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EMBRACING THE INEVITABLE: RETHINKING AND RESHAPING ANTITRUST LAW RE: VERTICAL RESTRAINTS

You know how this is going to turn out, don't you?

No. Do you?

Yes. I do. I think you do too. You just haven't accepted it yet. [1]

I. INTRODUCTION

The current state of vertical restraints analysis in the United States' antitrust law is confusing, counter-intuitive, and inefficient in its overall application. Antitrust law, like the law generally, tends to move in an efficiency-enhancing direction over time because inefficient laws are more likely to be challenged and judges, more often than not, tend to issue efficiency-enhancing rulings. Rather than wait for the inevitable, this Article proposes that fair readings of the academic literature, the case law, and the antitrust laws themselves support simple and efficient interpretations for all vertical restraints that will provide clarity to businesses and attorneys and enhance overall efficiency in the application of vertical restraints law.

Since 1890, the Sherman Act has outlawed agreements that unreasonably restrain trade. [2] Certain agreements in restraint of trade are so pernicious that they are *per se* illegal. [3] There is no defense--not that the restraint is reasonable (or even pro-competitive), not that prices were not raised but merely stabilized, not that the agreements brought order to a chaotic and undisciplined market, not even that it is necessary for the parties to the agreement to keep from going out of business. Agreements that fall within this camp of *per se* illegality include *horizontal* agreements to fix, raise, or stabilize prices, agreements to allocate, markets, customers, products, or territories, agreements to rig bids, and certain group boycotts. [4] All other restraints are subject to "rule of reason" analysis. ***473** Vertical agreements (e.g., agreements between a manufacturer and a distributor or a distributor and a retailer) were once afforded the same harsh condemnation as is reserved for these horizontal agreements. For example, agreements capping the *maximum* fixed price were, for a short while, deemed *per se* illegal. [5] Intrabrand vertical non-price restraints (e.g., distributorships assigned exclusive geographic territories by a manufacturer) were also once condemned as *per se* illegal. [6] Intrabrand vertical price restraints were subject to the *per se* rule from 1911 [7] until 2007. [8] Since 2007, intrabrand vertical price restraints (primarily resale price maintenance agreements) have been evaluated pursuant to the rule of reason.

Over the last 50 years, the Supreme Court has chipped away at the *per se* rule that was once applied liberally to vertical restraints. This general shift away from a significant concern with vertical restraints followed the "Chicago School" [9] drive to retool antitrust doctrines to track efficiency. Robert Bork's THE ANTITRUST PARADOX [10] led the charge, with Richard Posner and Frank Easterbrook (all Chicago professors turned Federal appellate court judges) following close behind. In defending vertical restraints (not just from *per se* analysis, but from condemnation generally), Bork argued that it is never efficient to condemn vertical restraints, including resale price maintenance, non-price territorial restrictions, [11] and both primary and secondary price discrimination.

While Bork may too quickly be dismissed as a monopolist apologist, his influence in shaping modern antitrust doctrine cannot be overstated. In large part due to the direct influence of Bork and other Chicago School academicians, all vertical restraints, with the very technical exception of certain tying agreements, are now adjudged pursuant to "rule of reason" analysis. All that remains in the *per se* camp (at least on paper) is a muddled "quasi *per se"* tying ***474** rule that is, at best, on life support. [12] This, of course, does not mean that such restraints are necessarily lawful, only that a defendant accused of a vertical antitrust violation has the opportunity to mount a defense and that the plaintiff bears the burden of establishing the restraint's unreasonableness (*i.e.*, that its anticompetitive effects outweigh any of its pro-competitive benefits). [13]

The current framework is generally considered a marked improvement from previous decades where pro-competitive vertical conduct was routinely condemned by draconian application of rigid *per se* rules. Indeed, many forms of vertical restraints (*e.g.,* predatory pricing and maximum price fixing) are so rarely successfully challenged that they are often regarded as *per se* legal under Section 1. [14] And therein lies the problem--they are *not per se* legal.

That these restraints are not immune from legal challenge is not as universally accepted a proposition as it should be. Indeed, in 2014, Professor Daniel Sokol argued that Bork's *"per se* dream" had been at least partially recognized in three areas of vertical restraints: (1) maximum resale price maintenance; (2) vertical territorial restrictions; and (3) Robinson-Patman Act violations (price discrimination). [15] To the academician, this may appear largely, if not entirely true.

Of these forms of vertical restraint, maximum re-sale price maintenance cases, which never result in injury to competition, are more rare than winged unicorns. Maximum resale price maintenance is thus something of a strawman-- *minimum* resale price maintenance is what remains relevant today, and, as discussed *infra*, we are quite far from a rule of *per se* legality in for minimum resale price maintenance agreements. Vertical territorial restrictions can be challenged under Section 1, generally only successfully when there is also a claim under Section 2. The potential for a challenge, most likely brought by a disgruntled recently terminated dealer or distributor, however, remains much higher under the current applicable rule of reason standard than it need or should be. Finally, price discrimination and, in particular, secondary line price discrimination are certainly not *"per se* legal" in reality. Challenges may be relatively infrequent, but they do occur and plaintiffs are still occasionally successful.

Professor Sokol's article is thus illustrative of the differing perspectives of academicians versus practitioners regarding the current law of vertical restraints. While, in an academic sense, we are much closer to Bork's 1970s vision for the future of antitrust, enough pitfalls remain that, in practice, risk averse market participants cannot take much advantage of the movement away from *per se* ***475** rules regarding vertical restraints.

This article proposes a "nudge" (to use *Twombly's* [16] terminology) in the same, efficient direction towards which the law has been trending for close to half a century. Specifically, this article proposes that all vertical restraints of trade, rather than being subjected to a rule of reason analysis, should be deemed *per se legal* under Section 1. This hypothesis would not allow for vertical restraints--in and of themselves legal--to immunize other illegal anticompetitive conduct, by virtue of incorporation of vertical restraints. For instance, if vertical restraints are used to facilitate, coordinate, or maintain a horizontal cartel, that cartel's conduct could still be prosecuted as a *per se* violation of Section 1.[17] Likewise, vertical restraints used by a monopolist to maintain or enhance market power (*e.g.*, by precluding competition to it) or vertical restraints used in an attempt to achieve market power (by a firm with a "dangerous probability" of doing so) may still be challenged as under Section 2.[18] It has long been accepted that there are some things a monopolist may not be permitted to do even if the same conduct would be perfectly legal if done by a firm without market power.[19] Tying, price discrimination or metering, or resale price maintenance by a monopolist, for example might, in rare circumstances, support a meritorious Section 2 claim.

Such a rule would greatly reduce confusion and uncertainty for businesses, resulting in significant cost savings to firms for legal consultation and advice. As will be discussed in greater detail below, the current, tepid application of the rule of reason requires firms to tailor downstream sales and distribution policies around "worst case" scenarios, with the end result being substantial over-deterrence.

The efficiencies created by this shift in the rule will far outweigh any costs associated with "false acquittals" (vertical restraints that, while anticompetitive, would no longer be condemned). And while certain vertical restraints may be anticompetitive, this hypothesis recognizes that, if a vertical restraint is not being used to facilitate a horizontal cartel or dominant firm's monopolization, it is almost certainly not anticompetitive.

Part II of this article examines the evolution of the treatment of vertical restraints under the Sherman Act, with a focus on: (a) vertical intrabrand non-price restraints (territorial and customer restrictions); (b) vertical intrabrand price restraints (resale price maintenance); (c) vertical interbrand restraints (exclusive dealing and tying arrangements); and (d) price discrimination (both primary line and secondary line). Part III examines the current state of the law and the resultant inefficiencies from the perspective of both the academician and the practitioner. Part IV proposes a solution that will enhance efficiencies in the law by reducing: (a) costs to litigants, (b) uncertainties and risk of litigation to ***476** market participants, and (c) burdens on American courts. Part V concludes that these changes are inevitable, as the law marches slowly but surely towards greater economic efficiency, and proposes that judges, legislators, and litigants do their parts to speed the process.

