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# A Call to Congress:

# Are the Courts Really Best Suited to "Reinvent" Antitrust Law?

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## INTRODUCTION

The United States economy has historically been "steeped in the philosophy of free, competitive markets [and] a fertile ground for the development of suspicious and fearful public attitude toward business monopolies."[1] Antitrust regulation falls squarely within the American tradition of checking sources of unfettered power. This legislation protects the interest of consumers and maintains a competitive marketplace by placing restraints on big businesses that might otherwise engage in price-fixing schemes. The existence of such monopolies and price-fixing would inevitably result in little to no variation in products, prices or even providers. Therefore, limited legislative intervention became necessary in order to protect the free market from domination and big business capture.

This regulatory need was particularly strong after the Civil War, when small local businesses expanded into large national markets. Trusts and monopolies soon developed. Oil and steel monopolies grew beyond the point of effective social control and began to frustrate the expectations of a free

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[1] Albert Atkins, *Sherman Anti-Trust Act, in* 1 The American Economy: A Historical Encyclopedia 255 (Cynthia C. Northrup ed., 2003).

market.[2] In response to the public outcry, Congress passed antitrust legislation prohibiting trade restraints. The legislation was meant to create a "sound foundation for positive government action against business monopolies."[3] Since then, numerous plaintiffs have utilized antitrust legislation to challenge the practices of big business.

A wide range of cases, including *Dr. Miles Medical Co. v. John D. Park & Sons Co*., *Texaco v. Dagher*, and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, led to complex court decisions covering a variety of business relationships and distribution agreements. The complexity of these relationships left some confusion as to what legal standard the courts should apply. Traditionally, American courts act in accordance with previous case precedents; the common law system used in this country allows these prior rulings to be used as a foundation for future cases. While maintaining consistency is important, overturning a past decision may occasionally be necessary in order to reflect changing conditions or to rectify a previous mistake. However, because private actors rely on consistency and predictability in ordering their affairs, overturning precedents should be done with particular care in cases concerning business relationships.

This article will address the concerns that arise from such a break in Supreme Court precedent. First, two general legal standards for analyzing price-fixing agreements under antitrust law will be presented. Next, the Court's evolving application of those legal standards will be illustrated through examination of the *Dr. Miles*, *Texaco*, and *Leegin* cases. The *Leegin* case is the source of the Supreme Court's recent change in the standard applied to "vertical" price-fixing agreements. Finally, an alternative, comprehensive approach will be proposed and applied to all three cases. Ultimately this article will demonstrate that: (1) the Supreme Court must occasionally overrule precedent to suit changing conditions in society, (2) the Court must carefully limit its involvement to making decisions that effectuate the will of Congress and eliminate confusion, and (3) although the Court achieved a useful result in the *Leegin* case, the role of precedent and the will of Congress would be better protected by using the newly proposed 3-part decision-making framework advocated in this article for future antitrust cases.

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[2] High tariffs eliminated foreign and domestic competition, and this lack of competition meant that workers would continue to receive low wages. *Id.*
[3] *Id.*

## BACKGROUND ON ANTITRUST LAW

### *The Overall Goals of Antitrust Regulation*

> In the United States the fact that some men possess power over the activities and fortunes of others is sometimes recognized as inevitable but never accepted as satisfactory. It is always hoped that any particular holder of power, whether political or economic, will be subject to the threat of encroachment by other authorities.[4]

Antitrust regulation is largely a reflection of the fundamental American principle of restricting unchecked power and creating a marketplace of opportunity. Without antitrust law, large businesses may be able to eliminate competitors. These businesses would have no incentive to offer consumers competitive prices for their products, nor would they have any incentive to create higher quality products since doing so would increase their production costs and lower their profit margins. Necessary to the interests of both businesses and consumers, such competition "promotes individualism, innovation, resourcefulness, wider choice, and greater efficiency as [marketplace] participants try to succeed in a competitive environment."[5]

Stemming from the idea of 'checks and balances,' antitrust laws act as a check on businesses, preventing them from unfairly eliminating competition through price fixing and monopolization. These checks and balances in the economic sphere are rooted in historical precedent of Congress regulating commerce.[6] As Senator John Sherman stated: "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[7] Antitrust regulation ensures a fair economic marketplace where no one actor can exercise hegemony over other businesses.

