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ESSAY

ON THE RAMIFICATIONS OF *LEEGIN CREATIVE LEATHER PRODUCTS, INC. V. PSKS, INC.*: ARE TIE-INS NEXT?

ALAN DEVLIN[*]

I. INTRODUCTION

Better late than never. From an economic perspective, the per se rule against resale price maintenance[1]—established by the 1911 Supreme Court decision, *Dr. Miles*[2]—was unquestionably one of the worst antitrust decisions of the twentieth century.[3] Yet, in intransigent and pertinacious fashion, the Court refused to overrule its former erroneous decision despite having had several opportunities to do so.[4] As a result, and notwithstanding the bedrock principle that antitrust cases must make

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[1]Minimum resale price maintenance refers to the practice wherein a manufacturer sells its produce to distributors, but insists that the latter not sell to consumers below a certain price.

[2]Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[3]While not all would agree with the proposition that a per se rule against resale price maintenance is fatuous, I find no rationality in such a prohibitionary rule. My view is ubiquitously shared by leading economists and also held by a large number of leading antitrust scholars. *See* Economists' Brief (arguing for repeal of the per se rule); RICHARD POSNER, ANTITRUST LAW 171-89 (Univ. of Chi. Press 2d ed. 2001); ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 280-98 (N.Y. Free Press 2d ed. 1993).

[4]The Court was asked to revisit the per se rule, or at least the rule's *raison d'être*, on many occasions. *See, e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919); United States v. Gen. Elec. Co., 272 U.S. 476 (1926); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967); Albrecht v. Herald Co., 390 U.S. 145 (1968); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); State Oil Co. v. Khan, 522 U.S. 3 (1997).

economic sense,[5] the rule that vertically imposed minimum price-based restraints are illegal has remained in force for almost a hundred years.[6] The Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[7] to overrule *Dr. Miles*, then, was not so much an iconoclastic judgment as it was a long overdue implementation of ubiquitously accepted principles of price theory.

Nevertheless, the case arguably stands for more than the correction of a century-old mistake. It sends a meaningful message about the direction the Roberts Court is taking in analytic jurisprudence. The stare decisis principle generally requires the Supreme Court to follow its prior determinations.[8] As described by the Ninth Circuit, "the doctrine of stare decisis concerns the holdings of previous cases, not the rationales."[9] Assuming the normative legitimacy of the doctrine, Leegin provided a paradigmatic example of a case in which the status quo should have been preserved and arguments for change rejected. There was no interpretive question as to the "what," rather the case was concerned with the "why." In other words, the rule set down in *Dr. Miles* was both unequivocal and firmly established. Under pure principles of stare decisis, this should have been enough to affirm the precedent. Yet, the Court went the other way and, as Justice Breyer stressed in dissent, all relevant factors weighing on the applicability of stare decisis weighed against the majority's decision.[10]

And so enters the crux of the decision—what was the trigger for the fervent dissent? In my opinion, the dissent in *Leegin* is not concerned with the social ramifications of a rule of reason approach. Rather, the dissent is all about one, seemingly unrelated issue: abortion. The Roberts Court has appeared to some to have taken a shift to the right with the addition of its two new members.[11] Given the left's perennial fear of having *Roe v. Wade*[12] overturned, for them, judicial deference to stare decisis is of the utmost importance. From their perspective, the addition of more right-leaning justices is a source of significant concern.[13] Not surprisingly,

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[5]*See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 594, n.19, 596-97) (noting that "[l]ike all antitrust cases, this one must make economic sense").

[6]Ninety-six years to be precise.

[7]127 S. Ct. 2705 (2007).

[8]*See, e.g.*, Tom Hardy, *Has Mighty Casey Struck Out? Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 HASTINGS CONST. L.Q. 591, 592-95 (charting a rough history of the principle of stare decisis).

[9]*In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996) (emphasis in original).

[10]Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2734-35 (2007).

[11]*See, e.g.*, Charles Lane, *Roberts Court Shifts Right: Recent, Bitterly Contested Decisions Underscore New Conservative Ideology with Potential to Change Rulings that once Seemed Definitive*, CHI. TRIB., July 1, 2007, at C3; Charles Lane, *Split Roberts Court Cements Shift to the Right*, SEATTLE TIMES June 29, 2007, at A18.

[12]410 U.S. 113 (1973).

