be overruled, we would have to have good reason to believe that minimum RPM is much more often than not anti-competitive, and, as noted above, this is the one position that is absent from the economic literature.

III: Observations and Conclusions

So after ninety-six years, it is the end of the road for *Dr. Miles*. The Chicago School of antitrust analysis has won the last majority victory there is to win, and there is no likelihood that Chicago School ideas will be seriously challenged in the Supreme Court's antitrust jurisprudence in the foreseeable future. This is all as most observers think it should be and as virtually all observers thought it would be. The only mystery left is why the remaking of the Court's antitrust jurisprudence in accordance with Chicago School ideas—a project that has been going on for three decades and has enjoyed unusually broad support among Supreme Court justices of all ideological persuasions—should, in this last major decision, suddenly produce a five-to-four split along conventionally conservative-liberal ideological lines. This is a regrettable blemish on an otherwise very credible episode in the Court's history.

As I explained above, the argument for overruling *Dr. Miles* was extremely strong. The economic literature teems with pro-competitive theories of minimum RPM, and there is virtually no support any more for the idea that RPM is always or almost always anti-competitive. Since the Court by default applies rule of reason analysis and employs per se rules only when a practice is known to be always or almost always anticompetitive, it is elementary that minimum RPM should be reviewed under the rule of reason. True, *Dr. Miles* was a venerable statutory precedent, but the antitrust laws are common law statutes, and the whole history of antitrust in the modern era has consisted in the Court's overturning antiquated rulings the justifications for which had been demolished by Chicago School analysis. Almost everyone assumed that, sooner or later, *Dr. Miles* would go the way of any number of other bad decisions that had already been overturned.

Making the best of a bad business, Justice Breyer is forced in dissent to adopt positions very difficult to defend. He says that per se rules should be applied not only to conduct known to be always or almost always anti-competitive but also to conduct the competitive effects of which we do not yet know with certainty. He admits he cannot find, or else did not understand, a key economic argument that had been cited to the Court. He argues that price increases from RPM are anti-competitive when in fact it is well known that both pro-competitive and anti-competitive explanations of RPM entail that prices will rise. He premises his dissent largely on stare decisis considerations and produces a great many arguments along such lines, but most of them are infected by an elementary formal fallacy. He finds himself in the very odd position of arguing that there has been no significant change in an area of law famous for having undergone an intellectual revolution in the last thirty years. How could this have happened?

Now, unless a justice happens to tell us that he or she had reasons other than those stated in the opinion for voting one way or another in a particular case, we have to take the stated reasons at face value. Going beyond them and searching for other reasons is pure speculation. Such speculation is, however, human, and the unexpected ideological split on the Court, along with the timing of the decision and other events in the 2006 term, suggest an explanation that would appeal to someone inclined to speculation. That explanation is that the liberals on the Court—Justices Stevens, Souter, Ginsburg, and Breyer—have felt, and disliked, the power of the new conservative majority of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. Such five-to-four splits have marked the most acrimonious cases this terms, including *Parents Involved in Community Schools v. Seattle School District No. 1*[115] on affirmative action, *Federal Election Commission v. Wisconsin Right to Life, Inc.*[116] on campaign finance, and *Gonzalez v. Carhart* on abortion.[117] All of these cases either overruled prior decisions or at least significantly undercut them. It is easy to imagine that the liberal justices saw *Leegin* as being more of the same.

If this correct, then, in dissenting so vigorously in *Leegin*, the liberals were emphasizing the ideological division of the Court and were attempting to persuade their conservative colleagues not—in the liberals' view—to overplay an admittedly strong position. By politicizing a case that by rights ought not to have been very political, the liberals may have been warning—some might say threatening—about possible politicization of the Court in the future. I offer no opinion on the merits or demerits of such a maneuver, for one's view of it will be determined very largely along the same ideological lines that divide the Court.

However that may be, *Dr. Miles* is overruled, a significant area of the law has been rationalized, and American consumers are likely to benefit. For results like those, a little more controversy about the Supreme Court is a price worth paying.

Endnotes

1 Robert H. Bork, The Antitrust Paradox 10-11 (1978) (*hereinafter* The Antitrust Paradox).

2 *Id.* at xi, x.

3 *Id.* at xiii.

4 State Oil Co., v. Khan, 522 U.S. 3 (1997), overruling *Albrecht v. Herald, Co.*, 390 U.S. 145 (1968).

5 220 U.S. 373 (1911).

6 Frank Easterbrook, "Vertical Arrangements and the Rule of Reason," mimeo, Law School, University of Chicago ("the days of Dr. Miles are numbered").