II. HISTORY OF THE TREATMENT OF VERTICAL RESTRAINTS

A brief history of the law regarding different types of vertical restraints is instructive. Vertical territorial and pricing restrictions were both once *per se* illegal. The Robinson-Patman Act has prohibited price discrimination since it was enacted in the middle of the Great Depression (1936). Tying agreements, while often said to be subject to a "quasi *per se"* rule, has really always been subject to a modified "rule of reason." At least on paper, there is currently a distinction between ties in which a degree of forcing is probable (when the *per se* tying rule is applied) and those that, despite market power in the tying product, do not (when the "rule of reason" is applied).[20] The latter agreements can be condemned under the rule of reason if they "foreclose a substantial tied market share and lack an offsetting pro-competitive justification."[21]

A. Vertical Intrabrand Non-Price Restraints

For a time, vertical intrabrand restraints were further subdivided, and accorded disparate treatment, according to whether a restraint was a "price" restraint or a "non-price" restraint. This was a rather curious distinction to make in the vertical context. When this distinction was recognized in the vertical context, it was ignored in the horizontal context, where non-price market, territory, or customer allocation is no less *per se* illegal than agreements on price. This is so because there is no practical difference in effect: an allocation scheme can raise prices above a competitive level just as easily (if not more easily) than an agreement among competitors to raise prices. Nevertheless, in the context of vertical restraints, courts for a time maintained the fiction that price and non-price restraints were materially and functionally different.

In *Schwinn*, the Supreme Court held that intrabrand, non-price, vertical restraints were *per se* illegal. [22] The United States had challenged Schwinn's three-tier distribution system comprising, in addition to Schwinn itself, 22 intermediate distributors and a network of franchised retailers. [23] Under Schwinn's system, each distributor was granted a defined geographic area in which it was granted the exclusive right to sell to franchised retailers. [24] Only franchised retailers were permitted to sell to the general public, and then only at specified locations. [25] The case came to the United States Supreme Court on ***477** appeal by the United States from the district court's decision. [26] On appeal, the United States abandoned its *per se* theories, instead arguing, "Schwinn's prohibition against distributors' and retailers' selling Schwinn bicycles to nonfranchised retailers was unreasonable under § 1." [27] Despite the Court expressly acknowledging that the government had abandoned its *per se* theories on appeal, the Court nevertheless articulated the following, bright, line, *per se* rule of illegality: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." [28]

Technically, then, Schwinn's holding sounded in property. Why? The 1977 version of the Court surmised that "[n]on-sale transactions appear to [have been] excluded from the *per se* rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, but rather because of the Court's unexplained belief that a complete *per se* prohibition would be too 'inflexibl(e).'" [29]

The *GTE Sylvania* Court acknowledged, just ten years after laying down this somewhat gerrymandered *per se* rule in *Schwinn*, that vertical restrictions "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." [30] These "redeeming virtues" allowed for, inter alia, "new manufacturers and manufacturers entering new markets ... to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." [31] In addition, as the Court noted, manufacturers can use vertical restraints to "induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." [32] Because of the "free rider" effect, such "services might not be provided by retailers in a purely competitive situation ...." [33]

Vertical intrabrand non-price restraints are ubiquitous in the United States. No one today seriously questions a manufacturer's general right to utilize distributors assigned to certain territories. In jettisoning *Schwinn* after just ten years, the *GTE Sylvania* majority relied expressly on the then-emerging work of Richard Posner. [34] In fact, the majority cited to Posner's work numerous times throughout its opinion. [35] The *GTE Sylvania* majority, however ignored Posner when it tried to explain its disparate treatment of non-price vertical restraints and price restraints (resale price maintenance). In fact, the majority insinuated that it was *relying* on Posner as support for the proposition that resale price ***478** maintenance, unlike vertical territorial restrictions, if enacted "'industry-wide[,]'" could "'facilitate cartelizing.'" [36] As Justice White pointed out in his concurring opinion, however, the same Posner article concluded that:

"There is no basis for choosing between (price fixing and market division) on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive territories is like market division, and therefore bad too .... [](If helping new entrants break into a market) is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free-rider problem .... In fact, any argument that can also be made on behalf of exclusive territories can also be made on behalf of resale price maintenance." [37]

Thus, with *GTE Sylvania*, the Court acknowledged the pro-competitive nature of most non-price vertical restraints while refusing to concede the same pro-competitive effects justified rule of reason treatment for vertical price restraints. Mercifully, the Court changed course in 2007 with its opinion in *Leegin Creative Leather Products v. PSKS, Inc.* Still, however, both types of restraints can be condemned--at least in theory--under a rule of reason.

B. Vertical Intrabrand Price Restraints

For almost a century, U.S. antitrust law maintained the fiction of a *per se* rule against resale price maintenance. The law on vertical resale price maintenance (the most common vertical price restraint) fundamentally changed-- ostensibly-- in 2007, when the United States Supreme Court struck down the nearly century-old law applying the *per se* rule to agreements between a manufacturer and its customers regarding resale prices. [38] Prior to *Leegin*, at least on paper, agreements between manufacturers and downstream sellers regarding price were *per se* illegal under Section 1. [39]

Dr. Miles' reasoning, however, was folly, and a *per se* ban soon proved unworkable. [40] For the next 75 years, the Court chipped away at *Dr. Miles*' reach, beginning just seven years later with *United States* v. *Colgate & Co.* [41] *Colgate* held that *unilateral* action by a manufacturer to set price was legal, since, without multiple actors, there could be no agreement in violation of Section 1. [42] *Colgate* thus allowed a manufacturer to set "suggested" retail prices ***479** so long as it did not reach an agreement with its retailers that they would adhere to them. Manufacturers could adopt unilateral policies (for almost a century known as "Colgate policies") that provided for termination of "cheating" discounting dealers. The problems came when a discounting retailer, after being "caught" by the manufacturer, asked for a "second chance." If a manufacturer elected not to terminate the cheating retailer, this act of forgiveness created an agreement between the manufacturer and the now-spared retailer, because the latter has either expressly or at least implicitly agreed not to continue selling below the manufacturer's suggested resale price.

Thus, after Colgate:

> (1) A manufacturer who announces to its dealer: "I only sell to dealers who resell at the prices I determine in advance," and then asks "will you agree to my terms?," has invited a resale price maintenance agreement. If the dealer responds "yes, I accept your terms," the dealer and the manufacturer have entered into an agreement to fix minimum resale prices."
>
> (2) On the other hand, if the manufacturer announces: "I only sell to dealers that resell at the prices I determine in advance," but then asks only "would you like to place an order?," it can arguably assert that no "agreement" has been reached, even if the sale is made, and even if the evidence discloses that the dealer thereafter adhered to the mandated price. [43]

"This technical and artificial legal fiction is unrelated to economic analysis." [44]

Resale price maintenance litigation is usually initiated by an embittered, terminated dealer. [45] Prior to *Leegin*, this often meant that the "victimized" plaintiff was seeking damages arising from a *per se* unlawful agreement of which it had happily once been a part. This absurdity may have helped limit *Dr. Miles*' practical reach before *Leegin*.