[13]*See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007) (describing the threat to *Roe v. Wade* from continuing appointments of conservative justices to the Court); Layla Summers, *The Future of the Abortion Right: Ayotte v. Planned*

then, a major factor in the recent confirmation hearings was the nominee's regard for precedent, particularly with regard to the issue of abortion rights.[14] The grave trepidation for proponents of those rights is that *Leegin* has undermined stare decisis, thus facilitating a future reversal of *Roe v. Wade*.[15] It is likely for this reason that the most knowledgeable antitrust Justice authored a dissent that was inimical to sound economics, but replete with citations to abortion-related cases discussing precedent.[16]

Yet, this Essay argues that not only is the dissent's focus on stare decisis incongruous, it is entirely misplaced. This case does not constitute, or even foreshadow, a portentous and monumental shift in jurisprudential thinking away from adherence to precedent and toward the right. Rather, it reflects the fact that Congress left the substance of the antitrust statute—the Sherman Act[17]—to the determination of the Court. There have been myriad instances in which the Supreme Court has revisited and overruled its earlier opinions in this field[18] and *Leegin* provides just one more example. In short, the decision is not the grave threat that it may initially have been perceived to be.

All of this is not to say that *Leegin* is devoid of future significance. To the contrary, the case has significant ramifications for antitrust law itself. Today, it is largely settled that consumer welfare[19] is of primary importance and that Chicago-derived principles of economics provide the tools for assessing challenged business practices.[20] Yet, the Chicago School's influence is not complete—indeed, many observers noted a partial retraction therefrom under the Rehnquist Court.[21]

Parenthood & The Roberts' Court, 5 WHITTIER J. CHILD & FAM. ADVOC. 669, 688 (2006) ("History has shown that the right to abortion is one that evolves given the composition of the Court, and thus, new appointments are crucially important to the future and development of the right [to abortion].").

[14]*See, e.g.*, *Confirmation Hearings on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the Sen. Comm. on the Judiciary*, 109th Cong. 549-555 (2005) (responses of Judge John G. Roberts, Jr., to written questions of Sen. Biden); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judicary*, 109th Cong. 2-5 (2006) (opening statement by Sen. Specter, Chairman, S. Judiciary Comm.).

[15]*See, e.g.*, *id.*

[16]*See* Part III *infra*.

[17]15 U.S.C. §1 (2004).

[18]*See* Part III *infra*.

[19]For antitrust purposes, consumer welfare refers to the aggregation of the gap between each consumer's reservation price and the price they actually pay. *See* CARLTON & PERLOFF, MODERN INDUSTRIAL ORGANIZATION 70-71 (Pearson 4th ed. 2005).

[20]*See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (holding that the Sherman Act creates a "consumer welfare prescription"); BORK, *supra* note 3, at 280-98 (arguing that the sole purpose of the antitrust laws is to promote consumer welfare); William J. Kolasky, U.S. and E.U. competition policy: Cartels, Mergers, and Beyond, http://www.usdoj.gov/atr/public/speeches/9848.pdf (noting that "the ultimate goal of any sound competition policy must be consumer welfare, which competition advances through lower prices, higher output and enhanced innovation") (last visited March 10, 2008); Chang, Evans & Schmalensee, Has the Consumer Harm Standard Lost its Teeth? 1 (Aug. 13, 2002) (AEI-Brookings Joint Center Working Paper; MIT Sloan Working Paper No. 4263-02, *available at* http://ssrn.com

In *Leegin*, the Court reversed *Dr. Miles* and a body of precedent that was replete with confused, self-contradictory, and economically illiterate normative foundations. In doing so, the Court not only gave force to the decades-old derision of the nearly century-old rule banning resale price maintenance[22] but signaled a second major step toward obeisance to the Chicago School's focus on price theory.[23] This past summer's decision furthers Chicago's hegemony and raises the crucial question: what are the repercussions for antitrust law of this latest move away from Harvard and toward Chicago?[24]

/abstract_id=332021 ("[C]onsumer welfare is the fundamental standard for evaluating competitive effects.") (last visited March 10, 2008). *See generally* Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001).

[21]*See, e.g.*, Robert H. Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Chicago World*, 62 ANTITRUST L.J. 193 (1993); Lawrence T. Festa, Eastman Kodak Co. v. Image Technical Services, Inc.*: The Decline and Fall of the Chicago Empire?*, 68 NOTRE DAME L. REV. 619 (1993).

[22]*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), established the rule that vertically imposed minimum price-based restraints are illegal per se. The rise of the Chicago School approach to antitrust analysis saw the introduction of price theory as the sole tool by which to inform a competition policy interested only in consumer welfare. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). Morally derived notions of fairness have no place in Chicago antitrust analysis; rather, the maximization of consumer welfare is the sole moral imperative. From this ontological perspective, many leading commentators criticized the underlying rationale behind *Dr. Miles* almost to the point of ridicule. *See, e.g.*, BORK, *supra* note 3, at 280-98; POSNER, *supra* note 3, at viii, 176-89 (opining that much of antitrust law in the 1970s was "an intellectual disgrace" and noting that *Dr. Miles* and its progeny's continuing force in face of improvements in other areas "is a sad mistake" given that "[t]here is neither theoretical basis, nor empirical support, for thinking the practice generally anticompetitive").