7 551 U.S. ___ (2007). Citations to *Leegin* are to the pagination used in the Supreme Court's slip opinion.

8 In the final examination in my antitrust class at Villanova Law School in the spring of 2007, I asked my students to write the majority opinion in the then-pending *Leegin* case; the answers were generally close student approximations to what Justice Kennedy in fact later said.

9 *E.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S.Ct. 1069 (2007) (unanimous opinion by Justice Thomas holding that plaintiff in predatory-bidding claim under § 2 of Sherman Act must prove that predatory bidding led to below-cost pricing of predator's outputs and that predator had dangerous probability of recouping losses through exercise of monopsony power); Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006) (unanimous opinion, except for Justice Alito who took no part, by Justice Stevens holding that patent does not necessarily confer market power); Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg and Breyer, and concurring opinion by Justice Steven joined by Justices Souter and Thomas, that telephone company had no duty under Section 2 of Sherman Act to share network facilities with competitors); Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) (unanimous opinion by Justice Breyer that per se rule against group boycotts does not apply to decision by single purchaser to buy from one seller rather than another even when such decision is not justified by usual competitive reasons); State Oil Co., v. Khan, 522 U.S. 3 (1997) (unanimous opinion by Justice O'Connor overruling *Albrecht v. Herald, Co.*, 390 U.S. 145 (1968), to hold that maximum resale price maintenance is not illegal *per se* but should be judged under rule of reason).

10 *E.g.*, Bell Atlantic Corp., v. Twombly, 127 S.Ct. 1955 (2007) (majority opinion by Justice Souter, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer and Alito; dissent by Stevens, joined in part by Justice Ginsburg); California Dental Assoc. v. FTC, 526 U.S. 756 (1999) (majority opinion by Justice Souter, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas; opinion by Justice Breyer concurring in part and dissenting in part, joined by Justices Stevens, Kennedy and Ginsburg).

11 *Id.* at 2.

12 *Id.* at 4.

13 *Id.* at 4.

14 171 Fed. Appx. 464 (2006) (*per curiam*).

15 *Leegin* at 5.

16 15 U.S.C. § 1.

17 *Leegin* at 5.

18 *E.g.*, The Antitrust Paradox¸ *supra* note 2, at xi.

19 *Leegin* at 5-6.

20 *Id.* at 5 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

21 *See* Broadcast Music, Inc, v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9 (1979) (referring to considerable experience with kind of restraint needed before subjecting it to per se treatment).

22 *Leegin* at 6. *Cf.* Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344 (1982).

23 *Id.*

24 *Id.*, referring to *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) and *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (*per curiam*).

25 *Id.* at 6-7 (quoting from State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

26 *Dr. Miles*, 220 U.S. 373, 404-405 (1911).

27 *Leegin* at 7 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977)).

28 *Id.* at 8.

29 The Antitrust Paradox, *supra* note 2, 285.

30 *Leegin* at 8.

31 *E.g.*, The Antitrust Paradox, *supra* note 2, 289, 296-297.

32 The authorities Justice Kennedy cites include the economists appearing at *amici*, Brief for Economists as *Amici Curiae* 16; the ABA Section of Antitrust Law, Antitrust Law and Economics of Product Distribution 76 (2006); H. Hovenkamp, The Antitrust Enterprise: Principle and Execution 184-191 (2005); Bork, The Antitrust Paradox, *supra* note 2, 288-291; and F.M. Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed., 1990).

33 *See Leegin* at 14 ("Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tend[s] to restrict competition and decrease output") (citations omitted).

34 Brief for Economists as *Amici Curiae* 16 (citations omitted and emphasis added) (*hereinafter* Brief for Economists).

35 Brief for Economists 5.

36 *Id.*

37 *Id.*

38 *Leegin* at 10.

39 Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3. J.L. & Econ. 86 (1960).

40 *Leegin* at 11.

41 Economists Brief 6.

42 *Leegin* at 11.

43 Economists Brief 5.

44 497 F.2d 1178 (10th Cir. 1974), *cert. denied* 419 U.S. 1105 (1975).

45 *Leegin* at 11.

46 *Id.* at 55 (quoting from *GTE Sylvania*).

47 *Id.* at 11-12.

48 *Id.* at 12.

49 Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contractual Enforcement Mechanisms*, 31 J.L. & Econ. 263 (1988).

50 Economists Brief 10-11 (citations omitted).

51 *Leegin* at 12-14.

52 *Id.* at 14.

53 *Id.* at 19.

54 *Id.*

55 *Id.*

56 *Id.* at 20.

