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Twombly, Leegin and the Reshaping of Antitrust

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The Court's 2006 Term was an unusually active one for antitrust as the Court decided four substantial antitrust cases. Each of the cases will undoubtedly attract substantial academic attention.[1] The overall direction of the four cases is reasonably clear: plaintiffs face greater regulatory obstacles to reaching the court system (*Credit Suisse*), are more likely to get tossed from court without reaching a jury once they get there (*Twombly*), and will have to work harder to make out substantive antitrust liability (*Weyerhaeuser* and *Leegin*). Taken as a group, the cases represent a substantial raising of the hurdles that antitrust plaintiffs face, even, if each case represents a simple one-step extension of current Supreme Court doctrine.

The Court's antitrust term started with *Weyerhaeuser*[2] in which a unanimous Court extended its analysis of predatory pricing in *Brooke Group*[3] to predatory bidding. The standard predatory pricing case concerns investing in losses through below-cost sales to achieve monopoly power. One competitor is alleged to sell at a price below an appropriate measure of cost in an effort to drive other competitors from the market, so that once monopoly has been achieved, the first seller can jack up its prices and more than cover its early losses. Predatory pricing is the Loch Ness monster of antitrust: occasional

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[1] And like this article, some will address all four of the cases together. See Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 Competition Policy Intl 24 (Aut 2007).

[2] *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co, Inc*, 127 S Ct 1069 (2007).

[3] *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993).

sightings that on further investigation turn out to be something else. Predatory pricing has received substantial attention from economists who can, as with much of game theory, spin out intricate stories in which predatory pricing is sensible but find it hard to articulate which real-world conditions will actually sustain it.[4] Given that difficulty, it is hardly surprising how mixed the caselaw is on predatory pricing.[5]

But compared to predatory buying, predatory pricing is the easy case, the fastball down the middle. The much more unusual situation alleged in *Weyerhaeuser* is predatory buying: a producer buys more of an input than it needs in order to push input prices up, sufficiently to cause competing producers also buying the input to exit from the market. Going forward, that eliminates competition to buy the input, and the successful predator is left as the only input buyer (predating to achieve *monopsony*, as opposed to predatory pricing's push to *monopoly*). In *Weyerhaeuser*, the Court rejected the much more expansive approach formulated by the Ninth Circuit and instead applied its 1993 *Brooke Group* approach for predatory pricing to predatory buying.

In *Twombly*,[6] in a 7-2 decision authored by Justice Souter, the Court transplanted its prior decision in *Matsushita*[7] regarding summary judgment standards to a motion to dismiss for failure to state a claim (Rule 12(b)(6)). The Court concluded that an antitrust complaint could not merely allege conspiracy but instead must set forth a factual context that would allow illegal conspiracy to be distinguished from legal parallel independent action. *Matsushita* had implemented this rule for summary judgment motions, and *Twombly* extends that rule much earlier in the case to Rule 12(b)(6) motions.

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[4] Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Georgetown L J 2239 (1999-2000).

[5] *United States v AMR Corp*, 335 F3d 1109 (10th Cir 2003).

[6] *Bell Atlantic Corp v Twombly*, 127 S Ct 1955 (2007).

[7] *Matsushita Elec. Industrial Co v Zenith Radio Corp*, 475 US 574 (1986).

Justice Stevens dissented, joined, except in one part of his opinion, by Justice Ginsberg.

In *Credit Suisse,*[8] five justices joined an opinion for the Court by Justice Breyer in concluding that federal securities law "implicitly" precluded claims asserting antitrust violations in the sale of new securities. That result tracked the Court's prior decision in *Gordon*,[9] which addressed another securities/antitrust intersection, as well as the Court's more recent preference for regulatory schemes over antitrust as seen in *Trinko*.[10] Justice Stevens wrote a separate opinion concurring in the judgment, while Justice Thomas dissented and Justice Kennedy recused himself.

Finally, on the last day of the Term, after announcing its hotly-contested decision in *Seattle School District No. 1* on promoting racial integration in lower schools, the Court announced its 5-4 result in *Leegin*.[11] In an opinion by Justice Kennedy, the Court overruled its nearly-century-old decision in *Dr. Miles*[12] and held that contractual minimum resale price maintenance must be judged under the rule of reason and is no longer per se illegal. In contractual minimum RPM, a manufacturer—Sony—requires a retailer—Best Buy—to agree to sell a Sony HD TV set for a price at least as great as a floor-price set by Sony. In overturning *Dr. Miles*, the Court continued its trend of killing off old Supreme Court precedents treating a variety of practices as per se illegal. In addition, *Dr. Miles* was hard to square both with the Court's rule for nonprice vertical restraints adopted in

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[8] *Credit Suisse Securities (USA) LLC v Billing*, 127 S Ct 2383 (2007).

[9] *Gordon v New York Stock Exchange, Inc*, 422 US 659 (1975).

[10] *Verizon Communications, Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004).

[11] *Leegin Creative Leather Products, Inc v PSKS, Inc*, 127 S Ct 2705 (2007).

[12] *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373 (1911).

Sylvania and with its rule for unilateral price restrictions established in *Colgate*.[13]

So all four cases are comfortably situated as natural steps in the case-by-case evolution that is the common law of the Sherman Act as created by the Supreme Court. Filling in the gaps in the caselaw, or doctrinal tuckpointing as it were. But this minimalist description of these cases captures poorly the overall sense of these cases and misses substantial disagreement within the Court. As a group, these cases impose meaningful limits on where antitrust will operate. For better or worse—more on that below—each of these cases reduces the role of private antitrust lawsuits, including the role of private antitrust plaintiffs in initiating cases and the role of the courts in deciding those cases.

Twombly will shrink substantially the ability of antitrust plaintiffs to file a complaint and find conspiracies through discovery. Indeed, the Court's precise point was to eliminate what it saw as fishing expeditions in discovery. In our joint system of public and private enforcement of antitrust laws, this tilts the balance considerably towards public enforcers (the Antitrust Division of the Department of Justice, the Federal Trade Commission and state attorneys general). *Credit Suisse* explicitly looks to other governmental actors—most directly, the Securities and Exchange Commission—as it substitutes agency definition and enforcement of competition policy in securities markets for private antitrust lawsuits in lower courts. Both *Credit Suisse* and *Twombly* thus centralize antitrust enforcement, while *Leegin* and *Weyerhaeuser* reduce the scope of the substance of antitrust law itself. And while *Weyerhaeuser* was decided unanimously, *Leegin* was 5-4, with Justice Kennedy writing for this Term's usual majority and Justice Breyer writing for the expected dissenters. In a Term filled with disputes over the role that precedent

13 *Continental T.V., Inc v GTE Sylvania Inc*, 433 US 36 (1977); *United States v Colgate*, 250 US 300 (1919).

should play, *Leegin* ended the Term with a full-out fight over the rule of stare decisis in antitrust cases.

We should dispense with *Weyerhaeuser* and *Credit Suisse* quickly. *Weyerhaeuser* is a one-off: a unanimous decision on an issue—predatory bidding—that the Supreme Court hadn't confronted before and isn't likely to see again soon. *Credit Suisse* is oddly situated procedurally—that accounts for the dissent—and the result flows naturally from the Court's prior cases in the area. This isn't to say that there aren't deep issues about the interaction of general competition policy and more specific industry regulation—an important topic worthy of a separate paper (hint)[14]—but *Credit Suisse* doesn't raise that topic directly. So I will offer brief discussions of *Weyerhaeuser* and *Credit Suisse* before turning to more extended discussions of *Twombly* and *Leegin*.

Twombly raises some basic questions about the mechanics of an adversarial court system. Plaintiffs will often have much less information about possible liability than defendants. To situate that in antitrust, plaintiffs are rarely invited to the proverbial smoke-filled rooms in which price-fixing conspiracies are hatched. The best price-fixing conspiracies will be those in which the least is known publicly. This information asymmetry poses a dilemma if we intend to rely on private enforcement of antitrust statutes. Will we let private plaintiffs make bald assertions of conspiracy with few if any facts to substantiate their claims? If so, we can be sure that antitrust plaintiffs will delight in rifling the files of defendants hoping to discover something—*anything*—that will make out a claim. But the alternative to these fishing expeditions seems to be to allow some defendants to get away with antitrust violations or to hope that the government will target these conspiracies.

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[14] Dennis Carlton and I address many of these issues—though not the specifics of *Credit Suisse*—in our forthcoming paper *Antitrust and Regulation*, in Nancy Rose, ed, *Economic Regulation and Its Reform: What Have We Learned* (University of Chicago Press 2008).

Leegin raises two important issues. One is a mixed question of economics and institutional design: what is accomplished when a manufacturer and a retailer agree on a minimum retail price? This is a long-standing question, and *Leegin* recognizes that our best understanding of contractual minimum RPM makes it difficult to conclude that it is almost always pernicious. Given that, as a matter of first impression, we wouldn't treat contractual minimum RPM as per se illegal. But *Leegin* isn't a case of first impression—far from it—and that takes us to the second issue in *Leegin*.

The Court has bobbed and weaved with contractual minimum RPM since its 1911 decision in *Dr. Miles* condemning the practice as per se illegal, but it had always chosen to duck rather than revisit *Dr. Miles*. *Leegin* forced the Court to confront its approach to stare decisis, at least in antitrust, if not more broadly. For the Court, stare decisis turns, in part, on the textual context. When the Court interprets the Constitution, Congress can't overturn the Court's interpretation. If a prior constitutional ruling of the Court is to be overturned, the Court must do it itself. But for statutes, if the Court chooses one interpretation rather than another, Congress can always jump in and revise the statute to impose its preferred interpretation. Hence, says the Court, it should tread more lightly in overturning its own interpretations of statutes. I think that that is wrong in important ways and that the Court should move towards applying its approach to stare decisis in constitutional cases to statutory situations as well.

All of this takes us to the Court's tools in antitrust. One of those tools is specifying who the decision-maker will be in the first instance, and *Credit Suisse* reflects a preference for specialized industry consideration and the possibility of trading off competition concerns against other values. In *Twombly*, the Court has its hand on every possible lever of policy: direct control over the discovery rules and hierarchical control over the district courts implementing them, and yet the Court eschews sharp refined approaches for the much more blunt instrument of early-case dismissal. Finally, in *Leegin*, it isn't clear that the Court fully appreciates the tools in its hand, or if it does so, it certainly doesn't seem to want to acknowledge that. The decisions of the Court interpreting the Sherman Act define the default point for any subsequent congressional action. Setting that point is a critical tool for establishing antitrust policy, and the sharpness of that tool in turn is set by how the Court itself approaches stare decisis in antitrust.