[23]As will be explained in Part IV *infra*, the Court's 2006 holding that patents should not be presumed to convey market power for the purpose of product tying claims closely matched Chicago-derived principles of economic theory. *See* Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 34-36 (2006).

[24]The terms "Chicago" and "Harvard" in antitrust terminology often take on a somewhat nebulous and ill-defined form, so I wish to make my understanding of them clear. By Chicago, I refer jointly to what are commonly referred to as the classic Chicago and post-Chicago views of competition analysis. Both are solely concerned with maximizing consumer welfare, though the latter is less agnostic toward the possibility of anticompetitive conduct. Whereas the former called largely for per se legality across the board (with an exception for horizontal cartels and mergers to monopoly), the latter has employed price theoretic models demonstrating the possibility of anticompetitive behavior in a greater variety of contexts. The post-Chicago approach would generally call for rule-of-reason. Both views, however, use the principles of economics as the sole lodestar and this exclusive focus is what I refer to when I speak of Chicago. With respect to Harvard, I refer to the approach to antitrust that proved particularly influential in the Warren Court era. Under this philosophy, socio-political preferences weigh in on antitrust analysis and there is a greater level of mistrust of economic predictions alone. Relevant considerations may include a fear of concentration and protection of politically favored—usually small or family-owned—business. This approach is not unconcerned with economic analysis, but is receptive to a more eclectic range of considerations. *See, e.g.*, Andreas Kirsch & William Weesner, *Can Antitrust Law Control E-*

As of two years ago, only three areas of antitrust law remained unchanged in the face of Chicago-driven principles of price theory—the per se rules against both resale price maintenance[25] and product tying,[26] in addition to the presumption that patents confer market power.[27] With *Leegin*, only one remains.[28] More specifically, now that the per se rule against resale price maintenance has been overruled, the prohibition of product tying stands as an anomaly. Accordingly, this Essay considers whether the Roberts Court would now overrule the last bastion of the Harvard School—the rule against product tying—if given the opportunity. The economic arguments against per se treatment of tie-ins apply a fortiori to those against resale price maintenance. In addition, applying the line of thought followed by the majority in *Leegin* leads inexorably to the conclusion that the per se rule proscribing tying arrangements should be similarly overruled.

Part II explains the business practice of resale price maintenance and the law's formerly mistaken understanding of its consequences. The *Leegin* case will then be introduced and compendiously detailed. Assuming familiarity with that decision, Part III asks whether stare decisis has been dealt a mortal blow, thereby rendering abortion rights less secure in the long run. Having answered that question in the negative, the Essay proceeds to its most important question: if not relevant to stare decisis, what are the repercussions of the judgment? The axiomatic point is that those seeking to invalidate minimum resale prices will now face an uphill battle. The Essay discusses which arguments would be likely to prevail post-*Leegin*. The more interesting insight, however, relates to an unrelated area of antitrust law, product tying. The qualified per se prohibition of tie-ins rests on a flawed economic interpretation highly reminiscent of the specious reasoning that supported the rule in *Dr. Miles*. I suggest that tie-ins would perhaps be subjected to rule of reason analysis were the Court to subsequently revisit the question. A brief conclusion follows.

II. RESALE PRICE MAINTENANCE AND THE *LEEGIN* DECISION

A. The Phenomenon of Resale Price Maintenance

Resale price maintenance exists when a manufacturer sells its goods to distributors and/or retailers, but refuses to give the latter free reign over the price at which they wish to sell to consumers. In the context of this Essay, the term refers to the more narrow circumstance in which a minimum price is fixed in a vertical context. Since the Supreme Court first ruled on the legality of the practice in 1911,[29]

Commerce? A Comparative Analysis in Light of U.S. and E.U. Antitrust Law, 12 U.C. DAVIS J. INT'L L. & POL'Y 297, 304-05 (2006).

[25] *Dr. Miles*, 220 U.S. 373.

[26] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461-62 (1992).

[27] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[28] In the 2006 term, the Supreme Court overruled the presumption that patents confer market power. *Illinois Tool Works, Inc.*, 547 U.S. 28.

[29] *Dr. Miles*, 220 U.S. 373.

it has been treated as inherently and invariably anticompetitive.[30] The first question is: why should the practice be per se illegal?