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[4] A.D. Neale & D.G. Goyder, *The Antitrust Laws of The United States of America* 442 (Cambridge University Press 1980) (1960).

[5] B. Dan Wood & James E. Anderson, *The Politics of U.S. Antitrust Regulation*, 37 Am. J. Pol. Sci., (Feb. 1993), at 1.

[6] U.S. Const. art. I, § 8.

[7] A.D. Neale & D.G. Goyder, *The Antitrust Laws of The United States of America* 16 (Cambridge University Press 1980) (1960).

*The Nature of Business Relationships*

*(1) The "Vertical" Chain of Distribution*

Traditionally, manufacturers sell their goods to wholesalers, who in turn sell to retailers, who in turn sell to consumers. This is known as a *vertical* relationship – the term "vertical" comes from the common practice of visually depicting the relationship between the parties as follows:

*Vertical Business Relationship*

Manufacturer
↓
Wholesaler
↓
Retailer
↓
Consumer

Competitors in a free market often compete aggressively through the price of a product. However, this traditional relationship can be disrupted when some of the parties in the vertical chain of distribution artificially agree to set their prices at a certain level. For instance, a vertical restraint[8] on trade can exist when a supplier and a retailer conspire to set a minimum retail sales price for the product. Free competition within the marketplace is thereby stifled through this artificial price restriction.

*(2) "Horizontal" Business Relationships*

The term "horizontal" refers to the relationship between multiple parties who occupy the same level within the preceding diagram. For instance, if multiple retailers all do business with the same manufacturer or wholesaler, these several retailers would sit side by side (horizontally) in the chain of distribution depicted above.

[8] "Vertical restraints" are defined as "an agreement between or combination of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market." Black's Law Dictionary 1340 (8th ed. 2004).

Taken in isolation, the following figure illustrates the horizontal relationship between such retailers:

*Horizontal Business Relationship*

Retailer 1 ⟷ Retailer 2 ⟷ Retailer 3

If these three retailers[9] agreed to artificially fix their prices at a certain level (in an otherwise unrestricted marketplace) then a *horizontal* restraint on trade would result.[10]

Horizontal price-fixing can be achieved by various parties within the chain of distribution: manufacturers with other manufacturers, wholesalers with other wholesalers, and retailers with other retailers. As with vertical restraints, horizontal restraints can also stifle price competition within the marketplace and thereby harm consumers.[11]

*(3) The Harm to Consumers*

The following figure illustrates, in the abstract, the effect that price restraints can have on an otherwise competitive market. Imagine that Sellers A and B both offer the same new product with an initial price of $10 per unit. However, Seller A's production cost is $4 per unit, while Seller B can produce the product for only $2.50 per unit. Soon, the two sellers begin to compete with one another by dropping their sales prices. Seller A discounts the product to $8.00 per unit. To be more competitive, Seller B lowers its price even more.

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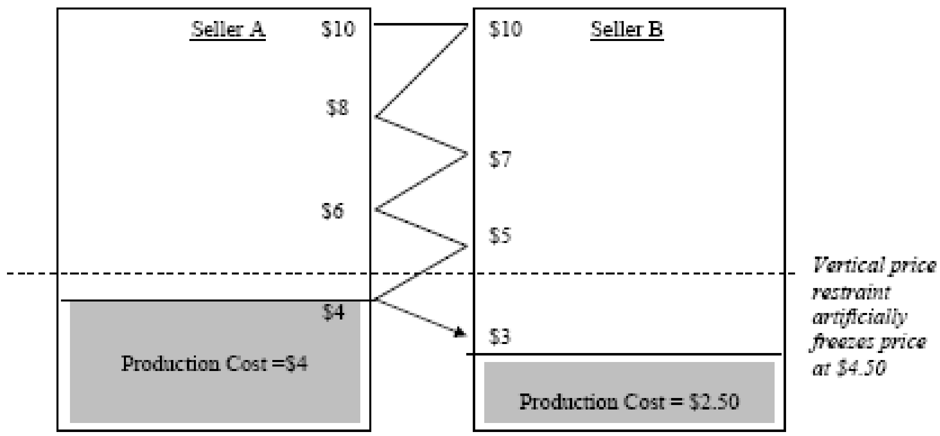
[9] "Retail" is defined as "the sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing." Black's Law Dictionary 1341 (8th ed. 2004).

[10] Horizontal price-fixing agreements refer to a cartel "among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007).