I. Weyerhaeuser: Doctrinal Simplicity and the Engines of Competition

The claim in *Weyerhaeuser* is predation to monopsony. In English, Weyerhaeuser was said to be paying too much for the red alder sawlogs that it needed to produce lumber and was doing so to drive its competitors for those sawlogs from the market so that it could become the only purchaser of those logs. With those firms gone, Weyerhaeuser would have a monopsony over the red alder sawlogs—it would be the only *buyer* of those logs—and it could then reduce the price that it would pay for those logs. This is predatory bidding—predation to monopsony—the flipside of the much more familiar, if still elusive in reality, predatory pricing, which is dropping sale prices initially to drive competing sellers from the market so as to emerge as the sole *seller* of a product.

Consider the facts of *Weyerhaeuser* itself. Ross-Simmons operated a hardwood-lumber sawmill in Washington. Sawmills turn logs into lumber, and indeed raw logs account for 75% of a sawmill's total cost. Ross-Simmons processed red alder sawlogs at its mill. Roughly two decades after Ross-Simmons commenced operations, Weyerhaeuser entered the northwestern hardwood-lumber market. Over time, Weyerhaeuser expanded its operations, and by 2001, it was purchasing roughly 65% of the alder logs available for sale in the Pacific Northwest.[15]

[15] *Weyerhaeuser*, 127 S Ct at 1072.

Ross-Simmons saw a nefarious intent in this pattern and filed an antitrust action alleging that Weyerhaeuser had used "its dominant position in the alder solid market to drive up the prices for alder sawlogs to levels that severely reduced or eliminated the profit margins of Weyerhaeuser's alder sawmill competition."[16] We now see where we are. Ross-Simmons is not alleging that Weyerhaeuser was seeking market power in the lumber market, that is, the market for finished goods produced by sawmills.[17] Instead, the claim is that Weyerhaeuser was trying to limit competition in the purchasing of alder sawlogs. With Ross-Simmons and other firms like it gone, Weyerhaeuser would be able to dictate prices that it would pay to purchase alder sawlogs. With its newly-acquired monopsony power, it would push those prices down, and depending on how price sensitive the alder sawlogs producers were, alder sawlogs sales would drop, as would Weyerhaeuser's production of finished lumber. But Weyerhaeuser would make sufficient profits from reducing its input prices that dropping sales of lumber would be profitable for it.

Competition over inputs is a critical way in which we organize production in the most efficient possible fashion. At the market price, a firm that wishes to purchase more of the input needs to offer a higher price. Doing so will lead to greater supply of that input, but also may cause a less efficient user of the input to reduce its use if it can't make money facing higher input prices. Input prices therefore serve as the medium we use to allocate production away from less efficient firms towards more efficient ones. This also means that we will see a standard pattern in these cases, where less efficient firms will have strong incentives to complain about the tactics being used by more efficient competitors.

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[16] Id at 1073.

[17] Although the Court recognized that predatory bidding could lead to market power in both the input market and the output market, id at 1076 n 2, the case appears to have been litigated on the premise that Weyerhaeuser was not seeking market power in the finished lumber market.

The District Court presented the jury with the following instruction. Weyerhaeuser behaved anti-competitively if it "purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price."[18] The appearance of the f-word should almost always make us nervous, but here we can probably offer an interpretation more congenial to economics. Presumably the notion of a "fair" price was intended to capture a price unaffected by the alleged predatory behavior.

Focus on how the jury instruction operates in practice. Weyerhaeuser buys more sawlogs. What does it do with them? Weyerhaeuser either sticks them in its inventory or processes them and converts them into finished lumber. If it inventories a sawlog, it incurs a cost but no revenue. If it processes it, it then sells the finished lumber and we can calculate profits or losses. "Purchase more logs than it needed" sounds like Weyerhaeuser was stockpiling sawlogs. Weyerhaeuser presumably has some inventory of sawlogs, but under Ross-Simmons's theory Weyerhaeuser's inventory should have been growing as it was trying to cut off Ross-Simmons's supply of logs by cornering the market. Attempts to corner the market are highly dependent on the elasticity of supply, as the Hunt brothers were dismayed to learn in their 1980s attempt to corner the silver market, though everyone agrees that the supply of red alder sawlogs—which take many years to grow—is relatively inelastic in the short run.

Confronted with this situation, the Court did exactly what we should have anticipated. In its predatory pricing cases, the Court has made clear that we should be particularly concerned about antitrust doctrine that interferes with the key levers of competition that routinely produce benefits for consumers.[19] Lowering prices is almost always good for consumers, and we should be nervous about the

[18] Id at 1073.

[19] *Brooke Group*, 509 US at 223.

possibility that the fear of antitrust liability will cause even a moment's hesitation about lowering a price. *Brooke Group* established a two-part test for predatory pricing. First, prices must be shown to be below cost. What cost? The Supreme Court won't tell us—"we again decline to resolve the conflict among the lower courts over the appropriate measure of cost"[20]—but presumably we are talking about marginal cost, or, perhaps more accessibly as in *Brooke Group* itself, average variable cost. With below-cost pricing made out, we turn to the second prong, which requires "a demonstration that the competitor has a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."[21]

In the predatory bidding context at stake in *Weyerhaeuser*, consumers benefit from the competition among efficient and less-efficient producers. Inefficient producers lead to higher prices and consumers should want those producers driven from the market by more efficient producers. Consumers want competition and want that output produced by the most efficient producers. The jury instruction in *Weyerhaeuser* threatened to interfere with that process by punting a question about fairness to the jury, and it is hard to imagine an instruction that would strike more fear into the heart of a producer competing for inputs. The Court recognized that and moved to simplify antitrust doctrine by synchronizing the tests for predatory pricing and predatory bidding by applying the *Brooke Group* test to both cases.[22]

[20] Id 222 n 1.

[21] Id at 224.

[22] For additional commentary on *Weyerhaeuser*, see John B. Kirkwood, *Controlling above-cost predation: an alternative to* Weyerhaeuser *and* Brooke Group, (unpublished manuscript, 2007), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027261 (visited Jan 16, 2008); Keith N. Hylton, Weyerhaeuser, *Predatory Bidding and Error Costs* (Boston University School of Law Working Paper No 08-03, 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084106 (visited Jan 24, 2008) (arguing that there are distinctions between predatory bidding and predatory pricing but that

II. Credit Suisse: Moving Competition Policy to Agencies

Two federal statutes might apply to the conduct in question: how are we to determine which applies? In some cases, Congress may address this directly by including an antitrust "savings" clause, as it did in the Telecommunications Act of 1996.[23] That doesn't mean, of course, that there won't be messy cases,[24] but at least Congress, as author of both federal statutes, will have made clear its plan for how the statutes should work together. But if Congress hasn't addressed this directly, what should we do? This isn't a question specific to antitrust nor is it a new question for antitrust—we faced this question in trying to mesh together the interstate Commerce Act, passed in 1887, and the Sherman Act (passed in 1890)[25]—but it is the issue in *Credit Suisse*.

In January, 2002 a group of investors sued ten investment banks alleging that their sales practices for initial public offerings (IPOs) violated the antitrust laws. The complaint stated that the commissions earned by the investment banks were being established noncompetitively, that investors were being forced to buy less attractive IPOs to get access to the really good ones—a tying claim—and that investors were being forced to promise to place bids in the

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concerns about court mistakes justify applying the *Brooke Group* doctrine to cover both); Thomas A. Lambert, Weyerhaeuser *and the Search for Antitrust's Holy Grail*, 2006-2007 Cato S Ct Rev 277 (arguing that *Weyerhaeuser* implicitly addresses the circumstances under which a more efficient rival can be excluded consistent with Section 2 of the Sherman Act); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light* (unpublished manuscript, 2007), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975992 (visited Jan 16, 2008).

[23] The note following 47 USC § 152 provides that "[n]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

[24] See *Verizon Communications, Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004).

[25] *United States v Trans-Missouri Freight Association*, 166 US 290 (1897); Carlton and Picker, *Antitrust and Regulation* (cited in note 14).

aftermarket after the IPO at prices higher than the IPO price (so-called laddering). The investment banks moved to dismiss the complaint on the ground that the federal securities laws barred the antitrust claims. The district court did so, but the Second Circuit reversed, and that took the case to the Supreme Court.

Justice Breyer, along with five other justices, concluded that the securities laws were "clearly incompatible" with the antitrust laws in these circumstances. Justice Kennedy didn't participate; Justice Stevens wrote a separate opinion concurring in the judgment; and Justice Thomas dissented. We might start with Justice Thomas's dissent. He noted that the Court had framed *Credit Suisse* as a case of whether the securities laws "implicitly" precluded application of the antitrust laws. Of course, implicit preclusion arises only if the federal statute doesn't address the matter explicitly. What do the securities laws say?

The 1933 and 1934 securities laws provided rights that were to be "in addition to any and all other rights and remedies that [might] exist in law or in equity"[26] and therefore presumably in addition to the Sherman Act (1890), the Clayton Act (1914) and the Federal Trade Commission Act (1914). So the core antitrust principles continue to apply and the Second Circuit was right to allow the IPO antitrust lawsuit to move forward. Next case. But Justice Thomas's position faced two hurdles. The Court majority believed that Justice Thomas's argument hadn't been presented below. Moreover, the argument was inconsistent with how the Court had approached the question of implicit preclusion in its prior cases in the area, in particular in *Gordon* and *NASD*.[27] All of that allowed the Court to move forward with its analysis of implicit preclusion, but also suggests that these issues will be argued differently the next time the

[26] 15 USC §§ 77p(a), 78bb(a).

[27] *Gordon v New York Stock Exchange, Inc*, 422 US 659 (1975) and *United States v National Association of Securities Dealers, Inc*, 422 US 694 (1975).

Court confronts a possible conflict between the securities laws and antitrust.

Justice Breyer synthesized *Gordon* and *NASD* as turning on four considerations. He focused on "(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." He added that the analysis should also consider whether the practices in question "lie squarely within an area of financial market activity that the securities laws seek to regulate."[28]

With this test in hand, the Court set off on relatively brief and unremarkable examination of the regulations that control initial public offerings. This is an area of extensive oversight by the Securities and Exchange Commission. Indeed, a central purpose in passing the 1933 and 1934 securities acts and creating the SEC was to create a substantial regulatory apparatus to control IPOs. The SEC has broad regulatory authority over IPOs and exercises it extensively. That is true generally but also true with regard to the IPO underwriting syndicates challenged in the original complaint in this case. As the Court emphasized, the SEC draws exceedingly fine lines between the allowed and the forbidden, which in turn created a severe risk that courts acting on antitrust lawsuits will interfere with the authority of the SEC.