The Supreme Court's fatal and long-lasting mistake was to confuse vertical with horizontal price-fixing. The latter is quite properly regarded as illegal in every jurisdiction that has a competition statute. When rivals in the same market meet to fix prices, they essentially seek to act as a joint monopolist by reducing output and so increasing price.[31] The result is an immediate decrease in consumer welfare—those consumers at the margin no longer purchase the now-cartelized product, while those whose reservation prices exceed the cartel price nevertheless suffer a wealth transfer without any cognizable, concomitant gain.[32]

Vertical price-fixing is different. Absent a cartel at the manufacturer level, resale price maintenance imposed by any given manufacturer is either pro-competitive or benign.[33] To understand why this is so, picture yourself in the position of a manufacturer. Having produced your products and set your price at a profit-maximizing level, your challenge now is to find someone to sell those goods to consumers on your behalf. The higher the cost of distribution, the lower your profit. As a distributor increases the mark-up between the price you sold at and the price he sells at, he makes you worse off by reducing demand for your product. Imposing a maximum resale price can prevent such an event occurring. Recognizing this at last in 1997, the Supreme Court held that vertically imposed maximum price-based restraints are no longer illegal per se.[34]

But why would it ever be in a manufacturer's interest to establish a minimum price? Surely a manufacturer would like its dealers to sell at as low a price as possible so as to increase the demand for its goods? This holds true only if risk is not a factor and if all distributors or retailers provide the same level of pre-sale service.[35]

Imagine once more that you are a manufacturer, except now you have just developed a new product, the consumer demand for which is uncertain. A retailer may be reluctant to take on the product line unless it has assurances of enjoying a premium to counter the risk involved. A manufacturer's agreement to establish a mutually satisfactory minimum price assures the retailer that if rivals start selling the same line in the future, she will not be undercut. Once entry has occurred and the retailer is selling the manufacturer's goods, it is true that consumers would be made better off in a single-period by eliminating the minimum price requirement and allowing other retailers to compete. But, of course, this takes for granted that a retailer agreed to carry the line in the first place, which is a rather large assumption.

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[30] *See, e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919); United States v. Gen. Elec. Co., 272 U.S. 476 (1926); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967); Albrecht v. Herald Co., 390 U.S. 145 (1968); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); State Oil Co. v. Khan, 522 U.S. 3 (1997).

[31] *See, e.g.*, CARLTON & PERLOFF, *supra* note 19, at 122-151.

[32] *See generally* POSNER, *supra* note 3, at 9-32 (describing the costs of monopoly pricing).

[33] *Id.* at 177.

[34] *State Oil*, 522 U.S. 3.

[35] *See* POSNER, *supra* note 19, at 172.

The second instance involves free-riding. If there are a number of retailers selling a given manufacturer's non-fungible goods, each retailer will have an incentive to let the others provide expensive pre-sale service and then use the ensuing cost differential to profitably undercut them. By imposing a minimum price, a manufacturer can prevent such free riding.[36]

This is not to say that resale price maintenance is necessarily benign. If there is a cartel at the manufacturer-level, the ubiquitous adoption of resale price maintenance provides effective means by which each conspirator can monitor the others to ensure compliance with the underlying price agreement. Such a monitoring program is essential to the efficacy of a cartel, given the fact that each member has a strong incentive to deviate.[37] Alternatively, if a group of retailers coerce a manufacturer into setting a minimum price, it will be in furtherance of a horizontal cartel at the distribution level, which is nefarious and worthy of condemnation.[38]

There is little need to get into further detail with respect to the economics of vertically imposed minimum prices. The economic literature is already replete with such analysis and repeating such scholarship here would be of little value. Nevertheless, even this brief summary demonstrates that a per se rule against resale price maintenance is axiomatically specious. The Supreme Court has reserved such prohibitionary treatment for those practices "lacking any redeeming virtue,"[39] yet minimum resale prices have several. It will suffice to say then that the Supreme Court's prior treatment of resale price maintenance can be characterized only as incongruous, obtuse and, worst, contrary to consumer welfare.[40]

The *Dr. Miles* rule and its progeny, characterized by some as an "intellectual disgrace,"[41] was at last revisited in a meaningful way in the past summer's decision, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[42]

B. The Leegin *Decision*

A brief discussion of the facts and holding of the case is important.[43] Defendant was a manufacturer of leather goods, under the brand name "Brighton," which it sold

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[36]*Id.* at 172.

[37]*Id.* at 172.

[38]*Id.* at 177.

[39]*See, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289 (1985) (*quoting* N. Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)).

[40]*See, e.g.*, BORK, *supra* note 3, at 280-98 (chastising the Supreme Court's repeated, and inconsistent, attempts to make sense of *Dr. Miles*' rationale without overruling the case).

[41]*See, e.g.*, POSNER, *supra* note 3, at viiii (referring to a host of non-economic antitrust rules, including by implication the law governing resale price maintenance, as an "intellectual disgrace").

[42]127 S. Ct. 2705 (2007).