In 1984, for example, the Supreme Court made it still more difficult for a terminated dealer to establish the requisite agreement between a manufacturer and its remaining dealers. [46] In *Monsanto Co. v. Spray-Rite Service Corp.*, the Court held that proof of an agreement required more than proof that a rival dealer complained about the discounting of the now-terminated dealer-plaintiff. [47]

***480** Just four years later, the Court again confronted resale price maintenance, and again it made prosecution of a resale price maintenance claim more difficult (but still without overruling *Dr. Miles*). Beyond just reaffirming *Monsanto*, the Court argued that, to prevail on a resale price maintenance claim, a terminated "price-cutter" must show a "further agreement on the price or price levels to be charged by the remaining dealer." [48] In other words, even a proven agreement between a rival and a manufacturer to terminate a discounter was insufficient to prevail under a supposed *per se* rule.

It was another 23 years before the Supreme Court finally killed off *Dr. Miles*. [49] In so doing, the Court noted the many pro-competitive virtues of resale price maintenance, including: (1) stimulating interbrand competition; (2) assuring adequate levels of retail services (by, *e.g.*, preventing Internet-only retailers from economic free-riding on brick-and-mortar shops); (3) facilitating market entry for new firms and brands; and (4) encouraging retailer services that might not otherwise be provided even absent free-riding discounters. [50]

Despite these potential benefits, the majority acknowledged that, in certain instances, "vertical agreements setting minimum resale prices ... may have anticompetitive effects." [51] In fact, the Court could come up with just three such examples: (1) vertical price restraints used to facilitate a manufacturers' cartel; (2) vertical price restraints used to facilitate a retailer cartel; and (3) vertical price restraints "abused by a powerful manufacturer or retailer." [52] In other words, resale price maintenance can have anticompetitive effects if part of a larger, *horizontal* cartel or when implemented by a monopolist in an abusive fashion. [53]

C. Tying

Tying arrangements force a consumer to buy an unwanted product as a condition for buying a product the customer does want. For example, suppose there is a gas station at a remote intersection in the desert with no other gas station in any direction within 100 miles. Suppose, too, that the gas station has an integrated convenience store selling snacks, soft drinks, etc. Across the street is a convenience store selling roughly the same selection of goods, but not gasoline. A traveler with little gas would be forced to stop for gas if he or she ***481** could not make it to another gas station (at least 100 miles away). The gas station could "tie" the sale of gasoline (the desired product) to the purchase of a soft drink. It may be that the customer would prefer to purchase the soft drink from across the street (perhaps because the stand alone convenience store has better prices or a broader selection of soft drinks). Or, it may be that the customer does not want a soft drink at all.

A tying agreement is a form of vertical interbrand restraints that can constitute a *per se* violation of Section 1. [54] Tying agreements can also be challenged under Section 2, as well as Section 3 of the Clayton Act if the agreements "substantially lessen competition or tend to create a monopoly ...." [55]

Although the Supreme Court first unequivocally applied the *per se* rule to tying arrangements in *International Salt*, it had condemned ties in previous cases as far back as 1922. [56] The requisite elements of a modern *per se* tying claim evolved into the following: (1) two products, with "one product conditioned on the sale of another;" (2) "appreciable economic" power in the tying product; and (3) a foreclosure of "a substantial volume of commerce in the tied product." [57]

In 1984, the Supreme Court, by a 5-4 margin, declined Justice O'Connor's invitation to remove tying agreements from the *per se* rubric altogether and declined instead to evaluate all alleged ties under a rule of reason. [58] Nevertheless, the majority noted that "[p]er se condemnation--condemnation without inquiry into actual market conditions--is only appropriate only if the existence of forcing is probable." [59] This standard focused "on the probability of anticompetitive consequences." [60] Thus, *per se* condemnation of a tie that is forced on only a single customer is inappropriate since "the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." [61]

Similarly, when a purchaser is "forced" to buy a product he would not otherwise have bought even from another seller [when, in the example above, the traveler through the desert would not have purchased a soft drink from across the street] in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed. [62]

Justice Stevens, writing for the majority, argued "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 ***482** therefore are unreasonable 'per se.'" [63] Justice Stevens recognized that many tying arrangements are not anticompetitive (and thus ill-suited for *per se* treatment), but he nevertheless sought to distinguish between *per se* illegal ties (where the existence of "forcing is probable") from other ties that, while not qualifying for *per se* treatment, would nevertheless fail under a rule of reason analysis. [64] Per the majority in *Jefferson Parish*, "[i]n order to prevail in the absence of per se liability, [plaintiff] has the burden of proving that [defendant's] contract violated the Sherman Act because it unreasonably restrained competition[, a burden that] necessarily involves an inquiry into the actual effect of the exclusive contract on competition ...." [65] How a tying arrangement could have an actual adverse effect on competition if there is no degree of forcing, however, is not satisfactorily explained by the Court.

Justice O'Connor (and the other concurring Justices) were similarly confused by the majority's tortured attempt to distinguish ties that fall under the rule of reason from ties that are *per se* illegal. O'Connor proposed that all ties should be evaluated under the rule of reason. [66] Even then, under O'Connor's proposed test, a tying agreement would constitute an unreasonable restraint of trade only in "rare" circumstances, primarily when a firm with a monopoly in one product tied uses that product to acquire additional market power in the market for the tied product. [67]

Recent scholarship has given the muddled logic of *Jefferson Parish* something of a pass. Einer Elhauge, for example, argues (correctly) that "the quasi-per se rule on tying has never truly been a per se rule ..." but goes on to say that *"Jefferson Parish* was never wrong; it was just misunderstood." [68] Misunderstood is one word. Disfavored is another, arguably more accurate term. Consider the U.S. Court of Appeals for the District of Columbia Circuit's opinion in *United States v. Microsoft Corp.* [69] In that case, the district court had applied the *per se* rule to the Government's claim under Section 1, alleging that Microsoft had illegally tied the Internet Explorer Web Browser to its Windows Operating System. [70] While reaffirming *Jefferson Parish's* pronouncement that it was "'far too late in the history of antitrust jurisprudence to question the proposition that *certain* tying arrangements pose an unacceptable risk to stifling competition and therefore are unreasonable "per se[,]"'" [71] the Court of Appeals then created its own exception to the *per se* rule--holding that that rule of reason ***483** should govern tying agreements involving software products. [72]

Elhauge argues that tying should not be *per se* legal even if there is no likelihood of substantial foreclosure in the market for the tied product, as such ties may still be anticompetitive. [73] According to Elhauge, this is because, in certain instances (and contrary to the single monopoly profits theory), a firm can charge more through tying than through selling just the tying product at a monopoly price. [74] This article takes no position on this hypothesis (other than noting that Professor Elhauge's position does not appear to consider the increased transaction costs of an inefficient rule), but notes that his position is not at odds with the thesis of this article (which does not stand or fall with the single monopoly profits theory). All tying arrangements, to be effectual, require market power in the tying product. Without market power in the tying product, there can be no coercion, no harm, and, thus, no violation. A tying arrangement by a monopolist that allows it to extract profits even greater than could be earned by charging the monopoly price for the unbundled product (the focus of Elhauge's article), could be challenged under Section 2. Therefore, it need not be actionable under Section 1 (or under Section 3 of the Clayton Act) if it is truly anticompetitive--there remains a remedy for a truly victimized plaintiff.

D. Price Discrimination

Price discrimination comes in two basic varieties: (1) primary line discrimination (in which a firm sells below its own cost to drive out a rival), and (2) secondary line price discrimination (in which a firm favors one of its customers over a second customer in competition with the first). Robert Bork argued in THE ANTITRUST PARADOX that laws prohibiting price discrimination run contrary to economic efficiency and, thus, price discrimination should be *per se* legal. [75] Bork is hardly alone in his view.