In its two most recent cases at the intersection of antitrust and regulation—*Trinko* and *Credit Suisse*—the Court has shown a high level of deference in favor of the regulatory scheme and in limiting the application of the antitrust laws. With regulations generally receiving a high level of deference under the *Chevron* doctrine, *Trinko* and *Credit Suisse* represent push towards entrusting competition

[28] *Credit Suisse*, 127 S Ct at 2392.

policy to specialized regulators. At a minimum, that shifts control over chunks of competition policy from courts to agencies, but it is probably a shift in emphasis as well. Specialized regulators will typically weigh competition policy as just one factor among many and, compared against a baseline of court-enforced antitrust law, this almost certainly represents a step back for the role of competition policy in these regulated industries.[29]

III. Twombly: How Do You Plead What You Don't Know?

In *Bell Atlantic Corp. v. Twombly*, a 7-2 decision, the Court ruled that the mere assertion in a complaint of an underlying agreement violating Section 1 of the Sherman Act was insufficient to withstand a motion to dismiss when the parallel behavior in question could just as easily be explained as independent behavior. The majority opinion, authored by Justice Souter, emphasized the high costs associated with antitrust discovery. In reaching its conclusion, the Court "retired"—as it put it—its 1957 decision in *Conley v. Gibson,* had embraced "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[30] *Twombly* will be asserted routinely in efforts to dismiss antitrust complaints, and it may have broad effects outside of antitrust as well.[31]

Twombly focuses on the pleading requirements established by the Federal Rules of Civil Procedure, and in particular, that staple of

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[29] For additional commentary on *Credit Suisse*, see Keith Sharfman, Credit Suisse, *Regulatory Immunity, and the Shrinking Scope of Antitrust* (unpublished manuscript, 2007), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997405 (visited Jan 16, 2008).

[30] *Bell Atlantic Corp*, 127 S Ct at 1968.

[31] For additional commentary on *Twombly*, see Scott Dodson, *Pleading Standards after* Bell Atlantic v. Twombly, 93 Va L Rev in Brief 121 (2007) (online at http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf) (visited Jan 16, 2008).

first-year civil procedure, Rule 8 of the FCRP. That rule requires that a pleading set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[32] What might that look like? Generations of students have considered Form 9 and especially its second sentence: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway"[33] That is all it says. Nothing about how the car was being driven—too fast? swerving?—just where and when and only one more word—"negligently."

What does all of that tell us about the complaint in *Twombly*? The oral argument focused on Paragraph 51 of the complaint.[34] That paragraph alleged:

> In the absence of any meaningful competition between the RBOCs in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent entry in their respective local telephone and/or high speed internet service markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[35]

If you don't speak telephonese, "RBOCs" are the Regional Bell Operating Companies, meaning, to again search for English, the local

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32 FRCP 8.

33 FRCP Form 9.

34 Oral Argument Transcript, *Bell Atlantic Corp v Twombly*, No 05-1126, *3, 22, 41 (Nov 27, 2006).

35 *Bell Atlantic Corp*, 127 S Ct at 1970 n 10.

phone companies that emerged from the break-up of the original AT&T, while a "CLEC" is a competitive local exchange carrier, meaning a new entrant into the landline phone market. The core allegation is one of market division: you take the East, I'll take the West, and we won't compete with each other. Market division is one of the dwindling number of *per se* violations of Section 1 of the Sherman Act.[36]

Of course, a plaintiff actually has to *prove* that Section 1 of the Sherman Act was violated, that is, that there actually was a contract, combination or conspiracy in restraint of trade. Independent parallel behavior isn't enough—even if the defendants are watching each other quite carefully. Paragraph 51 of the complaint alleges parallel behavior—the RBOCs have not entered each other's markets—and then—giant puff of smoke and POOF—agreement. We are given no facts of the agreement—where and when and what brands of cigars were being smoked in the proverbial smoke-filled room?—but just a bald assertion that an agreement exists. Other parts of the complaint try to make out why the RBOCs should have entered and why not entering was against their own interests, but there is ultimately little more than an allegation of parallel behavior and then a claim of agreement.

Even prior to *Twombly*, it was clear that more than that would be required at trial to win an antitrust case. The Supreme Court's 1976 decision in *Matsushita* requires that "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[37] We will not just let juries flip coins: if the plaintiff can't do more than just assert agreement, if the plaintiff can't *with evidence* exclude the possibility that the defendants were acting

[36] *United States v Topco Associates, Inc*, 405 US 596 (1972).

[37] *Matsushita Elec. Industrial Co*, 475 US at 588 (quoting *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984)).

independently, the plaintiff loses, and indeed, the judge must not let the case go to the jury.

But *Matsushita's* standard was announced in the context of summary judgment, after the plaintiff had had the opportunity to conduct discovery. What should we insist upon at the time that the complaint is filed? Return to Form 9 and focus on who knows what and what Form 9 tells us about the role of information asymmetry—what I know that you don't know—in pleading. Many of the core facts of the accident are known equally to both parties: the date, the location, the fact that a car struck a pedestrian. Presumably, both the plaintiff and the defendant have equal access to that information, and Form 9 seems to require that the plaintiff plead the facts known to her so as to give notice of the claim alleged.

But one set of facts isn't well-known to the plaintiff, that is, exactly how the car was driven. Was the driver yakking away on his cell phone and not paying sufficient attention? Did the driver have a child in the back seat and turn at just the wrong moment to hand back a sippy cup? We don't know and neither does the plaintiff. That is the key point. Form 9 tells the plaintiff to plead the facts that she can know before she undertakes discovery. She does exactly that in Form 9. But she can't know the underlying facts that would give rise to a finding of negligence, and, as to that, Form 9 lets the plaintiff assert—in just one word—that the car was driven "negligently." Justifying that at trial will require more facts, facts that the plaintiff does not have access to when the complaint is filed, facts that will have to emerge through the process of discovery and trial.

Discovery lets the plaintiff get at the underlying facts that are not available to her when the complaint is drafted and lets her move beyond an uninformative assertion of legal liability—"negligently," as Form 9 puts it—to proof of the underlying facts that demonstrate liability—that the driver was reaching for a sippy cup when the accident occurred. That evidence is initially available only to the defendant, and the lesson of Form 9 is that while we make plaintiffs plead the facts that are available to them without discovery, we don't make plaintiffs plead facts that are available only to the defendant.

The majority opinion in *Twombly* makes very little of this. Form 9 is discussed in footnote 10 of the majority opinion:

> Apart from identifying a seven-year span in which the §1 violations were supposed to have occurred ..., the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. … Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the §1 context would have little idea where to begin.

This discussion misses a number of crucial points. We should first put the "answer" problem to one side. As a look at any recently-filed answer makes clear, we know how the defendant is going to answer: the defendant is simply going to deny the allegation. Focus instead on what Form 9 says. As Justice Stevens notes in his dissenting opinion, the bare allegation of negligence in Form 9 would have been a conclusion of law under old-school pleading.[38] But it is exactly what Form 9 contemplates and nothing in the word "negligence" gives the defendant any specific sense of the negligence alleged. It is asserted, with nothing more. Footnote 10 of the majority opinion skips over this entirely in emphasizing that the plaintiff in the Form 9 exemplar

[38] *Bell Atlantic Corp*, 127 S Ct at 1977.

lists many facts. Yes, indeed; probably all of the facts known to the plaintiff, but nothing about how the car was driven—something unknown to the plaintiff—other than that it was driven "negligently."

If we turn back to antitrust, the assertion of negligence in Form 9 is no less bare than the standard assertion of the existence of a conspiracy in an antitrust complaint. The problem, of course, is the one-sidedness of the information available on the existence (or non-existence) of a conspiracy, a point that Justice Stevens emphasizes in his dissent.[39] Often the plaintiffs won't be able to get at the facts of conspiracy—the who, what when and where contemplated by footnote 10 of the majority opinion—without discovery.

Of course in both cases—in Form 9 and the complaint in *Twombly*—the plaintiffs make a critical assertion—negligence in Form 9 and a contract, combination or conspiracy in paragraph 51 of the *Twombly* complaint—and it isn't obvious on what basis the assertion is made. Paragraph 51 does little more than parrot the language of Section 1 of the Sherman Act. Does Rule 8 require no more than a simple assertion that Section 1 has been violated ("On information and belief, Plaintiff asserts that Defendant has violated Section 1 of the Sherman Act")? In the world of Form 9, the accident itself allegedly has taken place and perhaps that alone is enough, if we assume that most accidents arise from some sort of wrong. In contrast, paragraph 51 focuses on the *absence* of entry into markets, and that absence might arise from illegal agreement or from countless other causes. The *Twombly* complaint offers little more than the plaintiff's belief that such an agreement exists and will be confirmed only if discovery is permitted.

And remember that FRCP 11 provides that the attorney's signature on the complaint acts as a representation to the court that to the best of the attorney's information and belief the assertion of an

[39] Id at 1983.

agreement "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." If the attorney can't specify any of that evidentiary support in drafting the complaint, how can she sign the pleading and comply with Rule 11? For the experienced attorney, the likely existence of agreement might be just as self-evident as the likely existence of negligence in the accident in Form 9.

So we face something of a conundrum, almost certainly wanting a pleading system that demands more than just "they violated Section 1" and yet recognizing that the relevant information about liability will be systematically more available to one side than the other. A central point of the Federal Rules of Civil Procedure—rules controlled by the Supreme Court—is to figure out exactly how to manage that one-sidedness. The critical question isn't how to frame the answer—those rules will track the leniency or severity of our rules for framing the complaint—but rather how to frame discovery, and more generally, how to manage the one-sidedness of information. It is the fear of discovery run amok that drives the majority opinion,[40] but the Court offers no guidance as to how matters might be improved.

It is hard to imagine an area that the Court controls more completely. Under the Rules Enabling Act, the rules of civil procedure are squarely in the Supreme Court's hands.[41] If the current discovery rules don't work—in antitrust cases or other cases—the Court should fix them. This is a problem of institutional design entrusted to the Court by Congress. The opinion in *Twombly* acts as if the discovery rules come from Mars rather than from the Supreme Court itself. The Court majority is correctly concerned that vague complaints can be used as fishing expeditions, though note that the plaintiff proposed phased discovery starting with whether an

[40] Id at 1967-68 n 6.