[43]This Essay will not engage in an exhaustive regurgitation of the facts and law espoused by the Court. The point of this Essay is to interpret the cause and consequences of the *Leegin* decision rather than to summarize the case extensively. Those wishing to gain a more thorough knowledge of the Court's holding should read the opinion itself.

to Plaintiff PSKS—the operator of a women's apparel store.[44] Leegin imposed a vertical minimum price policy pursuant to which it would refuse to sell to any retailer violating that suggested price.[45] Leegin learned that PSKS was selling its Brighton products at twenty percent below its suggested price and consequently refused to sell any more of those goods to the store.[46] Suit quickly followed and the Supreme Court granted certiorari to determine whether it should revisit the rule in *Dr. Miles* that minimum vertical price agreements are illegal per se.[47]

In the closest possible decision, the Supreme Court reversed *Dr. Miles* by a 5-4 vote.[48] Justice Kennedy, who wrote the opinion of the Court, began by noting that most agreements subjected to antitrust scrutiny should be assessed under the "rule of reason," which involves a fact-finder weighing "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[49] From there, the Court referred to the economic conclusions articulated in Part II.A supra and observed that the "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[50] As a result, it concluded that per se treatment is inappropriate.[51] However, given the potential for anticompetitive practices,[52] the Court held that rule of reason, as opposed to per se legality, was the correct approach.[53]

The dissent is of equal interest. Justice Breyer practically fulminated at what he regarded as the Court's callous disregard of principles of stare decisis.[54] While he conceded that if the Court was considering the matter for the first time it would have been a difficult issue he emphasized that they were not writing on a blank slate.[55] He proceeded to make an ostensibly compelling argument that the per se rule against resale price maintenance was a highly inappropriate one to overrule. More specifically, every single principle followed by the Court in deciding to overrule prior precedents counseled against doing so here.[56]

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[44]Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710-11 (2007)..

[45]*Id.*

[46]*Id.*

[47]*Id.* at 2712.

[48]*Id.* at 2710.

[49]*Id.* at 2712.

[50]*Leegin*, 127 S. Ct. at 2714.

[51]*Id.* at 2715.

[52]*See* discussion *supra* Part II.A.

[53]*Leegin*, 127 S. Ct. at 2717-19.

[54]*Id.* at 2734-36 (Breyer, J., dissenting).

[55]*Id.* at 2726, 2735.

[56]*Id.* at 2734-35.

First, stare decisis applies "more rigidly in statutory than in constitutional cases;" yet *Leegin* involved the construction of a statute.[57] Second, "the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago."[58] But the *Dr. Miles* rule was almost a century old. Third, "the fact that a decision creates an "unworkable" legal regime argues in favor of overruling."[59] Justice Breyer could find no basis for believing that a rule of reason would be more workable than the per se standard. Fourth, "the fact that a decision "unsettles" the law may argue in favor of overruling."[60] Yet, the per se rule was well-settled for an elongated period of time. Fifth, "the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling."[61] Justice Breyer argued forcefully that industry has relied on the per se standard since the *Dr. Miles* rule was established.[62]

Despite these compelling points, something seems somewhat out of place given Justice Breyer's reputation as one of the Court's leading antitrust experts. He went against a decision backed by economists, antitrust scholars, the Federal Trade Commission, and Justice Department, amongst others. Part III infra explores what this Essay believes to be the true impetus for Justice Breyer's dissent.

III. A VEILED THREAT TO ABORTION RIGHTS?

The heart of Justice Breyer's dissent lay in his reverence for precedent. One suspects, however, that the force of his opposition came from a matter unrelated to antitrust doctrine. In this regard, he cited a number of abortion cases several times in support of stare decisis.[63] The significance of this is only magnified when one remembers that the case involves antitrust issues only and is far removed from the Fourteenth Amendment.

One need not be clairvoyant to see where Justice Breyer's concerns lay. By diminishing its deference to precedent, the Court necessarily undermines the security of other decisions that some people may hold dear. As a result, proponents of *Roe v. Wade* would likely look on the *Leegin* decision with some consternation. If cases such as *Leegin* establish a precedent for overruling firmly established and long-held decisions, future constituents of a yet more conservative Court would have less difficulty ruling that the liberty protected by substantive due process does not include a woman's right to an abortion.

Yet, such a Pavlovian response to the *Leegin* decision may be both myopic and mistaken. There is cause for concern only if Justice Kennedy's approach to stare decisis was distinctly differentiable to that taken in earlier antitrust cases. The most

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[57] *Id.* at 2734.

[58] *Id.*

[59] *Leegin*, 127 S. Ct. at 2734.

[60] *Id.* at 2735.

[61] *Id.*

[62] *Id.* at 2735-36.

[63] *See, e.g.*, *id.* at 2731 (*citing* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854-55 (1992) and Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007)); *id.* at 2734-35 (*citing* Wis. Right to Life, 127 S. Ct. 2652 (2007)).

rudimentary study of past decisions of the Court reveals that such is not the case. Indeed, the reversal of prior interpretations of the Sherman Act is almost the norm, rather than the exception.