The Robinson-Patman Act, the statute that outlaws such price discrimination, is a protectionist piece of legislation left over from the Great Depression. [76] Originally, it was intended to curb the rise of large chain stores at the expense of smaller "mom and pop" businesses. [77] Indeed, the Robinson-Patman Act is almost universally reviled by academics (who find it inefficient and unnecessary), practicing lawyers (who object to the needless difficulties created by the law and its many judicially-created exceptions), and businesses ***484** (who frequently ignore the Act altogether). [78] As just one example, the Antitrust Modernization Commission (established in 2002 and consisting of four members appointed by the President, four members appointed by the Senate, and four members appointed by the House of Representatives) recommended repealing the Robinson-Patman Act. [79]

While Bork's influence has helped move the ball slowly towards his goal of *per se* legality for price discrimination, the irony is that the inroads that have been made in the state of the law *more* confusing and *less* efficient. While it is more difficult now than in years past to bring and prevail on a secondary price discrimination case (and all but impossible to prevail on a primary line price discrimination case), the law remains on the books, tempting private plaintiffs with the prospect of the automatic trebling of damages and an award of fees and costs.

III. CURRENT STATE OF THE LAW

The current state of the law of vertical restraints, as we might say in the South, is "a hot mess." In all areas of vertical restraints analysis, courts have moved away from draconian *per se* rules of illegality, but they have not moved far enough. We currently are in a purgatory where very few challenged vertical restraints are condemned, but the possibility of condemnation is great enough that, in many instances, even moderately risk-averse firms are forced to be overly and inefficiently cautious.

A. Current Vertical Restraints Law is Confusing

From the perspective of both the academician and the practitioner, the current state of vertical restraints law is unnecessarily vexing. For instance, how should attorneys counsel their clients to balance the efficiencies and benefits of providing volume discounts to large customers against a possible civil action for treble damages by a jilted smaller customer? Is a skittish firm less likely to bundle products efficiently out of fear of being hit with a "quasi *per se*" tying lawsuit? These are nettlesome questions to be sure, but they are by no means the most troublesome arising out of the current state of the law regarding vertical restraints.

Perhaps no area of antitrust jurisprudence is a greater source for headaches for antitrust attorneys than the law regarding resale price maintenance. For decades, firms followed (usually rather loosely) the parameters that grew out of *Colgate,* [80] promulgating "unilateral" suggested resale prices. Today, manufacturers, vaguely aware that a recent Supreme Court decision has made resale price maintenance in some respect less illegal, want to know how, post-*Leegin*, they can dispense with continued, awkward adherence to a *Colgate* policy.

***485** Ironically, *Leegin* does little to alter the advice an antitrust lawyer is likely to give a client seeking to navigate resale price maintenance waters. While successful challenges may be quite rare, the door is still open for a litigious retailer to challenge price agreements between a manufacturer and other retailers. Therefore, the soundest advice is for a firm--as before-- to unilaterally announce its pricing policies. Might a cheating retailer be given a "second chance," which, historically, has been deemed an agreement on price, thereby give rise to *per se* liability for both the manufacturer and the repentant retailer? If so, the fact that a manufacturer had--at least on paper--a *Colgate* policy and made reasonable efforts to adhere to it, likely renders the agreement "reasonable enough" to withstand serious challenge under Section 1.

But why bother with trying to adhere to *Colgate* at all? Are there circumstances where resale price maintenance agreements are truly anticompetitive? In *Leegin*, the Court articulated three instances where resale price maintenance agreements may be unreasonable. All involved either horizontal cartel activity (at either the retailer or manufacturer level) or monopolization. [81] If there is a manufacturer cartel, there is a classic *per se* illegal agreement, rendering the resale price maintenance question moot. The same is true if there is a retailer cartel--the presence of a horizontal cartel would trigger the *per se* rule encompassing all of the cartel activity. [82] Finally, if the resale price maintenance in question is directed by a monopolist or a monopsonist, then that conduct could be challenged under Section 2. [83] If these are indeed only situations in which resale price maintenance agreements could be anticompetitive, then there is no need for additional enforcement through Section 1.

B. Economic Inefficiencies Abound Due to Over-Deterrence

The fact that vertical restraints are not *per se* lawful under Section 1 (however rare a successful challenge may be) necessarily results in firms taking more precaution than is ideal to avoid the possibility of being sued for treble damages under the antitrust laws. For example, despite no reported successful resale price maintenance challenges post-*Leegin*, manufacturers are likely to at least give the appearance of implementing and enforcing unilateral price policies. For those manufacturers selling in a state where resale price maintenance agreements are *per se* illegal under state law, adherence to a *Colgate* policy, silly as it may be, is still required. If resale price maintenance agreements were *per se legal* under Section 1, only potential monopolists would have any reason to seek legal advice regarding resale price maintenance, as ***486** opposed to now, where resale price maintenance legal counseling is ubiquitous in the business world. [84]

IV. PROPOSED SOLUTION

All vertical restraints should be *per se* legal under Section 1. Can a vertical restraint, on balance, be anticompetitive? While perhaps very uncommon, it is possible, but only if the party imposing the restraint has market power in some relevant market.

Robert Bork and Richard Posner were correct that vertical restraints all impact the market in generally the same way and should thus be accorded uniform treatment. [85] Recall that the *Leegin* majority opinion could posit no anticompetitive examples of resale price maintenance that did not necessarily implicate a monopolization offense. [86] Because all vertical restraints operate in the same way on the market, plausible anticompetitive examples of price discrimination, price and territorial restrictions, and, of course, tying (which necessarily involves the conduct of a firm with market power in at least one product) *all* involve conduct that would be more appropriate for challenge under Section 2.

As an example, primary line price discrimination, where a manufacturer sells below an "appropriate" level of cost, is rarely successful and, thus, consumers usually benefit from a firm's below cost pricing. [87] Predatory pricing is a concern only when rivals are driven out and the price-cutting monopolist can then raise prices to such a level for a sufficient period of time that the monopolist can recoup its price-cutting losses. [88] For that to occur, the price-cutter must necessarily have successfully excluded rivals (who could not sustain as long of a matching price-cutting campaign), which would give rise to a textbook Section 2 claim.

As another example, consider a secondary line price discrimination claim. A Manufacturer ("M") sells its products to two retailers ("S1" and "S2") who are in direct competition with one another. M favors S1 and disfavors S2, and provides preferential pricing to S1 but not to S2. To the extent S2 can purchase products from another manufacturer, what harm has it suffered? If there are multiple other retailers (acting independently and not collusively), where is the harm to competition? Intrabrand competition may be harmed, but not interbrand ***487** competition, which today is the focus of antitrust law. [89] Harm to competition (and any danger of increased prices to consumers) is not a risk until there is but one distribution channel for a seller with market power. If there are still multiple retailers selling M's product in competition with one another, the loss of one disfavored retailer does not alter the competitive landscape (which is what Robinson-Patman critics have argued for decades).

Is it possible for secondary line price discrimination to cause actual harm to competition? Perhaps. If M is a monopolist, it could seek to move downstream and monopolize the retail market. Competition among retailers can help check such a monopolist manufacturer's power. Or--and this is more likely--a dominant retailer could induce favorable pricing that allows it to drive rivals from the marketplace. In each of these examples lies a Section 2 claim. [90]

Absent the abuse or attempted expansion of market power by a monopolist, there is little real danger to competition from vertical restraints unless such restraints are used to facilitate a horizontal cartel. Of course, the use of such vertical restraints to facilitate a cartel would not immunize that cartelization or monopolization. Cartels are *per se* illegal under Section 1, regardless of the tools used to facilitate the collusion.