[41] 28 USC § 2072(a).

agreement existed. If the Court believes that district court judges can't be trusted to manage discovery or that sensible rules cannot be crafted, it should say so. Maybe, in fact, that is effectively what *Twombly* says.

Note where that puts us. Antitrust laws are enforced through a mix of private and public efforts. *Twombly* limits the efficacy of private lawsuits. The Court majority does not seem to recognize the fundamental problem that the critical information regarding the existence or nonexistence of a possible conspiracy resides in the hands of potential defendants. Private litigation substitutes, at least in part, for public enforcement or regulation. The federal government has broad, but not unlimited, authority to serve civil investigative demands (CIDs) prior to bringing an antitrust action.[42] *Twombly* shrinks the domain of private plaintiffs and it does so without even a passing thought about what that will do to the overall level of antitrust enforcement.

IV. Leegin: Statutory Stare Decisis for Strategic Judges

The decision in *Leegin* was announced on June 28, 2007, the last day of the 2006 Term. *Leegin* brings to a close a nearly 100-year saga of minimum resale price maintenance. That story is worth telling on its own, but the case also reveals sharp fault lines over the role of stare decisis in antitrust.[43]

[42] 15 USC § 1312.

[43] For additional commentary on *Leegin*, see Mark D. Bauer, *Whither* Dr. Miles? (unpublished manuscript, 2007), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009972) (visited Jan 16, 2008); Shubha Ghosh, *Vertical Restraints, Competition and the Rule of Reason*, (unpublished manuscript, 2007), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005380) (visited Jan 16, 2008); Lino A. Graglia, Leegin Creative Leather Products, Inc. v. PSKS, Inc.: *The Strange Career of the Law of Resale Price Maintenance* (University of Texas Law and Economics Research Paper No 115, Nov 2007, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028562 (visited Jan 16, 2008) ("*Strange Career*"); Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*,

A. MINIMUM RPM: FROM DR. MILES AND COLGATE TO LEEGIN

The antitrust statutes say very little on their own. Sections 1 and 2 of the Sherman Act set out only the most basic framework and thus much of the actual practice under the statute arises through judge-made interpretations of the broad phrases of those sections. Section 1 applies to joint activity—"every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade"—while Section 2 applies to single-firm activity—monopolization. Antitrust law is common law, that is, judge made law in which courts revisit recurring fact patterns. In that framework, the job of the Supreme Court is to establish rules that can be implemented by lower courts and which in turn can guide economic activity. And, for the joint activities reached by Section 1, the heart of that analysis over the last century has been the division of particular practices into those that are per se illegal—known to be illegal without extensive consideration or fact-finding in a particular case—and those that must receive more considered attention under the rule of reason.

Section 1 always has been and remains most concerned about horizontal practices, meaning those among firms that are direct competitors. And within that group, horizontal price-fixing has been the most pernicious practice of all.[44] But contracts among

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(Arizona Legal Studies Discussion Paper No 07-25, Jan 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033440 (visited Jan 16, 2008); Ittai Paldor, *Rethinking RPM: Did the Courts Have It Right All Along?*, (unpublished SJD dissertation, University of Toronto, 2007), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=994750 (visited Jan 16, 2008).

[44] *United States v Socony-Vacuum Oil Co*, 310 US 150, 224 n 59 (1940) ("Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."); *United States v Trenton Potteries Co*,

competitors are often artificial: the leading retailers of the day don't usually deal directly with each other. But retailers contract with manufacturers all of the time, or, perhaps with wholesalers who in turn have agreements with manufacturers. These sorts of *vertical* contracts will arise perfectly naturally unless manufacturers fully vertically integrate, meaning that Kellogg not only produces cereal in Battle Creek, Michigan but that it sets up Kellogg stores across the land to sell its cereal directly to consumers. We know that to be quite unusual, which suggests that there are frequently economies of scale and scope in retailing. It is more efficient to bring together Kellogg's many different brands along with those of General Mills and others, and add also milk, sugar, fruit—things that might go into a bowl of cereal—along with thousands of other products in a modern grocery store.

How should Section 1 approach these necessary vertical transactions? In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[45] the Court put in place a rule that would last nearly a century. Dr. Miles sold proprietary medicines through a network of dealers. One level down it entered into what it denominated as "Consignment Contracts—Wholesale." Consignees in turn were expected to deal with retailers who in turn sold to the public. And the retailers themselves entered into direct "Retail Agency Contracts" with Dr. Miles. So as Dr. Miles's potions traveled down the chain of commerce each transfer prior to sale to the general public was to be made to a party in a direct contract with Dr. Miles.

The consignment contract between Dr. Miles and its wholesalers seemed to contemplate that title in the medicines would remain with Dr. Miles even though possession had been transferred to the wholesaler. Put differently, the consignment contract was an agency contract making it possible for Dr. Miles as principal to direct how its agent wholesalers would act. The majority opinion in *Dr. Miles* seems

273 US 392 (1927).

[45] 220 US 373 (1911).

to waffle on this a bit based on some sloppy statements made by the plaintiff to the Court, but Justice Holmes in his dissenting opinion appropriately saw no reason to do anything other than give the consignment contract is most natural reading.[46]

Dr. Miles wanted to use its continuing control over title to allow it to set the prices which the medicines would be sold by wholesalers to retailers. The contract specified minimum sales prices, meaning that wholesalers could sell to retailers on Dr. Miles's behalf for a price not less than the specified contractual price. But Dr. Miles wanted to control not just wholesale prices—the prices paid by retailers to Dr. Miles—just as it would as if it acted without wholesalers, but also retail prices, meaning the prices paid by consumers to retailers. Again, Dr. Miles could have done that had it run only a mail-order business, and it wanted to achieve that same control over prices while operating through intermediaries. Thus, the retail agency contracts specified minimum sales prices as well.

But, and now we get to legal niceties, the retail agency contracts seemed to contemplate that the retailer actually purchased the medicines and then resold them to its customers. So when possession passed from Dr. Miles to its wholesalers, title didn't pass, but when possession passed from a wholesaler to a retailer, title passed as well. In the agency contract and notwithstanding the passing of title, the retailer agreed that it wouldn't sell at less than the full retail price as printed on the packages by Dr. Miles. So we have the passage of title and then a separate promise about the sales prices for the goods then owned by retailers.

When a former wholesaler of Dr. Miles outside the network of contracts bought from current consignee wholesalers and retailers within the contracts and then sold for less than the full retail price,

[46] *Dr. Miles*, 220 US at 409-410 ("That they are agents, and not buyers, I understand to be conceded, and I do not see how it can be denied. We have nothing before us but the form and the alleged effect of the written instrument, and they are both express that the title to the goods is to remain in the plaintiff until actual sale is permitted by the contract").

Dr. Miles sued alleging tortuous interference with contract and fraudulent dealing. That put the above contractual arrangements in front of the Court. The Court saw two problems. First, restraints on alienation were generally invalid, and the contracts in issue didn't fall within the narrow class of contracts excepted from that general rule.[47] Second, the Court understood Section 1 of the Sherman Act to condemn price fixing and saw that the contractual arrangements prevented price competition just as much as would a purely horizontal agreement among retailers.[48] That a manufacturer could choose not to sell at all or could choose not to sell through others was irrelevant; if the manufacturer chose to sell to retailers who then sold to consumers, the manufacturer had to accept whatever legal burdens came with its distribution choice.

But the Court complicated the analysis in *Dr. Miles* with its 1919 decision in *Colgate*.[49] Colgate had been indicted for forming a combination to fix resale prices by preventing its wholesale and retail dealers from selling below the minimum prices set by Colgate. Put that way, this seems like an easy case under *Dr. Miles*, and so the government argued to the Court. But confronted with a rather tangled district court opinion[50] and, as Lino Graglia has noted, with the guidance of former Justice Charles Hughes, the author of the *Dr. Miles* opinion who had since left the Court and then returned as an advocate (after running for President!),[51] the Court pieced together a

[47] Id at 404-07.

[48] Id at 408 ("As to this, the complainant can fare no better than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other").

[49] *United States v Colgate*, 250 US 300 (1919).

[50] Under the Criminal Appeals Act, the United States was allowed to take a direct appeal to the Court from the district court "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." Act March 2, 1907, 34 Stat 1246.

[51] Graglia, *Strange Career* at 12 (cited in note 43).

different story. On the one hand, Colgate was said to enter into no contracts with its dealers, but on the other, Colgate had combined with them and received their "assurances and promises" regarding the required minimum prices. The Court expressed "serious doubts" about what to make of all of that, but thought that the best understanding of the case was that Colgate had done no more than exercise its recognized right to choose not to deal with anyone, including the right not to deal with any person who had sold at a price below those announced by Colgate. Unilateral action regarding minimum retail prices didn't violate the joint action requirement of Section 1 of the Sherman Act (*Colgate*), while joint action on the same did (*Dr. Miles*).[52] A manufacturer implementing *Colgate*-style minimum RPM might face liability under Section 2 of the Sherman Act, which reaches unilateral actions, but Section 2 requires monopolization and not just the market power that suffices for a violation of Section 1.

It didn't take long for the Court to confront the difficulties of separating *Dr. Miles* and *Colgate*, with the Court returning to the question repeatedly in *Schrader's Son* (1920), *Frey & Son* (1921), *Beech-Nut* (1922) and *General Electric* (1926).[53] In *Schrader's Son*, the Court quoted extensively from the district court's opinion on the "distinction without a difference" between *Colgate* and *Dr. Miles*, before dismissing that analysis given the "obvious difference" between

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[52] As the Court put it, "[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." As for *Dr. Miles*, "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." *Colgate*, 250 US at 307-08.

[53] *United States v A. Schrader's Son, Inc*, 252 US 85 (1920); *Frey & Son, Inc v Cudahy Packing Co*, 256 US 208 (1921); *Federal Trade Commission v Beech-Nut Packing Co*, 257 US 441 (1922); *United States v General Electric Co*, 272 US 426 (1926).

the situations presented.[54] Justices Holmes and Brandeis dissented without opinion. In *Frey & Son*, a private antitrust action was brought under *Dr. Miles* seeking damages and a jury verdict was returned in favor of the plaintiff. In a 6-3 decision, the Court concluded that the Fourth Circuit had misunderstood *Colgate* and *Schrader's Son* in reversing the district court, but that the district court too had misunderstood *Colgate* in formulating the key jury instruction.