Consider some relatively recent instances in which the Court was asked to overturn its prior interpretation of the Sherman Act. Before the 2006 case, Illinois *Tool Works Inc. v. Independent Ink, Inc.*,[64] it was well established that patents confer market power for the purposes of product tying claims. Yet, as in *Leegin*, the economic evidence overwhelmingly suggested that the prevailing rule was erroneous. Recognizing this, the Court held that plaintiffs in tying cases involving patents must show that the holder of the patent actually possesses the power to control price and exclude entry.[65] In 1997, the Court overturned the settled rule that maximum resale price maintenance is per se illegal.[66] In 1984, the Court overruled its prior decision that a corporation could conspire with a wholly owned subsidiary for purposes of Section One of the Sherman Act.[67] In 1977, it had been long settled that vertical nonprice restraints were illegal per se, but the Court once again saw little difficulty in looking past stare decisis to alter its prior decision.[68] In the same year, the Court altered the per se rule against product tying to require proof of market power on the part of the tying party.[69]

These cases are but a sample of the instances in which the Supreme Court has seen fit to reverse its earlier determinations of antitrust law. From this perspective, Justice Breyer's dissent seems quite weak. Accordingly, there seems to be little direct reduction in the Court's deference to precedent in *Leegin*. As the majority noted, the Sherman Act is effectively a common law statute which has been left to the Court to substantiate as it sees fit.[70]

This Essay does not suggest that proponents of abortion rights have no reason to be wary of the Roberts Court. It does argue, however, that the extent of any such concern should be neither elevated nor diminished by *Leegin*. Despite the dissent's vociferous cries to the contrary, from a positive standpoint, stare decisis has neither contemporaneous nor historical potence in the antitrust context. From a normative perspective too, there is little reason to support dogmatic adherence to prior hermeneutic interpretations of the Sherman Act's open-ended provisions. Antitrust is a peculiar area of law in that it is largely, if not now exclusively, informed by economic policy. As our understanding of economics increases, so too does our understanding of business practices formerly, and erroneously, construed as anticompetitive. Stare decisis should not present a significant obstacle to the correction of previous mistakes formed on the basis of inadequate information.

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[64] 547 U.S. 28 (2006).

[65] *Id.*

[66] State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).

[67] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984).

[68] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977)

[69] U.S. Steel Corp. v. Fortner Enters., 429 U.S. 610, 613 (1977).

[70] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720-21 (2007).

IV. LIKELY RAMIFICATIONS FOR ANTITRUST POLICY

A. Attacking Resale Price Maintenance After Leegin

The easy lesson to draw from Leegin is what plaintiffs will have to show in the future to successfully challenge a vertical minimum price agreement. The Court's decision made this clear. First, cases in which a plaintiff can establish that a manufacturer or dealer cartel existed will be subject to continuing per se illegality.[71] Indeed, Justice Kennedy noted that such plaintiffs may be aided in their quest by pointing to pervasive resale price maintenance policies which provide "useful evidence" thereof.[72] Second, the existence of market power in either level of the vertical chain increases the potential for anticompetitive effect.[73] Third, and consistent with Judge Posner's charge,[74] the source of the minimum price agreement is critical. If the deal emanates from the dealers, it is almost certainly anticompetitive.[75]

An entity seeking to establish the illegality of resale price maintenance in the post-*Leegin* world should concentrate on these factors. The more interesting remaining question pertains to the effect of *Leegin* on other areas of antitrust law.

B. Are Tie-Ins Next?

Some readers may be surprised to see a connection being drawn between the Court's treatment of resale price maintenance and the law governing product tying. Yet, the foregoing discussion emphasized that the Roberts Court appears to have adopted an exclusively economic approach. Illustrative of this is the fact that all nine justices accepted economics' lesson that vertically imposed minimum price-based restraints are capable of having pro-competitive effect. The days of the Warren Court are long gone indeed.[76]

First, what is product tying and, second, why does *Leegin* undermine the contemporary law governing the practice? To answer the first question: Product tying occurs when a seller conditions the sale of a product or service ("the tying product") on the purchase of a second product or service ("the tied product").[77] Bundling—a closely related concept—is said to exist when two or more products are sold in fixed proportions; while requirements tie-in sales involve consumers being

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[71]*Id.* at 2733.

[72]*Id.* at 2734.

[73]*Id.* at 2735.

[74]*See* POSNER, *supra* note 3, at 177.

[75]*Leegin*, 127 S. Ct. at 2733.

[76]*See* Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 226-28 (1995) (charting and contrasting the history of the Warren Court approach to antitrust policy).

[77]*See, e.g.*, CARLTON & PERLOFF, *supra* note 19, at 291, 318.

compelled under contract, or otherwise,[78] to purchase all future tied products from the tying firm.[79]

The Supreme Court traditionally held that "tying arrangements serve hardly any purpose beyond the suppression of competition."[80] As a result, tie-ins were, and to a considerable extent still are, illegal per se. In modern times, however, product tying is subject to a qualified form of per se illegality. In order for a tie-in to automatically violate the Sherman Act the tying party must possess market power in the tying market.[81]

Despite the Court's dislike of tying arrangements, contemporary principles of price theory reveal them to be pro-competitive in all but the most restricted circumstances. If one adopts the accepted view in the United States that antitrust laws exist solely to promote consumer welfare,[82] then it is difficult to envisage how product ties can be harmful. I have charted the reasons for this in detail in another article,[83] but for the purposes of this Essay, an overview of the relevant economic insights will suffice.