[11] *Id.* at 2712. Artificial restraint of competition in the marketplace can harm consumers because marketplace participants no longer have the same incentive to compete on the basis of lower prices, higher quality service, or other factors that might otherwise attract consumers away from competitors.

Under normal conditions, this discounting goes back and forth until Seller A is selling the product at its production cost ($4.00 per unit); thus, Seller A is no longer making a profit. Seller B, the more efficient producer, can afford to discount the product even more and still obtain a profit. To remain competitive, Seller A can either become more efficient in its production methods, or Seller A can enhance its product (or service offerings) to make its product more attractive to consumers than Seller B's product.[12] This competition benefits consumers by keeping prices down, or by encouraging sellers to innovate in their production methods or product offerings in order to stay competitive.[13] The figure below demonstrates the impact that a vertical price restraint can have on this theoretical relationship:

*Impact of an Artificial Price Restraint*




[12] Adapted from hypothetical model presented by Steven R. Postrel, Business Strategy course, UC Irvine Graduate School of Management (March 1999).

[13] In theory, if Seller A is not able to make its product more attractive, and is still unable to offer its product at a competitive price, then Seller A is not an efficient provider of the product in question and should leave the market for this product. If, however, Seller B is then left without any further competition and begins to raise its prices again, then new competitors might enter the market. *Id.* On the other hand, if no new competitors appear and/or Seller B otherwise has monopoly-like power to charge higher prices, American antitrust law may provide a remedy for consumers. This aspect of antitrust "anti-monopolization" law is beyond the scope of this article.

With a vertical price restraint, a contractual barrier[14] is created that allows prices to drop only to an agreed-upon level. This means that both sellers would still profit; however, the public would no longer reap the benefits of lower, more competitive prices or incentive for innovation. Due to this potential harm to consumers, created through either vertical price restraints (demonstrated here) or through horizontal price restraints (similar effects), Congress stepped in to prohibit anti-competitive practices with antitrust legislation.

*Regulating Trade Restraints:*

*General Legal Standards for Antitrust Cases*

In 1890, Congress created a broad package of legislation applicable to various forms of anti-competitive business practices. Section 1 of the Sherman Antitrust Act (15 U.S.C.) states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in *restraint of trade* or commerce among the several States, or with foreign nations, is declared to be illegal.[15]

The Supreme Court has repeatedly stated that § 1 prohibits only "unreasonable" restraints on trade rather than taking the term literally to mean *all* possible restraints on trade.[16] In order to analyze the *reasonability* of trade restraints, the Court has employed two different forms of analyses.

[14] "Contract" is defined as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable as law." Black's Law Dictionary 341 (8th ed. 2004).

[15] Sherman Antitrust Act, 15 U.S.C. § 1 (1890) (emphasis added). Section 2 of the Sherman Act pertains to punishment for a violation. It provides: "Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." Sherman Antitrust Act, 15 U.S.C. § 2 (1890).

[16] *Leegin*, 127 S. Ct. at 2712 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

*Approach 1: PER SE ILLEGALITY*

The courts have deemed certain types of trade restraints as *per se* unreasonable. Under the *per se* illegality rule, courts can decide cases without hearing any expert testimony or specific evidence regarding economic harm.[17] Instead, the court strikes down the behavior based on an assumption that "manifestly anti-competitive" effects categorically exist.[18] The *per se* analysis is only used "after courts have had considerable experience with the type of restraint at issue,"[19] and have determined that the type of behavior in question produces "predictable and pernicious anticompetitive effect [along with] limited potential for procompetitive benefit."[20]

"Horizontal price-fixing agreements" have been included in the *per se* illegal category, as well as other horizontal non-price agreements such as agreements between competitors to divide markets. In 1911, the Supreme Court also added *vertical* restraints to the list of behaviors covered by the *per se* illegality rule.[21] In the *Dr. Miles* case, the Supreme Court explained that with vertical restraints, "all room for competition between [those] who supply the public is made impossible."[22] For nearly a century, *vertical minimum price* restraints continued to be analyzed under the *per se* illegality rule, although some other forms of vertical restraints are now analyzed under the rule of reason instead.[23]

[17] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 171 Fed. Appx. 464, 466-67 (5th Cir. 2006) (citing cases).

[18] *Leegin*, 127 S. Ct. at 2713.