Beech-Nut added a new wrinkle, as the Federal Trade Commission initiated an action against minimum RPM under its authority under Section 5 of the Federal Trade Commission Act to condemn unfair methods of competition. The Second Circuit once again tried to navigate *Dr. Miles* and *Colgate*. It understood *Dr. Miles* to turn on the existence of an agreement in writing, while in *Beech-Nut*, there was no more than a tacit understanding regarding Beech-Nut's desire for minimum resale prices and the likely consequences if dealers failed to meet those prices. The Second Circuit thus understood the Beech Nut plan to be protected under *Colgate*.[55] Not so, said the Court, in a 5-4 decision, with both Justices Holmes and Brandeis siding with the dissenters. Written contracts of the sort used in *Dr. Miles* were not required, and indeed the FTC had found none in its consideration of Beech-Nut's sales program. Instead, a course of dealing would suffice to show a combination, so long as that dealing established more than just the mere refusal to sell protected under *Colgate*. Of course, *Colgate* itself involved more than just a naked refusal to sell, but the majority didn't dwell on that point. In his dissenting opinion, Justice Holmes noted that whatever one might think generally about permitted vertical arrangements, the Federal Trade Commission faced the greater burden of showing that the practice in question was an "unfair" method of competition, and that

[54] *A. Schrader's Son, Inc*, 252 US at 99.

[55] *Beech-Nut Packing Co*, 257 US at 451.

it could hardly be unfair for a manufacturer to control the extent to which its own goods competed with themselves.[56]

Finally, in *General Electric*, the Court held that if a manufacturer entered into genuine agency contracts with wholesalers and retailers, the manufacturer could establish final-market sales prices for its goods (incandescent light bulbs in this case). The government pressed *Dr. Miles*, but the Court found that case to be one of true sales dressed up as agency, whereas General Electric's contracts created genuine agents.

Think of *Dr. Miles (*1911) through *General Electric* (1926) as the first key window for the Court on minimum resale price maintenance. Jump forward to consider a second key window, say one defined by *Parke, Davis* (1960) to *Sylvania* (1977). With the Court's 1960 decision in *Parke, Davis*, *Colgate* hung by a thread, if that.[57] In a delicious irony, the Court had worked its way up from the snake-oil medicines of Dr. Miles to the modern pharmaceuticals of Parke, Davis, once the world's largest drugmaker.[58] Pursuant to what it understood to be its rights under *Colgate*, Parke had used its wholesale and resale catalogues to announce a minimum RPM policy. It did so only after consulting counsel who emphasized the need to proceed unilaterally and without agreement, thereby navigating between *Colgate* and *Dr. Miles*.[59] In the Court's view, Parke had overstepped the *Colgate* line when it sent to wholesalers the names of retailers who were no longer to receive Parke's products. But for the three dissenting justices (Harlan, Frankfurter and Whittaker), the

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[56] Id at 457 ("And to come back to the words of the statute I cannot see how it is unfair competition to say to those to whom the respondent sells and to the world, you can have my goods only on the terms that I propose, when the existence of any competition in dealing with them depends upon the respondent's will. I see no wrong in so doing, and if I did I should not think that it is a wrong within the possible scope of the word unfair").

[57] *United States v Parke, Davis and Co*, 362 US 29 (1960).

[58] For discussion of Parke, Davis's history, see http://www.pfizer.com/about/history/pfizer_warner_lambert.jsp.

[59] *Parke, Davis*, 362 US at 33.

Court had sent *Colgate* to its "demise." purporting to "profess respect for Colgate and eviscerate it in application."[60]

But if *Parke, Davis* turned *Colgate* into a zombie—condemned to live among the walking dead—it also had the consequence of pushing manufacturers away from vertical price restraints and towards nonprice vertical restraints. That in turn led to the Court's landmark 1977 decision in *Continental T.V., Inc. v. GTE Sylvania Inc*.[61] which ended more than a decade of per se ping pong and established a new framework for evaluating certain nonprice vertical restraints. And, though it took three decades, the path from *Sylvania* to *Leegin* was reasonably clear, as Justice White's concurring opinion in *Sylvania* recognized in 1977.

We should start with the Court's 1963 decision in *White Motor*.[62] In a 5-3 decision, the Court declined to find that territorial restrictions in vertical arrangements—a truck manufacturer defining territories for its dealers—were per se illegal.[63] The Court distinguish price-fixing agreement—both the horizontal agreements at the heart of the Sherman Act and the vertical agreements condemned by *Dr. Miles*—but believed it had too little information to assess the actual effects of dealer territories. A trial was required to create a richer record for evaluation.

But four years later, the Court took a different path in its decision in *Schwinn*.[64] In a case argued for the government by Richard Posner, the Court once again considered dealer territories imposed by a manufacturer, in this case, the well-known bicycle maker. The Court, reaching back to its analysis in *Dr. Miles* and *General Electric*, turned the analysis of the vertical territorial restrictions on whether the

[60] Id at 49, 57.

[61] 433 US 36 (1977).

[62] *White Motor Co v United States*, 372 US 253 (1963).

[63] Id at. 261, 264

[64] *United States v Arnold, Schwinn & Co*, 388 US 365 (1967).

manufacturer had passed title to the good down the chain of distribution. If title was passed, any restraint by the manufacturer was per se illegal.[65] But if the manufacturer retained title, so that its distributors acted as its agents, the restraint would be evaluated under the rule of reason, as *White Motor* contemplated.

Schwinn set a rule for the ages. Actually, *Schwinn* barely made it a decade. In *Sylvania* (1977), the Court overruled *Schwinn* and returned nonprice vertical restraints to the rule-of-reason analysis that had controlled prior to *Schwinn*.[66] Sylvania had re-organized its distributor program for the TV sets it manufactured and had boosted its share of the market from 1% to 5%, a still-piddling share against then-dominant RCA, which had a 70% market share. An unhappy Sylvania distributor had asserted an antitrust claim against Sylvania for the territorial limits it had imposed on its franchisees. The Ninth Circuit struggled to permit the restriction consistent with *Schwinn*, but the Supreme Court wouldn't play that game and instead overturned *Schwinn*. The decision wasn't unanimous: Justices Brennan and Marshall would have adhered to *Schwinn*, while Justice White thought that *Schwinn* could be distinguished. Justice White was particularly concerned that the opinion in *Sylvania* put at risk *Dr. Miles* ("[t]he effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints").[67]

It is important to trace the path here. We spent the better part of four decades—say 1920 to 1960—trying to make *Dr. Miles* and *Colgate* work together. Generations of antitrust lawyers tried to advise their clients on how to remain on the *Colgate* side of the line—unilaterally-imposed minimum RPM—without stepping over the line into the RPM via contract or combination condemned as illegal

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65 Id at 382.

66 *Continental T.V., Inc v GTE Sylvania Inc*, 433 US 36, 58-59 (1977).

67 Id at 70.

per se by *Dr. Miles*. The Court's 1960 decision in *Parke, Davis* had to make clear to lawyers that they couldn't provide reliable advice to their clients about how to do that. So they switched away from minimum RPM and moved to nonprice vertical restraints of the sort seen in *White Motor*, *Schwinn* and *Sylvania*. That set off more doctrinal churn, but the Court moved through that with reasonable dispatch—the 14 years between *White Motor* and *Sylvania*—and *Sylvania* then launched the modern analysis of vertical restraints. We see the nature of legal innovation at work: if *Parke, Davis* limited the practical effect of *Colgate*, it also gave birth to *Sylvania* and then *Leegin*, and *Leegin* restored *Colgate*.

We can move quickly through the balance of the pre-*Leegin* cases. The Court's 1984 opinion in *Monsanto* is noteworthy for a number of reasons.[68] The Court declined the Solicitor General's suggestion that *Dr. Miles* be reconsidered. At the same time, the Court saw two key doctrinal framings for considering vertical restraints. The first was the key distinction between unilateral activity and joint activity—citing to *Colgate* and *Parke, Davis* (really?)—while the second was the line between price and nonprice vertical restraints, that is, the line between the per se illegality of contractual minimum RPM in *Dr. Miles* and the rule-of-reason analysis of nonprice restraints in *Sylvania*. *Monsanto* serves as a natural baseline for assessing recent Supreme Court approaches to stare decisis in antitrust. Finally, in 1997, in *State Oil Co v. Kahn*, the Court overturned its 1968 *Albrecht* decision to move maximum retail price maintenance into the rule-of-reason category. *Albrecht* is interesting in its own right for the way it approached the meaning of "combination" in Section 1 of the Sherman Act, but after *State Oil*, maximum RPM would be evaluated under the rule of reason.[69]

[68] *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984).

[69] *State Oil Co v. Kahn,* 522 US 3 (1997).

Together, *Sylvania*, *Monsanto* and *State Oil* set the stage for *Leegin*. Nonprice vertical restraints receive rule of reason treatment under *Sylvania*. *Monsanto* suggests that *Colgate* still matters, notwithstanding *Parke, Davis,* and that unilateral minimum RPM is free of Section 1 scrutiny. *State Oil* establishes that contractual maximum RPM was to be evaluated under the rule of reason. As we sliced and diced the vertical restraints space that seemed to leave us only with contractual minimum RPM, which remained per se illegal under *Dr. Miles*. Until *Leegin*.

B. THE OPINIONS IN LEEGIN

Leegin is a small maker of women's leather belts. Leegin's revenues had been flat for most of the 1980s—hovering around $10 million in annual revenues—but then its growth rapidly accelerated from $15 million in 1988 to $20 million in 1989 and then to $47 million in 1992.[70] The leather belt market is the ultimate old-economy business: it takes little more than a dead cow to enter the business and the overall market is almost certainly quite competitive.

Leegin sells women's belts under its Brighton brand and does so in more than 5,000 small stores across the country. One of these was Kay's Kloset, a small women's clothing store in the Dallas suburbs, run by Phil Smith and his wife Kay since 1986. Leegin moved to contractual minimum resale price maintenance in 1997 when it started its "Brighton Retail Pricing and Promotion Policy."[71] Leegin's letter to retailers describing the policy emphasized that it was seeking to avoid what it saw as the poor quality of service of "mega stores like Macy's, Bloomingdales, May Co. and others" and instead wanted to partner with small specialty stores offering "great looking stores selling our products in a quality manner."[72]

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[70] See John Case, *A Business Transformed: How one CEO transformed his entire company in order to make its service indispensable to its customers*, Inc. Magazine (June, 1993).

[71] *Leegin Creative Leather Products*, 127 S Ct at 2711.