Transaction costs, in the form of legal counseling fees and expenses and unnecessary and undesirable litigation, are increased by the current uncertain state of the law. A *per se* rule of legality for vertical restraints under Section 1 would minimize the uncertainty and greatly diminish these unnecessary costs.

How much easier it would be for lawyers to counsel clients if only they did not have to navigate the vertical restraints minefield of exceptions, defenses, and outdated protectionist policies and law. As but one example, resale price maintenance agreements challenged under federal law are evaluated under the rule of reason. Because a few states still maintain a *per se* ban on resale price maintenance agreements, however, manufacturers selling nationwide must still take care to act "unilaterally."

Suppose a manufacturer opts to eschew the headaches of a *Colgate* policy and instead rolls the dice under federal law that its resale price maintenance "agreements" are reasonable. Following *Leegin*, the manufacturer is very likely ultimately to prevail if its agreements are challenged. Notwithstanding that success, if the agreements covered sale in, for example, New York, that manufacturer would be in violation of New York's *per se* ban on resale price maintenance agreements. [91] This absurd result--where the same restraint is lawful and reasonable under federal law but illegal under state law could not occur if such restraints were deemed *per se* lawful. If vertical restraints are *per se* legal, contrary state laws would be preempted, greatly enhancing clarity and ***488** simplicity in application of vertical restraints law.

A. Anticompetitive Restraints Can Be Fully Addressed Under Section 2.

1. There is no plausible argument against *per se* legality of non-price territorial restraints under Section 1.

Sylvania moved the ball in the right direction, but it did not go far enough. A manufacturer should be given the freedom to distribute its products in the manner it deems fit. For almost forty years, the Supreme Court has maintained (not always consistently) that the primary concern of antitrust laws is interbrand competition, and not intrabrand competition. [92] It is difficult to imagine a non-price, intrabrand restraint that would threaten competition. Here, the danger of over-deterrence is much greater than the almost negligible danger of under-deterrence.

From a practitioner's standpoint, however, it would be malpractice to counsel a client that vertical territorial restraints are *per se* legal. They should be, but they are not. As a result, antitrust practitioners are forced to warn their clients that "the pro-competitive benefits ... must offset any harm to competition[,]" determined after examining "the purpose of the vertical restriction, the effect of such restriction in limiting competition in the relevant market, and, importantly, the market share of the supplier imposing the restraint." [93] International law firm Sidley Austin LLP concludes its online summary of vertical restraints by noting that so "long as inter-brand competition is strong, courts *typically* find territorial restraints lawful under the rule of reason." [94]

The fact that courts "typically" find restraints lawful is small comfort to a large, risk-averse supplier with many dealers or distributors who purchase from it (any one of whom, if terminated for whatever reason, is a potential plaintiff). Moreover, a firm weighing the risks imposing territorial distribution restraints must consider not only the possibility of a treble damages judgment, but also the costs of defending an antitrust lawsuit, even if were to prevail. [95] Unfortunately, Professor Sokol's characterization of vertical territorial restrictions as *per se* legal is incorrect.

There is hope, however. Vertical territorial restraints are rarely condemned absent monopoly power. [96] Treating vertical territorial restraints as *per se* legal under Section 1 does not then impact the likelihood that a meritorious challenge will succeed (because that challenge could proceed under Section 2), but it would eliminate the possibility of a lawsuit or counterclaim from being initiated ***489** when there is lacking even the possibility of harm to competition.

This may not seem like a large gap to close to the academic, but to the practitioner it is substantial. Consider a client seeking advice on structuring a distribution network with commonplace territorial restrictions in place to lessen intrabrand competition. Under the proposed rule, if the client could not plausibly be considered a monopolist, as will be the case in the vast majority of cases, then that is where the risk of antitrust liability ends. The answer to the client would be simple and inexpensive--there is no way to run afoul of the antitrust laws on account of the structuring of one's distribution network.

2. There is no plausible argument against *per se* legality of resale price maintenance agreements under Section 1.

As Richard Posner noted over 30 years ago, there is no substantive division between vertical territorial restraints and vertical price restraints. [97] For the same reason the territorial restraints in *GTE Sylvania* should be *per se* legal, so too should price restraints--most notably agreements on resale price maintenance and minimum advertised pricing should be *per se* legal under Section 1. The Supreme Court's *Leegin* opinion underscores this-- all of the anticompetitive resale price maintenance scenarios given involve monopolization in violation of Section 2 or stand-alone horizontal cartel activity in *per se* violation of Section of 1.

Per se legality of vertical price restraints would also serve to preempt state laws still embracing the *per se* illegality rule of *Dr. Miles*. This means manufacturers need not research--and keep abreast of--current state laws regarding resale price maintenance. It also means they can have one overarching national sales and pricing policy, with no need for isolated pockets of "throwback" *Colgate* policies for, *e.g.*, New York or Maryland.

Is it possible that prices to consumers will be higher under a *per se* legal standard? Possibly, but that is not to say that there would necessarily be a diminishment in consumer welfare. Consumers in most instances could expect more informed and better-trained (and thus more helpful) sales personnel as well as better post-sale service. Moreover, the certainty and clarity provided to manufacturers would increase total welfare (by increasing overall efficiency) without harming consumers.

3. There is no plausible argument against *per se* legality of tying arrangements under Section 1.

Tying is the most complex vertical restraint, but for purposes of this article it is the easiest restraint for which to justify *per se* legal treatment under Section 1. Tying, in all cases, should be *per se* legal under Section 1 or, given that tying agreements can also be challenged under Section 3 of the Clayton Act or Section 5 of the Federal Trade Commission Act, perhaps it is better to state the argument that tying should be subject to challenge only under Section 2. True, tying agreements, in certain circumstances, can facilitate price discrimination, but, for ***490** reasons articulated elsewhere in this Article, price discrimination should also be *per se* legal under any statute other than Section 2.

While all ties necessarily involve market power in the tying product, the vast majority of ties are, on balance, pro-competitive. [98] When are they, on balance, *anticompetitive*? When they facilitate monopolization in violation of Section 2. Tying can also facilitate monopolization in two ways. First, in very limited situations, a tying agreement can allow the monopolist in the tying product to achieve market power in the tied product. [99] Tying can allow a firm with market power in a tying product whose price is capped through regulation to circumvent the regulatory price caps and secure monopoly profits through tying. [100] Both of these examples would constitute illegal monopolization under Section 2, because both involve the illegal maintenance or expansion of a monopoly.

Because tying necessarily involves market power in at least one market (the "tying" product), monopolization will always be an issue in tying cases. Because of the arguably "quasi *per se"* treatment of ties historically, plaintiffs have opted, whenever possible, for the much lower proof thresholds of Section 1. This is analogous to forum shopping, and the truth is that no aggrieved plaintiff needs Section 1 to pursue a valid tying claim.

4. Primary line price discrimination should not be actionable unless it establishes a claim under Section 2.

It is doubtful, absent the most rare and extreme facts, one can prevail on a primary line price discrimination action today. The vast majority of below-cost pricing schemes, to the extent they exist, actually benefit consumers. [101] If there is a set of facts in which a monopolist could likely recoup its investment, such conduct would support a claim under Section 2 for monopolization. If so, it would be yet another example of conduct, which, while ordinarily permissible, may not be legal if undertaken by a monopolist. [102] Otherwise, there is no danger of actual harm to competition and, as such, challenges should fail under any antitrust statue, including the Robinson-Patman Act. [103] And why punish the ***491** below-cost pricing itself? The focus should instead be on whether a firm is able to exclude competitors from the market over time, an analysis that does not require a separate action for primary line price discrimination.