[19] *Id.* The *per se* rule is used when courts are confronted with conduct that experience teaches is overwhelmingly likely to be anticompetitive; in such cases there is no need for a detailed market analysis. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents,* 468 U.S. 85, 104 (1984).

[20] *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[21] *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), *overruled by* 127 S. Ct. 2705 (2007) (vertical minimum pricing restraints are now to be examined under the rule of reason to determine whether they are anti-competitive and thus violate antitrust law).

[22] *Id.* at 400.

[23] *Leegin*, 171 Fed. Appx. 464, 466 (citing cases); *see also Leegin,* 127 S. Ct. at 2713 (citing cases). In 1997, the Court overruled a 29-year-old precedent that had been treating *vertical maximum price* restraints as *per se* illegal; instead, the Court held that

*Approach 2: Rule of Reason*

The courts have analyzed other types of antitrust challenges under what is known as the "rule of reason."[24] The rule of reason takes into account a detailed evidentiary examination of various factors including information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.[25] Under the rule of reason, courts evaluate the evidence presented on a case-by-case basis, undertaking a complex burden-shifting analysis in order to determine which trade restraints are "anti-competitive" and should thus be deemed illegal.[26] In some cases, this evidence may tap into a complex field of disputed economic theory.

Recently, the Supreme Court ruled in the *Leegin* case that *vertical minimum price* agreements should no longer be automatically deemed *per se* illegal. Therefore, these agreements will now be analyzed under the rule of reason, in order to further explore the economics of each case.[27] This article will provide a detailed examination of the *Leegin* Court's ruling. First, however, the following cases will further illustrate the difference between "horizontal" and "vertical" price restrictions, as well as the thinking that led to the original classification of vertical price restraints under the *per se* illegality rule.

such cases should now be analyzed under the rule of reason. *Id.* at 2722 (citing *Khan*, 522 U.S. 3, 22 (1997) (overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968))).

[24] *Leegin*, 127 S. Ct. at 2712.

[25] *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343 and n.13 (1982). The rule of reason also takes into account evidence as to whether the businesses at issue have "market power." *Leegin*, 127 S. Ct. at 2712-13 (citations omitted).

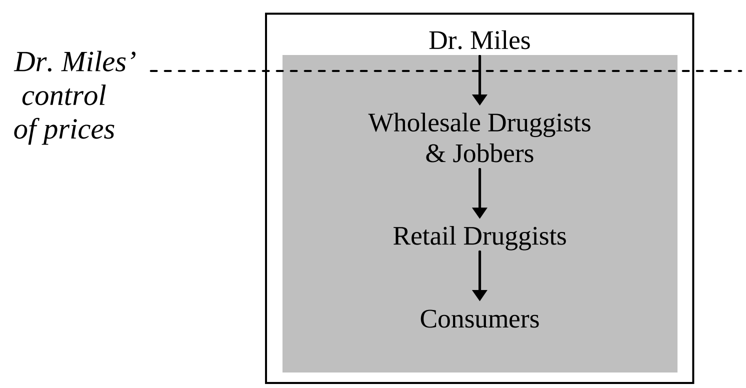
[26] Under the rule of reason's burden-shifting analysis: "[The] plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. … 'After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive 'redeeming virtues' of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.'" *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) (quoting, in part, 7 Areeda & Hovenkamp, *Antitrust Law* P 1502) (additional citations omitted)).

[27] *Leegin*, 127 S. Ct. at 2725.

## LEGAL STANDARD APPLIED: 1911- 2006

*Dr. Miles Medical Co. v. John D. Park & Sons Co.*

Dr. Miles Medical Company (Dr. Miles) manufactured pharmaceuticals under secret formulas and sold these products in easily identifiable packages. The company sold to jobbers[28] and wholesale druggists, who in turn sold the medicine to retail druggists for eventual sale to consumers. To oversee the trade of its products, Dr. Miles adopted restrictive agreements that fixed the prices for all wholesale and retail sales of its medicines.[29] According to Dr. Miles, the agreements were meant to create "minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies," in order to preserve Dr. Miles' reputation for high-end quality and to ensure a fair profit margin to distributors.[30] The following graph illustrates Dr. Miles business agreement:




[28] A "jobber" is defined as "one who buys from a manufacturer and sells to a retailer; a wholesaler or middleman." A "wholesale" transaction is defined as "the sale of goods or commodities, [usually] to a retailer for resale, and not to the ultimate consumer." Black's Law Dictionary 852, 1628 (8th ed. 2004).