57 *Id* at 19-20 (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

58 *Id.* at 20.

59 *Id* . at 20-21.

60 *Id.* at 21 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

61 *Id.*

62 United States v. Colgate & Co., 250 U.S. 300 (1919)

63 *Leegin* at 21, referring to United States v. Colgate & Co., 250 U.S. 300 (1919).

64 *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (finding manufacturer defendant had entered into RPM agreement); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) (holding that antitrust plaintiffs alleging Section 1 price-fixing conspiracy must present evidence tending to exclude possibility that manufacturer and distributor acted independently); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) (holding per se rule of *Dr. Miles* applied only to agreements over price levels, not to agreement between manufacturer and dealer to terminate another dealer selling at lower prices).

65 465 U.S. 752 (1984).

66 485 U.S. 717 (1988).

67 *Leegin* at 21-24.

68 *Id.* at 25.

69 *Id.* at 24.

70 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

71 *Leegin* at 25-28.

72 89 Stat. 801.

73 66 Stat. 632.

74 California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980); *Leegin* at 26.

75 *Leegin* at 26.

76 89 Stat. 801.

77 *Leegin* at 25.

78 *Id.* at 25-26 (internal quotation marks and citations omitted).

79 *Id.* at 26 (internal quotation marks and citations omitted).

80 Albrecht v. Herald, Co., 390 U.S. 145 (1968).

81 388 U.S. 365 (1967).

82 *See* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

83 *Leegin*, Dissenting Opinion of Justice Breyer 1.

84 Nynex Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) (citations omitted).

85 *Leegin*, Dissenting Opinion of Justice Breyer 2.

86 There is, of course, the "quick-look" analysis that the Court has sometimes used, but this is really just an abbreviated rule of reason analysis, not a third class of review, and its existence does not help to make sense of what Justice Breyer says here. *See* California Dental Assoc. v. FTC, 526 U.S. 756 (1999) (discussing quick-look analysis).

87 *Leegin*, Dissenting Opinion of Justice Breyer 3.

88 *Id.* at 8.

89 *Id.*

90 *Id.*

91 *Id.* (citing F.M. Scherer & D. Ross, Industrial Market Structure and Economic Performance 335-339 (3d ed. 1990)).

92 *Id.* at 8-9.

93 *E.g.,* Broadcast Music Inc. v. CBS, Inc., 441 U.S. 1 (1979); Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 342-343 (1982); Nat'l Soc. of Prof. Engineers v. United States, 435 U.S. 679 (1978); Nat'l Collegiate Athletic Association v. Bd. of Regents of the University. of Oklahoma, 468 U.S. 85 (1984); California Dental Assoc. v. FTC, 526 U.S. 756 (1999).

94 *Leegin*, Dissenting Opinion of Justice Breyer 9-11.

95 *Id.* at 14 (internal quotation marks and citations omitted).

96 *Id.* at 14-15.

97 Economists Brief 10-11.

98 Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contractual Enforcement Mechanisms*, 31 J.L. & Econ. 263 (1988).

99 G. Franklin Mathewson & Ralph A. Winter, *The Law and Economics of Resale Price Maintenance*, 13 Rev. Indus. Org. 57, 74-75 (1998).

100 *Leegin*, Dissenting Opinion of Justice Breyer 5-6.

101 *Id.* at 5.

102 *Id.*at 11.

103 *Id.*

104 *Id.* at 12.

105 *Id.* at 15.

106 Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

107 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), *cert. denied* 534 U.S. 952 (2001).

108 In fact, the Supreme Court denied certiorari, 534 U.S. 952, and affirmed a remarkable decision of the Court of Appeals for the District of Columbia Circuit that acknowledged the per se rule against tying but went on to hold that the per se rule would not apply to certain kinds of software products. United States v. Microsoft Corp., 253 F.3d 34, 89-95 (D.C. Cir. 2001).

109 Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. ___ (2007).

110 *Leegin*, Dissenting Opinion of Justice Breyer 17-23.

111 *Id.* at 17.

112 *Id.* at 17-18.

113 *Id.* at 18.

114 *Id.* at 18. Justice Breyer goes on to speculate about what might be called consequential reliance, asking, "What about malls built on the assumption that a discount distributor will remain an anchor tenant? What about home buyers who have taken a home's distance from such a mall into account?" *Id.* at 19. The spectacle of malls closing and home prices plummeting at a result of overturning *Dr. Miles* is, in my view, utterly fanciful.

115 Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. ___ (2007).

116 Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. ___ (2007).

117 Gonzalez v. Carhart, 551 U.S. ___ (2007).