[72] Id.

In December, 2002, Leegin learned that Kay's Kloset was discounting the Brighton brand. The opinion doesn't say when that discounting had started, but Phil Smith's account suggests that it started after September 11, 2001. Leegin had started offering discounts to airline and airport employees at a store at the Dallas/Fort Worth airport, and Kay's Kloset matched those prices.[73] But Leegin cut off Kay's Kloset after it refused to sell at the minimum retail prices and that in turn led to the antitrust lawsuit by Kay's against Leegin.

Leegin is really a two-issue case: (1) as a matter of first consideration, should contractual minimum RPM be treated as per se illegal or should it instead receive rule-of-reason treatment?; and (2) if rule-of-reason treatment is appropriate, should the Court nonetheless adhere to the result of per se illegality established in *Dr. Miles*? On the first issue, the Court returned to 1628, the date of Coke upon Littleton, which *Dr. Miles* cited for the general proposition that restraints on alienation were invalid. The Court seemed skeptical that a nearly 300-year old analysis should have sufficed in 1911 and saw no basis for that nearly a century later ("[t]he general restraint on alienation … tended to evoke policy concerns extraneous to the question that controls here").[74]

With the analysis in *Dr. Miles* itself pushed to the side, the Court then turned to a fresh consideration of the policies at stake in minimum resale price maintenance. That took the Court to the defining feature of modern antitrust analysis, namely the role of economics in understanding how we should evaluate particular practices. As has been the Court's pattern in other cases moving practices away from per se illegality and towards rule-of-reason

[73] Maria Halkias, *Local Antitrust Fight Goes to D.C.*, The Dallas Morning News, (Mar, 25, 2007).

[74] *Leegin Creative Leather Products*, 127 S Ct at 2714.

analysis, the Court cited the extensive literature arguing that minimum RPM can have procompetitive benefits.[75]

Minimum RPM shapes interbrand competition, meaning, for example, competition between different manufacturers of belts. Minimum RPM is said to, as the Court put it, "encourage[] retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers."[76] Minimum RPM also expands the mix of price/service combinations. With a set minimum resale price, retailers will compete over services instead. Manufacturers who want low prices can have them, while other manufacturers who believe that higher prices and higher service are warranted can sustain that combination as well. As to minimum RPM, Justice Kennedy's conclusion was clear: "[t]hough each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[77]

But even if the Court majority believed, as it obviously did, that a fresh consideration would result in rule-of-reason treatment for minimum RPM, what about *Dr. Miles*? Should stare decisis cause the Court to stay with the good doctor? Justice Kennedy started with the Court's history in antitrust. The Sherman Act is effectively a common-law statute and over the last hundred years the Supreme Court has steadily moved away from rules of per se illegality towards the rule of reason. In many cases, it has overturned prior precedent in doing so, just as it did for maximum RPM in 1997 *State Oil* and as it did last term in *Independent Ink* in overturning the rule that a patent holder would be presumed to have market power in a tying case.[78]

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[75] Id at 2715.

[76] Id.

[77] Id at 2714.

[78] *Illinois Tool Works Inc v Independent Ink, Inc*, 547 US 28 (2006).

In considering stare decisis, Justice Kennedy noted the difficulties of making sense of a world populated by *Dr. Miles*, *Colgate* and *Sylvania*: "If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question."[79] Of course, this isn't a new point. Justice White had said much in his concurrence in *Sylvania* in which he tried to hang on to *Schwinn*. But the passing of time may have made more apparent the costs of trying to make these three cases work together. As Justice Kennedy emphasized: "[i]n sum, it 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."[80] This a regime you can like only if you are a hard-line Darwinist—the survival of the competitors with the fittest lawyers.

That left the Court with two other factors to consider in its analysis of stare decisis. The first is congressional intent. Section 1 of the Sherman Act is quite slim, as it was when it was enacted in 1890, but for nearly forty years, it was substantially more chunky. In 1937, Congress enacted the Miller-Tydings Fair Trade Act which added two extensive provisos to Section 1.[81] The first excepted from the reach of Section 1 contracts providing for minimum resale prices so long as underlying state law allowed the transaction, as it might under a so-called fair trade law. The second proviso made clear that the new exception was not intended to allow horizontal price setting. Miller-Tydings was the law of the land until 1975, when it was struck from the statute and Section 1 was returned to its original form.[82] So for

79 *Leegin Creative Leather Products*, 127 S Ct at 2722.

80 Id at 25.

81 50 Stat 693 (1937).

82 Consumer Goods Pricing Act of 1975, 89 Stat 801 (Dec 12, 1975).

forty years, Congress delegated the legality of minimum RPM to the states, only to reclaim federal authority in 1975. What does this tell us about the stare decisis status of *Dr. Miles*?

In the Court's view, this is a lot of woulda, coulda, shoulda and the Court makes very little of it. Yes, in passing the 1937 act, Congress allowed states to jump in and render minimum RPM legal, and yes, in acting in 1975, Congress took away that authority and thereby restored the full reach of *Dr. Miles*. Prior to 1975*, Dr. Miles* had no effect in states which had enacted a fair trade act and its bar was limited to only those states which had not acted. After 1975, *Dr. Miles* again applied everywhere. But at no point did Congress limit the Court's ability to continue to evolve antitrust doctrine and Congress certainly didn't enact *Dr. Miles* in 1975.

Finally, that leaves the question of the relevance of reliance for stare decisis in antitrust. As to that, said the Court, actual reliance on *Dr. Miles* had to be limited. No one could seriously claim a century's worth of reliance, as it was only with the 1975 amendments to Section 1 that *Dr. Miles* again applied throughout the nation. Moreover, the alternatives to contractual minimum RPM—unilateral minimum RPM and other vertical contracts—necessarily limited the domain of *Dr. Miles*. All of that meant, for the Court, that reliance interests couldn't justify keeping an inefficient rule. And with that, after nearly a 100 years, *Dr. Miles* was gone; contractual minimum RPM would now be evaluated under the rule of reason.

Justice Breyer dissented, joined by Justices Stevens, Souter and Ginsburg. *Leegin* came down on the last day of what one guesses had been a frustrating term for these four justices. When the Court decided *State Oil* in 1997 and overturned *Albrecht* (1968) and thereby moved maximum RPM from per se illegality to rule-of-reason analysis, the opinion was unanimous. None of the *Leegin* dissenters said a peep about the importance of stare decisis in antitrust. One gets the sense that the dissent in *Leegin* may have just been an easy placeholder for a term's worth of frustration.

Justice Breyer's dissenting opinion emphasized that, were he writing on a blank slate, he would have found the question of whether to apply the rule of reason to minimum RPM difficult. This turns much on the genuine difficulties of establishing an administrative rule that meaningfully implements the rule of reason. Economists may be able to get tenure writing articles that conflict about the theoretical consequences of minimum RPM, but a district court judge actually has to make a decision. As Justice Breyer put it: "… antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because 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."[83] That led Justice Breyer to his conclusion: "[a]nd, 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.'"[84]

Part of this clearly turns on Justice Breyer's concern that minimum RPM pushes up prices. Of course, that is almost certainly right, as the whole point of minimum RPM is to ensure that prices meet a floor that some retailers would otherwise push beyond. But, as Justice Scalia emphasized at oral argument, consumers clearly care about more than just price.[85] If higher prices come with better services, consumers may be happier. Evidence of higher prices, without more, tells us nothing about how consumers are faring.

Justice Breyer then turned to the question of whether *Dr. Miles* should be overruled. His core point was that nothing had changed recently that would call *Dr. Miles* into question. The administrative difficulties of making *Dr. Miles* and *Colgate* work together arose as

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[83] *Leegin Creative Leather Products*, 127 S Ct at 2729.

[84] Id at 2731.

[85] Oral Argument Transcript, *Leegin Creative Leather Products, Inc v PSKS, Inc*, No 06-480, *15 (Mar 26, 2007) ("Leegin Transcript").

soon as *Colgate* was decided in 1919, as the Court's docket over the next few years made clear. The economic understanding of minimum RPM hadn't change recently either, a point Justice Breyer made in the oral argument by drawing upon a 1966 economics text on minimum RPM.[86]

As to stare decisis itself, Justice Breyer started with what he saw as the most recent learning on the subject, namely Justice Scalia's then four-day-old opinion in *Wisconsin Right to Life*.[87] Something more than antitrust seemed to be stake. Justice Breyer went through a laundry list of considerations in implementing stare decisis. Stare decisis applies with greater force (1) in statutory cases than in constitutional cases; (2) to old mistakes rather than more recent mistakes; (3) when the regime created by the original decision is unworkable; (4) when the original decision "unsettled" the law; (5) when property rights or contract rights are at stake; and finally (6) when the original law "becomes 'embedded' in our 'national culture." For Justice Breyer, each of these factors pointed to preserving *Dr. Miles*.

That left Justice Breyer with the dog that didn't bark, his missing dissent in *State Oil*. *State Oil* was nine zip with our current dissenters—Justices Breyer, Stevens, Souter, and Ginsburg—all silent. If stare decisis was so important in 1997, why didn't we hear something about it then? This point wasn't lost on Justice Breyer and he attempted to distinguish *State Oil* and *Leegin*—*State Oil* overruled *Albrecht* and only 29 years had passed, while *Leegin* overruled *Dr. Miles* and we are at almost a century—but that is something of an artificial comparison given the fair trade era—1937-1975—and so we might focus on 1975 as the date of full restoration of *Dr. Miles*. With that date, the *Leegin*/*State Oil* comparison is much tougher for Justice Breyer.

86 Id at *12.

87 *Federal Election Commission v Wisconsin Right to Life, Inc*, 127 S Ct 2652 (2007).

C. THE ECONOMICS OF MINIMUM RESALE PRICE MAINTENANCE

We should follow the path that the Court did in *Leegin*, considering first the structure of the economic argument and then the status of stare decisis in antitrust. We should start with the core notion behind minimum RPM. The manufacturer believes that in-person services need to be provided to best sell its goods at retail. Provision of services is costly and the manufacturer fears that some retailers will try to free ride on other retailers, and if each retailer tries that, no one will provide the required services.

So the classic example of free-riding might arise in the 1988 case of *Business Electronics*.[88] Calculators were expensive and complicated back then—and, even today, who has actually mastered Reverse Polish Notation?[89]—and needed to be explained in person. The high-end electronics store invests in educating its customers and they learn all about how the calculator works. That of course costs money and the price for the calculator should reflect that. But once the consumer understands the calculator, the consumer can buy from the cheaper place next door. That means the first store incurs costs that it can't recover and therefore won't provide the services. No one provides the services and the product isn't sold.