First, to harm consumers, a tying firm must employ its tie to extract wealth from its customers in a tied market. To do this, it must have a literal monopoly, or virtual monopoly, in the tying market. If a firm lacking monopoly power attempts to impose an unwelcome tie on its customers, those clients will go to a rival firm that does not insist on such a tie. However, even a monopoly is insufficient in itself. For the tying firm to acquire monopoly market share in the tied market, the relationship between the tying and tied markets must be such that consumers derive a greater degree of utility from the former. In any other situation, an unwelcome tie would lead consumers to forego the tying product and purchase the tied product directly instead. If all these conditions are met, a firm may be able to employ a tie to "monopolize" a tied market. Notice, however, that the prerequisite for this is a level of monopoly power far exceeding that required for establishing a violation of Section Two of the Sherman Act.[84] Thus, the current per se rule erroneously forbids tie-ins that are incapable of harming consumers.

Second, and counter-intuitively, successful "monopolization" of a tied market through a tying arrangement does not directly facilitate the use of market power

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[78]Various pricing techniques such as discount rebates may be found to have an equivalent effect to a contractual tie.

[79]CARLTON & PERLOFF, *supra* note 19, at 321.

[80]United States v. Loew's, Inc., 371 U.S. 38, 47-48 (1962) (*citing* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-06 (1949)).

[81]*See* U.S. Steel Corp. v. Fortner Enters., 429 U.S. 610, 613 (1977).

[82]*See supra* text accompanying note 20.

[83]Alan Devlin, *A Neo-Chicago Perspective on the Law of Product Tying*, 44 AM. BUS. L.J. 521 (2007).

[84]The Supreme Court has generally established market power from market share for the purpose of Section Two liability. Seventy-five percent share has been found to constitute monopoly power by the Court. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-92, 425 (1956). Obviously, such market share falls well short of the literal or near-literal monopoly required to facilitate effective monopolization of a tied market, which would require there to be no appreciable rival presence in the tying market.

there. Even the successful acquisition of monopoly market share in a tied market may not lead to consumer injury. The idea that market power can be transferred from one market to another is known as monopoly leverage and is fundamentally flawed. The fact that a tying firm manages to acquire 100% market share in a tied market does not mean that the combined levels of consumer welfare in the tying and tied markets will fall. The "single monopoly mark-up constraint" prevents a firm acquiring two monopoly profits through one tie. When two products are tied, increasing the price of one is equivalent to increasing the price of the other and leaving the first intact. If a monopolist imposes a tie, presumably it was charging a profit-maximizing price in the tying market to begin with. If it subsequently acquires complete market share in a second market by virtue of a tie and then increases the price there, its move would be equivalent to setting a price for the tying product above the profit-maximizing level. This, of course, would be irrational.[85]

The only major way such a tie can reduce consumer welfare is where there are insurmountable entry barriers in the tied market such that the tying firm, having monopolized the tied market, can then cut the tie and charge two separate monopoly prices. However, the only markets likely to be characterized by such barriers would be those subject to governmental regulation.[86] Accordingly, they are easily recognizable by the courts.

The preceding discussion highlights the extremely limited circumstances in which tying arrangements may harm welfare. Yet, if there were no benefit associated with the practice, even limited instances of harm would justify prohibition. Importantly, however, there are myriad efficiency gains inherent in almost every tie-in. First, complementary effects lead a firm employing a tie to reduce joint price and increase joint output, thus elevating both its own profits and consumer welfare.[87] Second, there are many transaction cost efficiencies associated with tying arrangements.[88] Consider the quantity of tie-ins encountered in day-to-day life that unequivocally enhance consumer welfare: remotes are often sold with batteries (consider the annoyance when they're not!); buttons come with shirts; computers are sold with operating software pre-installed; cars are sold with a spare tire; and so on. Third, tying arrangements can facilitate efficient forms of price discrimination.[89]

To date, these economic insights have yet to persuade the Supreme Court to reverse the per se treatment of tie-ins. However, signs of a move away from the Court's hard-line position have been visible. First, a less conservative Court has come close to adopting a rule of reason approach in the past.[90] Second, the *Microsoft* case saw the D.C. Circuit enunciate a rule of reason approach to product tying in the context of high-technology, software markets.[91]

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[85] *See generally* BORK, *supra* note 3, at 365-381.

[86] *See* Devlin, *supra* note 83, at 551-57 (explaining these points in greater detail).

[87] CARLTON & PERLOFF, *supra* note 19, at 638.