[29] *Dr. Miles*, 220 U.S. at 394.

[30] *Id.* at 399. A bill was also established that outlined "not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition." *Id.*

John D. Park & Sons Company (Park & Sons) was a wholesale drug business in Kentucky that refused to enter into Dr. Miles' contracts.[31] Dr. Miles sued, alleging that Park & Sons conspired with a number of wholesalers and retailers (who similarly had not agreed to be bound by Dr. Miles' contracts) to induce others who *were* under Dr. Miles' contracts to violate the price restrictions. Dr. Miles also accused Park & Sons of obtaining, advertising and selling its Dr. Miles' products at lower prices than Dr. Miles allowed.[32]

The district court and the court of appeals dismissed Dr. Miles' claims. However, the Supreme Court granted certiorari and concluded that Dr. Miles' attempt to restrain free trade destroyed competition and harmed the public interest. The Court ruled that a manufacturer had only the right to sell its own products at a fixed price.

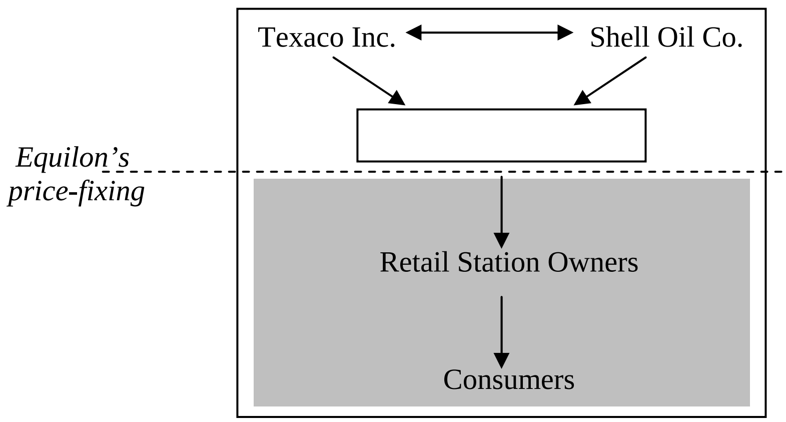
According to the *Dr. Miles* Court, after a manufacturer sold a product to wholesalers or jobbers, the manufacturer no longer had the right to control the product's price. Dr. Miles had attempted to set prices throughout the trade process, from the initial sale to wholesalers to the price at which consumers ultimately purchased the medicine from retailers. This type of vertical price-fixing eliminated competition at all levels of trade and prevented the consumer from reaping the benefits of competitive pricing.

Within its decision, the Court established that *vertical* agreements (between a manufacturer and its distributors) to set *minimum resale prices* were categorically contrary to free trade. Therefore, the Court determined that such practices would be treated as *per se* antitrust violations without any need for further evidence of actual economic harm on a case-by-case basis.[33] For nearly a century, the Court continued to follow this standard and businesses were left to arrange their affairs accordingly.

[31] *Dr. Miles*, 220 U.S. at 394.
[32] *Id.* at 397. Although not included in the Court's main opinion, the attached syllabus included allegations that Park & Sons was able to work outside of the Dr. Miles system by surreptitiously obtaining the products, obliterating the serial numbers, and thus concealing its source of supply. Wholesale and retail dealers, unaware of the Park & Sons' actions, allegedly bought these products at discounted rates and in turn sold them to their own buyers at the reduced rate. Dr. Miles then brought legal action to restrain Park & Sons from continuing in such activity.
[33] *Leegin*, 127 S. Ct. at 2724.

*Texaco Inc. v. Dagher*

Although entire categories of business relationships – such as vertical price restraints – had been labeled as *per se* antitrust violations, a variety of cases demonstrated that the "categorization" of business relationships is not always a simple matter. One such case involved the relationship between oil giants Texaco Incorporated (Texaco) and Shell Oil Company (Shell). Texaco and Shell had long been competitors in the national gasoline market until they pooled their resources and created Equilon Enterprises (Equilon), a joint venture that existed from 1998 to 2002.[34] Equilon refined and sold gasoline in the western United States under the two companies' original names. The joint venture was legally created under relevant U.S. law and it eliminated domestic competition between the two companies. The Texaco and Shell business agreement can be illustrated as follows:




Equilon set a fixed price for its product, so a group of Texaco and Shell retail station owners sued Equilon for price-fixing.[35] The station owners characterized Equilon's practice as a *horizontal* restraint of trade (i.e., between two manufacturers), which would have been treated as a *per se* violation of § 1 of the Sherman Act.[36]

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[34] *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006).
[35] *Id.* at 3-4.
[36] *Id.* at 4.