Minimum RPM changes the nature of competition. By construction, the stores can't compete on price. Minimum RPM allows the manufacturer to create a specified gap between the wholesale price—set directly by the manufacturer in its sales to retailers—and the retail price. Absent minimum RPM, that difference floats and is determined by the competition among retailers. With it fixed, price-competition among retailers will go away but they should shift their competitive juices in other directions. Retailers will take other costly actions and in so doing will

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[88] *Business Electronics Corp v Sharp Electronics Corp*, 485 US 717 (1988).

[89] Hewlett-Packard started selling calculators using RPN in 1972 and continues to do so today. See RPN, An Introduction to Reverse Polish Notation (available at http://www.hp.com/calculators/news/rpn.html).

compete away the bonus that has been offered to them through the fixed retail price.

At least so goes the theory. Put this way, there is a clear clumsiness associated with minimum RPM. Some retailers might continue to free ride and hope to just make more money. Alternatively, retailers might spend the margin—the gap between retail and wholesale prices—but they might take any number of steps to provide superior services. Some of those might be nice showrooms or other investments in ambience. Recall that Leegin's letter announcing its new RPM policy focused on "great looking stores selling our products in a quality manner." Those investments may benefit the manufacturer providing the minimum RPM bonus, but many of these investments actually benefit all manufacturers.

No one manufacturer actually wants to invest in ambience; as a manufacturer, you want all of the other manufacturers to invest in nice stores. This should make clear the second free-riding problem at stake in minimum RPM. The first is about retailer-retailer competition; the second is about how manufacturers interact with each other when they share retailers. Of course, most retailers are shared retailers. There is the occasional Apple store and the Nike Store on Michigan Avenue in Chicago is legendary, but the vast majority of retailers sell multiple brands. Those brands share retailers.

We now see the hamhandedness of minimum RPM. Minimum RPM decentralizes the "extra" service decisions to the retailers. The retailer might invest in more education for HP calculators, and, if so, HP has taken an important step towards solving the problem of Reverse Polish notation—though even here, that education benefits any calculator maker using that notation and so we have another version of the free-riding problem—but the retailer might just as well spend the money on nicer fixtures, and HP gets no particular benefit from that.

Consider a natural alternative: a direct contractual provision from the manufacturer requiring that education be provided.[90] As a nonprice vertical restraint, an education provision would be judged under the rule of reason under the rule announced in *Sylvania*. If the manufacturer believes that education is best provided at each place the product is sold, the manufacturer presumably will require such education in each retail contract. If instead the manufacturer believes that it is important that education be available in each market, the manufacturer will have different contracts for each retailer.

Of course, providing education isn't free, and the manufacturer would need to compensate retailers for providing the education. But if direct payments are made, much of the air is gone from the free-riding balloon. Indeed, if the manufacturer "overpays" for education, retailers will fight to provide education. And an education clause, like any other clause in a contract, needs to be enforced to work and that requires the manufacturer to create some enforcement mechanism.

Nothing in the core service theory of minimum RPM tells us where the push for extra services should come from. Manufacturers may understand from the get-go that their products need special handling and, if so, they may initiate minimum RPM. But in other cases, retailers may be closer to customers and may have a better understanding of the need for extra service. These retailers also may see more directly how the free-riding dynamic operates day-by-day. In those cases, we should expect to see retailers pushing the manufacturer to implement minimum RPM. In the extreme case, the push might be purely horizontal. How should we treat these cases?[91]

The direction of the push shouldn't matter. We would have to be much more confident than I see reason to be about where the information regarding the importance of services is likely to lie.

[90] Leegin Transcript at *41.

[91] At oral argument, Justice Stevens addressed the possibility of a purely horizontal cartel designed to promote interbrand competition. Leegin Transcript at *4-5, 20-21.

Although there seems to be no logical reason to exclude the possibility that a local horizontal cartel might facilitate interbrand competition, we might administratively want to use the manufacturer's agreement to that practice as a way to separate out pernicious horizontal agreements from those that actually promote interbrand competition. The manufacturer has a shared interest in seeing the latter and strong interests in opposing the former. Requiring the smart retailers to persuade the manufacturer to implement minimum RPM means we avoid having horizontal cartels spring up in the guise of providing better services.

Leegin also shouldn't be understood as changing our basic rules about the per se illegality of horizontal cartels. Justice Stevens's questions at oral argument suggested that he recognized that the analytical framework of using minimum RPM to produce retail services meant that there could be net benefits from some retailer cartels. These would be cartels limiting intrabrand competition in an effort to induce service provision and doing so in a context where there was extensive interbrand competition. On those facts, the retailers shouldn't have meaningful market power, and the intrabrand cartel would just be making possible a new price/services combination.

But *Leegin* doesn't go this far and, for now at least, we will continue to treat these horizontal cartels as per se illegal. Given that, we shouldn't need the rule in *Dr. Miles* to get at horizontal cartels—good or bad—implemented by retailers. That is, we shouldn't need to condemn *every* instance of minimum RPM to make sure that we have blocked situations in which harmful retailer-led horizontal cartels have been dressed up as minimum RPM.

In *Leegin*, the Court also focused on the transaction costs of *Dr. Miles*. Manufacturers who want to implement minimum RPM can do so as long as they proceed unilaterally and comply with *Colgate*; what they couldn't do was implement minimum RPM through agreements that violated *Dr. Miles*. But even after *Leegin* with *Dr.*

Miles gone, some manufacturers will continue to try to meet *Colgate*. A manufacturer who stays on the *Colgate* side of the *Dr. Miles/Colgate* line avoids the Section 1 rule-of-reason inquiry entirely. For that manufacturer, there is no triggering contract, combination or conspiracy and hence no possibility of Section 1 liability. Unilateral activity is dealt with under Section 2, but Section 2 requires monopolization, and that is more than just the market power that will trigger liability under Section 1. With *Dr. Miles* gone, some manufacturers will switch to contractual minimum RPM and accept that they may face a possible Section 1 rule-of-reason inquiry. Others may continue to implement the *Colgate* version of RPM if they wish to avoid Section 1 risk entirely.

D. STARE DECISIS AND STATUTES: PRIOR COURT DECISIONS AS STARTING POINTS FOR CONGRESS

Now switch to stare decisis. We start by mapping the lay of the land in antitrust. For doing that, almost any starting point would be arbitrary, but given that *Leegin* overturns *Dr. Miles*, we might start our analysis of stare decisis from a point where the Court *didn't* overturn *Dr. Miles*, its 1984 decision in *Monsanto*.[92] *Monsanto* was the first of five antitrust cases decided during the Court's 1983 Term.[93] The Solicitor General had asked the Court to reconsider *Dr. Miles* in *Monsanto*, but in a footnote, the Court declined to do so. Justice Brennan's brief concurring opinion focused exclusively on the status of *Dr. Miles*. He emphasized the opinion's longevity—73 years at that point—and the fact that Congress had never enacted legislation to overrule *Dr. Miles*.[94]

The 1983 Term is also interesting for the different ways that the cases approached stare decisis. In *Jefferson Parish*, the Court

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92 *Monsanto Co v Spray-Rite Service Corp*, 465 US 752, 761 (1984).

93 For discussion of those cases, see Diane Wood Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 Sup Ct Rev 69.

94 *Monsanto Co*, 465 US at 768.

considered the law of tying, that is, the circumstances under which a seller forces a purchaser to take one product with a second product.[95] The question of whether or not to abandon the Court's prior rule that tying cases should receive per se treatment divided the Court. The five-member majority believed that it was "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'."[96] The Court saw a steady line of support for per se treatment going back to 1947 (*International Salt*) if not earlier.[97] Justice Brennan, joined by Justice Marshall, concurred briefly pointing to his earlier concurring opinion in *Monsanto* and emphasizing that Congress had left alone the Court's prior per se treatment of tying.[98] But for Justice O'Connor and the other three justices joining her opinion concurring in the judgment, it was time "to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."[99]

But less than three months later, the Court took a different approach to stare decisis in antitrust. In *Copperweld,*[100] the Court considered the question of whether a parent and its wholly-owned subsidiary were legally capable of conspiring under Section 1 of the Sherman Act. Yes, the two were distinct legal entities and hence could contract with each other, but was that what Section 1 was looking for

[95] *Jefferson Parish Hospital District No 2 v Hyde*, 466 US 2 (1984).

[96] Id at 9.

[97] *International Salt Co v United States*, 332 US 392 (1947).

[98] *Jefferson Parish*, 466 US at 32 ("Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress").

[99] *Jefferson Parish*, 466 US at 35.

[100] *Copperweld Corp v Independence Tube Corp*, 467 US 752 (1984).

in its focus on "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade?" In a 5-3 decision, the Court concluded that the parent and the sub lacked sufficient separateness for Section 1 purposes. In so doing, the Court "disapproved and overruled" its prior decisions that were inconsistent with the rule announced in *Copperweld*. Which ones exactly was a point of dispute between the majority and the dissenters. In dissent, Justice Stevens counted at least seven decisions of the Court that he believed to be inconsistent with *Copperweld*[101] going as far back to 1947 (*Yellow Cab*).[102] The majority attempted to recharacterize most of the cases to suggest that they could have been decided on an alternative basis and to suggest that the issue had never been considered in real depth by the Court.[103] Justice Stevens noted that Congress could have revised the Court's prior rulings on capacity to contract for Section 1 purposes but had declined to do so over four decades.[104]

From the 1983 Term through the 2006 Term—24 terms—the Supreme Court decided 51 antitrust cases, or an average of more than two per term.[105] We can try a mechanical approach to the role of stare decisis in antitrust. Of these 51 decisions, only five used the phrase "stare decisis": *Leegin* (2007); *State Oil* (1997); *Eastman Kodak* (1992); *Square D* (1986); and *Copperweld* (1984)). That suggests immediately one of weaknesses of the "tag cloud" approach to matching text and ideas: both *Jefferson Parish* and *Monsanto* are

[101] *Copperweld*, 467 US at 779-782.

[102] *United States v Yellow Cab Co*, 332 US 218 (1947).

[103] *Copperweld*, 467 US at 760 ("Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result").

[104] Id at 784.

[105] 51 is the number that emerges from the Westlaw search, run on Nov 21, 2007, on the Supreme Court database using the search request "to(29t) and date(after 1983) and sy(antitrust sherman clayton (federal +1 trade +1 commission)."

missing from the list, even though it was precisely the question of stare decisis that separated the justices in *Jefferson Parish* and even though Justice Brennan's concurring opinion in *Monsanto* is almost exclusively about the importance of not overturning prior decisions of the Court.