[88] *See, e.g.*, *id.* at 319.

[89] *See* Devlin, *supra* note 83, at 543-47.

[90] *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 32 (O'Connor, J., concurring) (arguing for rejection of the per se illegal standard in tying cases).

[91] United States v. Microsoft Corp., 147 F. 3d 935, 949–50 (D.C. Cir. 1998).

What has changed with the decision in *Leegin*? The Court now appears more receptive than ever to economic arguments of the kind supporting adoption of a rule of reason standard. The simple fact that a prohibitionary rule has existed for some time is no longer sufficient to maintain a status quo inconsistent with sound economics. As mentioned, economists ubiquitously deride the per se prohibition of tying arrangements.[92] Looking at the majority decision in *Leegin*, it is impossible not to draw parallels between the treatment of tie-ins and resale price maintenance in the context of sound economic policy. Consider how Justice Kennedy's analysis would apply to the case of tying arrangements:

First, his emphasis that rule of reason analysis is the accepted general standard would counsel against the current per se rule against tie-ins.[93] Second, the Court's requirement that per se illegality be reserved for business practices "with no redeeming virtue" would exclude tying arrangements from such treatment. As articulated above, and as with resale price maintenance, "the economics literature is replete with procompetitive justifications [for the practice]."[94] Third, Justice Kennedy noted that former determinations are entitled to less weight if the Court then "failed to consider" the economics we now understand.[95] As with resale price maintenance, full understanding of the effect of tie-ins is a relatively new phenomenon.

Given the weakness of stare decisis in the antitrust field, this Essay suggests that the Roberts Court may well be able to muster the majority needed to overrule the clearly erroneous prohibition of product tying. The Court came close in 1984, with four justices arguing for a rule of reason approach in dissent.[96] It seems likely looking at *Leegin* that the current Court would do better.

V. Conclusion

This Essay has argued that the *Leegin* decision poses no threat to those who desire to see the continuing force of *Roe v. Wade* and its progeny. What, then, are the repercussions of the decision? Obviously, those retailers seeking to undercut their manufacturers' vertically imposed prices will now have a more difficult time establishing the illegality of those price restraints. Part IV outlined the manner in which such retailers may nevertheless properly attempt to do so.[97]

Yet, the impact of *Leegin* transcends the boundaries of the business practice there in issue and, so, a more perspicacious insight is possible.

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[92] *See, e.g.*, POSNER, *supra* note 3, at 197-207; BORK, *supra* note 3, at 365-81; David S. Evans & Michael Salinger, *Why do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005); Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

[93] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712-13 (2007).

[94] *Id.* at 2714.

[95] *Id.*

[96] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[97] *See supra* Part IV.A.

The Sherman Act is an infamously nebulous statute, devoid of explicit congressional demand.[98] Accordingly, it has always been a vehicle for judge-made principles of competition law that have evolved in line with the Justices' economic and political leanings.[99] It is, without question, a statute highly pre-disposed to polytheistic modes of interpretation. What makes *Leegin* most significant, I argue, is its resounding adoption of economics as the sole analytic tool in antitrust analysis. Though the Court's approach falls short of the per se legal ideal of the classic Chicago School,[100] the Chicago focus on economic reasoning through the lens of price theory is prevalent throughout the Court's opinion. While it is true that the post-Warren Court era has seen several antitrust rules struck down or rendered obsolete on the ground of being inconsistent with economic reasoning,[101] the per se rule against minimum resale prices was arguably the most firmly engrained and certainly the longest-running. *Leegin* marks the end of two active years for antitrust issues before the Court[102] and the message could not be more clear: this is the beginning of an age in which a high level of economic sophistication is the new benchmark. From this perspective, and given the substance of the majority's argumentation, this Essay suggests that the per se rule against product tying has been severely undermined. Time will tell whether that prohibitionary rule—now the last bastion of the Harvard School—will survive for long.

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[98]*See, e.g.*, Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1067 n.94 (noting that the provisions of the Sherman Act are "notoriously vague" and the substance of the law has been "defined almost entirely by court decisions").

[99]*See, e.g.*, Jacobs, *supra* note 78, at 226-28 (describing the Harvard School's influence on antitrust policy during the Warren Court era and the subsequent rise of the Chicago and post-Chicago Schools respectively).

[100]*See, e.g.*, BORK, *supra* note 3, at 280-98. The fact that the majority in *Leegin* did not adopt a per se legal approach is not necessarily a negative. As Judge Posner has written, "it makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits." POSNER, *supra* note 3, at 177.

[101]*See supra* Part II.B.

[102]*See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber, 127 S. Ct. 1069 (2007); Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007); Credit Suisse Securities v. Billing, 127 S. Ct. 2383 (2007). A discussion of these cases is beyond the confines of this essay, though I note that these cases too are noteworthy for their adoption of economic analysis.