5. Secondary line price discrimination should not be actionable unless it establishes a claim under Section 2.

Secondary line price discrimination, most often involving a manufacturer providing preferential pricing to a favored dealer, is in some ways even less appropriate for condemnation (absent certain monopolization scenarios) than primary line price discrimination. Why? Because secondary line price discrimination does not, even if successful, freeze out a competitor of the manufacturer. Rather, it disadvantages one or more distributors or retailers vis-à-vis a favored distributor or retailer. Currently, placing a distributor or retailer at a disadvantage can trigger treble-damages liability, when simply cutting off the disfavored distributor or retailer is perfectly legal.

Such a rule makes little sense. For one, it encourages a manufacturer to simply cut off a smaller or disfavored distributor or retailer altogether, rather than simply provide them product on unequal terms. Second, absent market power of the manufacturer, there is likely no injury to competition (and if there were market power, of course Section 2 would provide an aggrieved party with an opportunity for redress), because the disfavored buyer could look to another manufacturer for the product in question. Even the Federal Trade Commission acknowledges that "[c]ourts may be starting to limit [the competitive injury] inference to situations in which either the buyer or the seller has market power, on the theory that, for example, lasting competitive harm is unlikely if alternative sources are available." [104] As with primary line price discrimination, absent monopolization, there can be no injury to competition. While there may be harm inflicted upon a disfavored distributor or retailer, the antitrust laws protect competition generally rather than individual competitors. [105]

V. THE LAW WILL CONTINUE TO EVOLVE TOWARDS PER LEGALITY FOR VERTICAL RESTRAINTS

This Article argues not only what the law should be; it also predicts that we will inevitably arrive there one day. Why? Because current vertical restraints law is massively inefficient, and the law, over time, will evolve to correct these inefficiencies.

The law generally evolves in an efficient direction over time. There are at least two accepted reasons why this is so. First, as Posner believes, judge-made law tends to be efficiency-enhancing. [106] That is, all things being equal, judges ***492** prefer to create efficiency-enhancing rules. Certainly in the antitrust law realm, courts have endeavored to do just that (if the results are, perhaps, sometimes mixed). The *Sylvania* Court relied extensively on the recent scholarship of "Professor" Posner. [107] Two decades later, the *Leegin* Court likewise courted efficiency, noting that "it [*per se* treatment of resale price maintenance agreements] is a flawed antitrust doctrine that serves the interests of lawyers ...." [108] And in *Volvo Trucks*, the Court, grounded in its current understanding of economics, reminded us that its "'primary concern of antitrust law"' was "[i]nterbrand competition." [109]

Lower Courts have followed suit as well. The U.S. Court of Appeals for the District of Columbia Circuit, despite affirming many of the verdicts against Microsoft under Section 2, overruled the district court's *per se* treatment of the accusation that Microsoft had tied its browser (Internet Explorer) to its Windows Operating Systems. [110] On remand, the DOJ and various states prosecuting claims elected not to pursue their tying claim under a rule of reason theory. [111] Why? Because there was no need, as the underlying conduct had been adequately addressed in the broader monopolization case against Microsoft.

The second reason the law trends towards efficiency is that efficient rules are less likely to be challenged over time, while inefficient rules will more likely be challenged. [112] Succinctly put, according to Priest, inefficient rules impose greater costs on parties and are thus more likely to be challenged. [113] Further, the more frequently inefficient rules are challenged, the more likely they are to be corrected. [114] While some cases will inevitably be incorrectly decided--resulting in an efficient rule being replaced by an inefficient one--overall the trend will always be to a more efficient system of laws.

Current vertical restraints law produces inefficient results in the form of increased transaction costs, attorneys' fees, unnecessary uncertainty on the part of market participants, and over-deterrence of perceived harms to competition by risk averse market participants. Non-price vertical restraints are not the source of much controversy these days, but such was not always the case. In a now infamous case, just 44 years ago, the Supreme Court declared vertical *intrabrand* restraints to be *per se* unlawful. [115] At the time, the Court (or at least a majority of its members) did not appreciate the economic distinction between interbrand ***493** restraints and intrabrand restraints. [116] Just five years later however, in *GTE Sylvania*, a majority of the Court's members recognized that vertical non-price restrictions "generally ... are [un]likely to cause a 'pernicious effect on competition' or to that they lack ... any redeeming virtue." [117] It was still not ready, however, to recognize the fallacy of trying to distinguish between vertical non-price and price restrictions. [118]

It took until 2007 for the law on vertical price restraints to catch up with *Sylvania*, but, now that it has, the changes are less than one would have hoped. Holdover states with *"Dr. Miles"* laws and the possibility--however remote--of a successful treble damages claim brought under the antitrust laws artificially restrict the number of reasonable and beneficial resale price maintenance programs. Why make countless firms go through the motions of creating and adhering to a *"Colgate* policy?"

Notwithstanding the economic complexities of tying agreements, it is no longer disputed that most ties are pro-competitive and beneficial to consumers. [119] Given that the vast majority of ties are pro-competitive, it makes little sense to subject ties to a "quasi-*per se"* rule, even when a degree of forcing is "probable". Of course, without a degree of forcing, there is almost assuredly insufficient market power in the tying product to cause any economic harm. Plaintiffs, who are not actually victimized, are left over-incentivized to bring tying claims for imaginary or cooked-up antitrust injuries.

Finally, there is price discrimination--a leftover piece of protectionist legislation from the Great Depression, which has never been accused of making good economic sense. Courts have sensibly made recovery for primary line price discrimination almost impossible. But the very slight sliver of a possibility that remains may well discourage below-cost pricing or promotions that would otherwise *benefit* consumers. How ironic, that fear of consequences under the antitrust laws, may be depriving consumers of the benefits of *lower* prices. Secondary line price discrimination law is no better. As both Bork and Posner have argued for years, price discrimination prohibitions result in the "needless deformation of market processes and the destruction of [enormous] national wealth." [120] In the case of price discrimination, Robinson-Patman is an open secret. Perhaps no legislator wants to lead the charge to repeal a statute that, when enacted, was intended to protect "mom and pop" shops in Middle America, but it is curious the extent to which we continue to subject ourselves to the statute's harmful influences.

*494 VI. CONCLUSION

This Article suggests that, in time, vertical restraints will evolve into the standards herein proposed. Defendants will be more likely to try, rather than settle, vertical restraints cases because the current law--as applied to (a) non-price restraints, (b) price restraints, (c) tying agreements; (d) and price discrimination--is inefficient. Moreover, judges are more likely to select an efficiency-enhancing rule over a less efficient alternative.

But more than simply predict how "the dust will settle," this Article suggests that we need not wait for the inevitable but slow "correction" in the law to occur. Rather, it is but a small step--and consistent with both Supreme Court precedent and a plain reading of the antitrust statutes--for courts to establish that vertical restraints will not be condemned under Section 1, the Clayton Act, or the Robinson-Patman Act. If vertical restraints are condemned at all, such condemnation should be under Section 2 and Section 2 alone.

If the restraint is truly anticompetitive and thus worthy of condemnation, the harm will be addressable through Section 2. Conversely, if there is no Section 2 claim that would arise out of the challenged conduct, the probability that that conduct is truly anticompetitive is very slight. The uncertainty and associated transaction costs from the current state of the rule--where very few vertical restraints are ultimately condemned but none are immune from challenge--far outweigh the danger of potential "false negatives" that might arise under a *per se* legal rule. Under a rule of *per se* legality, clients could stop paying lawyers to draft *Colgate* polices. Manufacturers could favor larger and more efficient distributors if they so choose (without feeling compelled to fire smaller, competing distributors if they would rather not deal with them on the same terms). The muddled law of tying--which can currently trigger liability under no fewer than three separate federal antitrust laws--would be drastically simplified; it would be beyond challenge unless it triggered liability under Section 2. This is where we are headed, and we should push to get there as soon as we can.