We should start with a basic conception of stare decisis and then work up from there. A minimalist approach to stare decisis might focus on almost a physical notion of repeatability: if the same inputs go into the same production system, the same output should result. Treat the Court as a thing unto itself; not something made up of a changing slate of nine individuals but instead as a coherent, integral entity. In that formulation, mere changes in Court personnel shouldn't change case outcomes. If the Court reaches a conclusion, if the same arguments are subsequently presented to a different instantiation of the Court, the same outcome should result. This isn't to say that the Court can't learn and therefore change results. Operating experience under one rule and new arguments should move the Court just as they do individuals, but it is precisely these input changes that should result in different outcomes, not change in the Court itself.

We might think that an odd, sterile and mechanical conception of what the Court is. Do we really think that a Court comprised of nine male justices would approach, say, the First Amendment status of pornography in the same fashion as an all-female Court? If you think not, then you probably believe that one of the inputs brought to Court decision-making are the individual experiences of the justices. We can submit the same briefs to one Court and then resubmit them to a new Court and see different results because the individual experiences of the justices shape outcomes.

We might think of stare decisis then as about the size of a required change necessary to reach a different result, where stare decisis might address either the non-court inputs to decisionmaking or the court process itself. The input version of stare decisis would focus on the required change in inputs that would permit the Court to change outcomes. A thin-version might mean that even small changes in inputs would cause the Court to change outcomes. So even weak new arguments or small changes in data would cause the Court to overrule a prior decision. A thick-input version of stare decisis would require much more substantial changes in circumstances before the Court would abandon prior positions.

A personnel-version of stare decisis might focus on voting rules for cases, which the Court might implement by adopting a super-majority decision rule for overruling prior cases. Don't overrule if the vote is only 5-4 in favor; instead, require greater unanimity than that.[106] To be mechanical about this, a 6-3 or better rule would mean that a one-member change on the Court wouldn't by itself change results. A 5-4 case in one term couldn't become a 5-4 decision the other way if one of the original five justices were replaced by a new justice who held the opposite view of the question.

The Court hasn't articulated stare decisis in this fashion. Instead, as Justice Breyer's dissent in *Leegin* emphasized, the Court has typically proceeded under a multi-factor approach. So the Court believes that stare decisis weighs more heavily when it construes statutes than when it reads the Constitution.[107] This is based on the view that, save for rare amendments to the Constitution, only the Court can change how the Constitution is applied, but Congress can rewrite statutes if the Court has misunderstood statutory text. Congress's knowing inaction then amounts to a type of silent ratification of the Court's interpretation of a particular statute.

That analysis dramatically overstates the ease with which Congress can overturn the Court's statutory interpretations. This

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[106] Compare Jacob E. Gersen and Adrian Vermeule, *Chevron as a Voting Rule*, 116 Yale L J 676 (2007).

[107] In antitrust, see, eg, *Illinois Brick Co v Illinois*, 431 US 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

isn't about the normal difficulties of getting legislation enacted in the U.S.—though those hurdles are genuine—but much more about the Court's power to select positions strategically and know that they won't be overturned. Take a simple example. Assume the relevant statute bears two natural interpretations. If the Court chooses one and both the House and the Senate disagree with the Court's choice, we should expect Congress to rewrite the statute. In contrast, if the Court chooses the interpretation favored by both chambers, Congress leaves the statute alone. This seems to be the framework that animates the Court's views on the importance of stare decisis in cases dealing with statutes.

But consider two other possibilities. The Senate and the House have different preferences over the two natural readings of the statute. The Court will choose one or the other, and *whichever* one the Court chooses, we will not see legislation overturning that choice. If the Court chooses the interpretation favored by the Senate, the Senate will block legislation overturning that choice, and both the Senate and the House must approve new legislation for it go forward. Alternatively, if the Court chose the House's favored interpretation, the House will block new legislation.

In this simple situation—a statute with two natural readings—we have four possibilities. We will see responsive legislation in only one case—when the Court gets it "wrong" and the Senate and the House both disagree with that choice—but in the other three cases, we won't see new legislation. In only one of those situations should the Court infer acquiescence in the Court's read of the statute; in the other two cases, the two chambers don't agree and therefore can't agree to overturn the Court's interpretation. Note also that an especially strategic Congress wanting to send information to the Court might choose to pass confirmatory legislation in the case in which the Congress agrees with the Court's reading of the statute. Given the presumed agreement between the houses, it should be relatively costless to pass the confirming statute. The point of that legislation isn't to change the meaning of the text but to make clear that when the Court interprets statutory text and nothing issues from Congress, Congress disagrees internally over the meaning of the text. Guaranteed action in both cases in which Congress agrees internally would convey information to the Court about the existence of internal disagreement in Congress over the meaning of the relevant text in cases in which Congress *doesn't* act.

Play this out briefly one more time. Imagine a text with three readings, where the House's preferences are 1 > 2 > 3 and the Senate's are just the opposite, 3 > 2 > 1. We shouldn't expect Congress to overturn *any* decision of the Court choosing *any* of the readings. If the Court chooses 1, the House is happy and will block new legislation. Ditto for the Senate if the Court chooses 3. And 2 probably represents the compromise position that would be reached by Congress were it required to act. A decision by the Court followed by congressional inaction would tell us nothing about congressional acquiesce in the Court's reading. The Court's approach to stare decisis for statutes and its power to draw inferences from congressional inaction and silence has ignored the way that that the Court's prior interpretation of a statute determines the default position in the next round of legislative gamesmanship. As these examples suggest, the default position established by the Court matters enormously for the subsequent legislative path.

What does this mean for the Court's special rules of stare decisis for statutes, taking seriously, of course, that those rules actually exist meaningfully? The Court should kill them off. Return to the simple four-possibility situation. If the Court chooses the wrong interpretation and Congress overturns it, very little harm is done. If the Court reaches the result desired by both houses of Congress, we probably won't see legislation, absent the sort of exquisite legislative signaling that I describe above. But in that case, the Court has adopted the interpretation favored by the current Congress. And, to head towards stare decisis, if the Court flipped its position, in these cases, Congress would respond. The agreed Congress would overturn the contrary interpretation by the Court.

But if the Court chooses an interpretation and Congress is disabled from acting, what should the Court do in reconsidering the issue? For constitutional issues, Congress is disabled from acting by institutional design, as we have assigned the role of constitutional interpreter to the Court. In our two remaining cases, Congress is disabled from acting not by design but because of internal disagreement. By definition, that internal disagreement is just the opposite of acquiescence in the Court's view. One chamber favors one interpretation, the other the second, and that will be true regardless of which interpretation the Court chooses. Under those circumstances, the Court should give no special weight to that disagreement in figuring out whether to reconsider its prior ruling but instead should rely on whatever general framework the Court brings to stare decisis.

What does that mean for *Leegin*? In my view, the Court majority appropriately gave very little weight to Congress's changes to Section 1. Recall that Section 1 expanded in 1937 with the Miller-Tydings fair trade delegation to the states and then contracted in 1975 when Congress reclaimed federal authority under Section 1. But the Court didn't take that to somehow limit its ability to continue to evolve Section 1 antitrust doctrine, and it understood itself to have full authority to overturn *Dr. Miles*. That isn't to say that the Court was right to overturn *Dr. Miles*, as all I have done above is to sketch some general ways to frame stare decisis and I haven't offered a full theory of it, but it is to say that the fact that *Dr. Miles* interprets a statute shouldn't be given real weight in the stare decisis analysis.

V. Conclusion

So there were four antitrust decisions of note in the 2006 Term. *Weyerhaeuser* is a small, modest decision. The Court isn't likely to see another predatory bidding case soon and the Court chose to minimize doctrinal complexity by bringing predatory bidding analysis in sync with the Court's prior treatment of predatory pricing in *Brooke Group*. *Credit Suisse* too is minimally incremental. In concluding that federal securities law "implicitly" precluded claims asserting antitrust violations in the sale of new securities, the Court followed its prior decision in *Gordon* as well as the Court's more recent preference for regulatory schemes over antitrust as seen in *Trinko*. Pushing antitrust authority toward specialized regulators like the Securities and Exchange Commission broadens the trade-offs that can be made between antitrust concerns and other values and almost certainly expands the circumstances under which industry actors can act collectively. That matters, so *Credit Suisse* covers more of the economic landscape than *Weyerhaeuser*, but the decision itself is a small step from prior doctrine.

Twombly and *Leegin* are each, in their own ways, blockbusters. *Twombly* will appear in case after case, as antitrust defendants try to rely on its new tougher rules for FRCP 12(b)(6) motions. *Twombly* represents a preference for blunt instruments over sharp edges. The central problem confronted by *Twombly* is discovery run amok. The Court has the tools in its hands to control that by rewriting the discovery rules and overturning lower court decisions implementing those rules. *Twombly* suggests that the Court believes that refinement of those rules will fail in controlling discovery and it is willing to pay the price that private plaintiffs will have no good way to get at the best-hidden antitrust conspiracies.

Finally, *Leegin* brings to a close—for now or forever?—the 100-year saga of contractual minimum resale price maintenance. Since its decision in 1911 in *Dr. Miles*, the Court has confronted this issue again and again in the slightly-refined versions that make up the art of institutional design. Over time, the Court has chipped away at *Dr. Miles*, first in not finding a violation of Section 1 of the Sherman Act for the unilateral minimum RPM in *Colgate* in 1919 and in then broadly subjecting nonprice vertical restraints to rule-of-reason treatment in *Sylvania* in 1977. Given that, on what basis would *Dr. Miles* survive?

That is a question of stare decisis and *Leegin* ends up in an all-out fight over stare decisis in antitrust. That is new: the Court has been overturning old decisions in antitrust for some time and has done so with little stare decisis fanfare. That suggests that the dispute over stare decisis in *Leegin* is just a convenient forum for the larger dispute over stare decisis that is percolating through a divided Court. I don't have a full-blown theory of stare decisis but I do suggest why the Court has been mistaken to treat stare decisis in statutory cases differently from that in constitutional cases. The Court has made too little of one of its critical tools in shaping statutes, namely, the power to set a default point for subsequent congressional action. Once we treat the Court's decisions as inputs in subsequent lawmaking, there is greater reason to think that the Court should have a uniform approach to stare decisis across the Constitution and statutes.

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