Footnotes

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1 CORMAC MCCARTHY, NO COUNTRY FOR OLD MEN 184 (Alfred A. Knoph 2005).

2 *See* 15 U.S.C. § 1 (2012).

3 *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (noting that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

4 To qualify as *per se* illegal, a group boycott must be committed by firms with, collectively, market power. *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1990) (acknowledging that *per se* treatment of boycotts is limited to "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"). Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). Absent such market power, the refusals to deal will be very unlikely to have any appreciable effect on competition generally, and therefore of no real concern from an antitrust perspective.

5 *See* State Oil v. Kahn, 522 U.S. 3, 22 (1997) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)). Not surprisingly, no one really attempts to bring maximum resale price claims (likely because there are no damages, and, sans damages, no aggrieved plaintiff). D. Daniel Sokol, *The Transformation of Vertical Restraints: Per se Illegality, The Rule of Reason, And Per se Legality*, 79 ANTITRUST L.J. 1003, 1010 (2014), available at http://scholarship.law.ufl.edu/facultypub/546 (noting that, since Kahn was decided, there have been only "six cases" dealing with "actual claims of maximum RPM").

6 *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967) (holding it *per se* illegal for a manufacturer, after parting "with dominion over the product," to "restrict territory or persons to whom the product may be transferred"), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977) (returning non-price vertical restraints analysis to the rule of reason).

7 *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911); *see also* ANDREW I. GAVIL, WILLIAM E. KOVACIC, & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (2d Ed. 2008), 356 (Thompson West) (noting that, although *"Dr. Miles* did not itself use the *'per se'* label, over time the Court, as well as lower courts and commentators, consistently recognized the decision as holding that vertical price restraints are *per se* unlawful) [hereinafter GAVIL, KOVACIC, & BAKER].

8 *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 907 (2007) (overruling *Dr. Miles*).

9 Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PENN. L. REV. 925, 925 (1979).

10 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (The Free Press, 1st ed. 1978).

11 *Id.* at 298.

12 Indeed, even the U.S. Department of Justice's Antitrust Division argues that tying agreements "should not be *per se* illegal." *Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act: Chapter 5*, THE DEPARTMENT OF JUSTICE, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-5. The DOJ notes that "many legal scholars, commentators, economists, and others" have "questioned for decades whether tying should be accorded *per se* treatment." *Id.* The *per se* rule is inappropriate for any tying analyses, the DOJ concludes, because "tying has the potential to help consumers and cannot be said with any confidence to be anticompetitive in almost all circumstances." *Id.*

13 *See* United States v. Microsoft Corp., 253 F.3d 34, 96 (D.C. Cir. 2001) (en banc).

14 Sokol, *supra* note 5.

15 *See generally id.* at 1010, 1013.

16 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring antitrust plaintiffs, at the pleading stage to "nudge[] their claims across the line from conceivable to plausible").

17 *See* 15 U.S.C. § 1 (2012).

18 *See* 15 U.S.C. § 2 (2012).

19 *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (holding that, *"in the absence of any purpose to create or maintain a monopoly*, the [Sherman 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" (emphasis added)).

20 *See* Jefferson Parish Hosp. Dist. 2. v. Hyde, 466 U.S. 2, 16, 28-29 (1984) (noting that *per se* condemnation is appropriate if anticompetitive forcing is likely).

21 Einer Elhauge, *Rehabilitating Jefferson Parish: Why Ties without a Substantial Foreclosure Share Should Not be Per se Legal*, 80 ANTITRUST L.J. 463, 466 (2016).

22 *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

23 *See id.* at 370.

24 *See id.* at 370-71.

25 *See id.* at 371.

26 *See id.*

27 Continental T.V., Inc. v. GTE Sylvania Corp., 433 U.S. 36, 44 (1977).

28 *Schwinn*, 388 U.S. at 379.

29 *GTE Sylvania*, 433 U.S. at 54 (emphasis added) (quoting *Schwinn*, 388 U.S. at 379).

30 *See id.*

31 *Id.* at 55.

32 *Id.*

33 *Id.*

34 *Id.* at 48 n.13 (citing Richard Posner, Note, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975)).

35 *Id.*

36 *Id.* at 51 n.18 (quoting Posner, *supra* note 31, at 294 (footnote omitted in original)) (citing Richard Posner, *Antitrust: Cases, Economic Notes and Other Materials*, 134 (1974)).

37 *GTE Sylvania*, 433 U.S. at 69 n.10 (White, J., concurring) (citing Posner, *supra* note 31, at 292-93 (footnote omitted in original)).

38 *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877 (2007).

39 *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

40 Indeed, in a dissent that has proved much more memorable than the majority opinion, Oliver Wendell Holmes argued that the *per se* ban protected free-riding dealers (in his words, "knaves"). *Dr. Miles*, 220 U.S. at 412 (Holmes, J., dissenting) (arguing that he could not "believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get"). The concern for free-riding has been a primary justification for the Court's many efforts to "chip away" at the reach of *Dr. Miles* before finally overruling it in *Leegin*.

41 250 U.S. 300, 300 (1919).

42 *Id.* at 307.

43 GAVIL, KOVACIC, & BAKER, *supra* note 7 at 371.

44 *Id.*

45 *See, e.g.,* Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 39 (1977) (brought by dealer following termination); Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 884 (2007) (involving the same).

46 Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984).

47 *Id.* (holding that to "permit the inference of concerted action on the basis of receiving complaints alone and thus expose the defendant to treble damages liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute") (quoting Edward J. Sweeny & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)).

48 Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 717-18 (1988).

49 *Leegin*, 551 U.S. at 907. Although the decision was decided by a, perhaps, surprisingly close 5-4 margin, the dissenters may have been more concerned with the stare decisis aspect of the case and, in particular, its impact on future cases in the abortion arena. The dissent (the largely liberal Justices Breyer, Stevens, Souter, and Ginsburg) focused in large part on another stare decisis case decided that term--Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007)--and a concurring opinion authored by Justice Scalia. In particular, the *Leegin* dissent applied Scalia's six-factor stare decisis analysis to the underlying facts in *Leegin,* after which it concluded that there were not sufficient grounds for overruling *Dr. Miles. Leegin,* 551 U.S. at 923-27 (Breyer, J. dissenting). The (largely conservative) majority, on the other hand, did not mention the parallel stare decisis *Wisconsin Right to Life* case once.

50 *Leegin*, at 890-92.

51 *Id.* at 892.

52 *Id.* at 892-93.

53 By way of example, consider a dominant retailer in a two-tiered distribution network. The retailer's only competitors are much smaller retailers, who might seek to gain market share by attempting to undercut the dominant retailer's price. The dominant

retailer can pressure a manufacturer to implement a resale price maintenance plan to insulate it from price competition at the retail level.

54 15 U.S.C. § 1 (2012).

55 15 U.S.C. § 14 (2012); *see also* Int'l Salt v. United States, 332 U.S. 392, 396 (1947) (condemning challenged tying arrangement under both the Clayton Act and Section 1 of the Sherman Act as a *per se* offense).

56 *See* United Shoe Mach. Corp. v. United States, 258 U.S. 451, 464-65 (1922); *see also* Int'l Bus. Mach. Corp. v. United States, 298 U.S. 131, 140 (1936).

57 GAVIL, KOVACIC, & BAKER, supra note 7 at 793.

58 *See* Jefferson Parish Hosp. Dist. 2. v. Hyde, 466 U.S. 2, 32 (1984) (Justice O'Connor was joined in her concurrence by Chief Justice Rehnquist and Justices Burger and Powell).

59 *Id.* at 15.

60 *Id.* at 16.

61 *Id.*

62 *Id.*

63 *Id.* at 9. Of course, as further discussed *supra*, the Court, in 2007, turned away from nearly one-hundred years of *per se* condemnation of resale price maintenance agreements and ruled that, going forward, such agreements should be subject to rule of reason analysis. *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 907 (2007).

64 *Jefferson Parish*, 466 U.S. at 9-15.

65 *Id.* at 29.

66 *Id.* at 34 (O'Connor, J., concurring).

67 *Id.* at 36 (O'Connor, J., concurring) (noting that tying "may be economically primarily harmful in the rare cases where power in the market for the tying product is used to create *additional* market power in the market for the *tied* product" (emphasis in original)).

68 Elhauge, *supra* note 18, at, 463, 465.

69 253 F.3d 34 (D.C. Cir. 2001).

70 *See id.* at 84.

71 *Id.* at 89-90 (quoting *Jefferson Parish*, 466 U.S. at 9) (emphasis in original).

72 *See id* at 89 (noting that there are "strong reasons to doubt" that "the integration of additional software functionality into an OS falls among [*per se*] arrangements").

73 Elhauge, *supra* note 18, at 467.

74 *Id.* at 470.

75 BORK, *supra* note 9, at 382 (equating the Robinson-Patman Act to "a baseball player who, although a weak hitter, was also a poor fielder," Bork noted that it "does not prevent much price discrimination" but has "at least ... stifled a great deal of competition").

76 *See* 15 U.S.C.A. § 13 (2012); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo.Wash.L.Rev. 2064, 2069 (2015).

77 *See* John B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has Volvo Reconciled Them?*, 30 SEATTLE U. L.REV. 349, 349 (2007) (referring to the "Robinson-Patman Act as the "black sheep of antitrust law").

78 "The Robinson-Patman Act may well be the most reviled of all antitrust laws." Douglas L. Wald, *Recent Court Decisions Make Complying with the Robinson-Patman Act Even More Confounding*, LEGAL TIMES, Sept. 1, 1997, at 25.

79 Antitrust Modernization Commission, Report & Recommendations at 311-32 (Apr. 2, 2007).

80 250 U.S. 300, 300 (1919).

81 Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 892-93 (2007) (noting that resale price maintenance may be, on balance, anticompetitive when used to "facilitate a manufacturer cartel," used "'to organize cartels at the retail level[,]'" or "abused by a powerful manufacturer or retailer" (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 725-26 (1988)).

82 *Leegin*, 551 U.S. at 893. Moreover, the "source of the restraint may also be an important consideration" because if there is evidence that "retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer." *Id.* at 897-98.

83 This would be all the more intuitive because the artificial distinction between a "unilateral" Colgate policy and an agreement would be irrelevant under a Section 2 analysis.

84 Horizontal cartels, due to their hidden nature, would be very unlikely to seek counseling as to ancillary vertical restraints in furtherance of their illegal activity.

85 Posner, *supra* note 31 at 292-93; Robert H. Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171, 171 (criticizing the Supreme Court's *GTE Sylvania* decision for taking "care to distinguish indistinguishable business practices [vertical market division and vertical price restraints] and to suggest that vertical market divisions might be unlawful under some (unspecified) circumstances").

86 551 U.S. at 897-98. This disregards the Court's references to horizontal agreements to implement resale price maintenance agreements, which, as noted *supra*, renders any resale price maintenance claims superfluous and trivial.

87 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993).

88 *See id.* at 224 ("Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.").

89 *See* Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180 (2006) (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-52 n.19 (1977) (noting that "[i]nterbrand competition ... is the 'primary concern of antitrust law'")).

90 *See* 15 U.S.C. § 13(f) (2012) (prohibiting "any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section").

91 *Antitrust Enforcement*, ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, http://www.ag.ny.gov/antitrust/antitrust-enforcement (the New York Attorney General's office reiterates that "[r]esale price maintenance violates New York law").

92 *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-52 n.19 (1977).

93 Joel Mitnick, *Vertical Agreements. The regulation of distribution practices in 36 jurisdictions worldwide*, SIDLEY AUSTIN LLP 303, 307 (2013), http://www.sidley.com/~/media/files/publications/2013/03/getting-the-deal-through--vertical-agreements-2013/files/view-united-states-chapter/fileattachment/va2013-united-states.pdf.

94 *Id.* (emphasis added).

95 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (noting that "proceeding to antitrust discovery can be expensive").

96 *See* Sokol, *supra* note 5 (citing Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason,* 60 ANTITRUST L.J. 67, 71 (1992)); Mitnick, *supra*, note 90.

97 Posner, *supra* note 34.

98 *See* Jefferson Parish Hosp. Dist. 2. v. Hyde, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring) *abrogated (on other grounds) by* Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

99 *Id.* (noting that tying may be "economically harmful primarily in the rare cases where power in the market for the tying product is used to create *additional* market power in the market for the *tied* product" (emphasis in original)).

100 *Id.* at n.4.

101 Not surprisingly, the Antitrust Section of the American Bar Association views primary line cases with considerable skepticism, noting that "[c]laims of predatory pricing are extremely difficult to prove and usually are defeated on motions to dismiss or for summary judgment." Ross E. Elfand, *The Robinson-Patman Act*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/robinson_patman_act.html.

102 *See* Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951) ("The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. But the word 'right' is one of the most deceptive pitfalls .... *In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (emphasis added)).

103 *See* 15 U.S.C. § 13(a) (2012) (condemning price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce"). While the underlying economics may not have been fully understood at the time Robinson-Patman was enacted, we know now that there is little danger of any appreciable harm to competition if a restraint does not also "tend to create a monopoly ...." *Id.*

104 *Price Discrimination: Robinson-Patman Violations*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman.

105 *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

106 *See* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW, 495-99 (3d. ed. 495-99).

107 *See generally* 433 U.S. 36, 58 (1977).

108 551 U.S. 877, 904 (2007).

109 546 U.S. 164, 180 (2006) (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-52 n.19 (1977)).

110 *See* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) (en banc).

111 GAVIL, KOVACIC, & BAKER, *supra* note 7, 822.

112 George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 67 (1977) (arguing that "litigation will be more likely for disputes arising under inefficient rules than for those arising under efficient rules").

113 *See id.* (noting that "the costs imposed by inefficient rules will always be higher than the costs imposed by efficient rules").

114 *See id.* at 72 (arguing that "[i]nefficient rules perish because they are more likely to be reviewed and review implies the chance of change ....") (internal quotations omitted).

115 *See* United States v. Topco Assoc., Inc., 405 U.S. 596, 612 (1972). In *Topco*, the majority condemned an intrabrand grocery store cooperative of small, independent brands that utilized territorial restraints to help market private label products in competition with the private label products of larger, chain grocery stores.

116 *See id.* at 614 (Burger, C.J. dissenting) (noting that the majority decision reversing the district court not only failed to increase interbrand competition, it would "substantially diminish competition in the supermarket field") (internal citation omitted).

117 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977).

118 *See id.* at 70 (White, J. concurring) (chastising the majority for, despite heavily relying on Richard Posner's analysis of vertical restraints, ignoring his conclusions that non-price and price restraints are indistinguishable in effect and should thus be accorded the same treatment under the law).

119 *See* Jefferson Parish Hosp. Dist. 2. v. Hyde, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring).

120 Bork, *supra* note 9, at 382, 384-85 (quoting RICHARD POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES (American Enterprise Institute, 1st ed. 1976) (arguing that the "literature of Robinson-Patman abounds with ... such horror stories, and the total wealth loss due to this one statute must be staggering")).

35 MSCLR 472

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