However, the district court utilized the rule of reason standard instead, found that the station owners had not provided sufficient proof of specific economic harm, and awarded summary judgment to Equilon.[37] The court of appeals reversed that decision, holding that the *per se* rule against price-fixing should have been applied. The Supreme Court granted certiorari to evaluate which standard would be appropriate when a joint venture collectively sets prices to sell products: *per se* illegality or the rule of reason.

Here, the Court found that it was not *per se* illegal for joint ventures to collectively set prices, because Texaco and Shell were no longer competing with one another in the domestic gasoline market. Though the companies had (by definition) "price-fixed" a product, they had not violated antitrust price-fixing law because Equilon represented an "economically integrated joint venture" rather than two horizontally aligned competitors in the same market.[38] If the companies had been two independent businesses competing in the same market, then Equilon's price-fixing could have qualified as a horizontal agreement that illegally restrained competition.

The Court explained that historically it had never adopted a literal view of the Sherman Act, because Congress had intended the Act to apply *only* to contracts that created "*unreasonable* restraints" on trade.[39] According to the Court, setting one price at which to sell Equilon's product was simply part of the nature of running an integrated business.[40] Thus, the Court determined that no *per se* violation occurred, because a horizontal relationship was not created when a joint venture – acting as a single entity – decided to utilize two different brand names to sell the same product at a fixed price. Thus, this case demonstrates that by 2006 the Court was willing to concede business relationships can take many creative forms, and not all "price-fixing" may be inherently anti-competitive in the sense contemplated by antitrust law.

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[37] A "summary judgment" is "a judgment granted on a claim or defense about which there is no genuine issue of material fact [in the evidence presented] and upon which the movement is entitled to prevail as a matter of law. The court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact…. This procedural device allows the speedy disposition of a controversy without the need for trial." Black's Law Dictionary 1476 (8th ed. 2004).

[38] *Texaco*, 547 U.S. at 6.

[39] *Id.* at 5.

[40] *Id.* at 7-8.

## 2007: THE *LEEGIN* CASE BREAKS FROM PRECEDENT

*The Relationship Between the Parties*

Shortly after the Court's decision in the *Texaco* case, the longstanding 1910 *Dr. Miles* precedent was in was called directly into question in *Leegin Creative Leather Products, Incorporated v. PSKS, Incorporated.* At the time of the litigation, Leegin Creative Leather Products, Incorporated (Leegin) designed, manufactured, and distributed leather goods. In 1991, Leegin created its "Brighton" line of belts and women's apparel accessories. Approximately 5,000 businesses nationwide (mostly small boutiques and specialty stores) began to carry Brighton products. The company catered to smaller retailers because it believed customers would appreciate the more intimate shopping experience they would receive.[41]

Kay's Kloset (Kay's), a women's apparel store in Lewisville, Texas, was one of these small retailers. At its peak, Kay's sold Brighton products as well as goods from 75 other manufacturers. Kay's first started purchasing from Leegin in 1995, and Brighton merchandise soon accounted for 40 to 50% of Kay's profits. Kay's promoted the Brighton brand through various advertisements and was deemed a designated retailer for Brighton products.

In 1997, Leegin established its "Brighton Retail Pricing and Promotion Policy" (the Pricing Policy).[42] The Pricing Policy's purpose was to allow retailers "sufficient [pricing] margins to provide customers the service central to [Brighton's] distribution strategy."[43] Under the Pricing Policy, Leegin prohibited its retailers from selling Brighton goods below a certain price; this strategy was designed to uphold Brighton's high-end reputation.[44]

In December 2002, to compete with neighboring stores, Kay's began discounting Brighton products by 20% below the Pricing Policy's guidelines.

[41] *Leegin,* 127 S. Ct. at 2710.
[42] *Id.* at 2711.
[43] *Id*.
[44] One year after implementation of the Pricing Policy, Leegin further created its "Heart Store Program," a marketing strategy in which participating stores promised to sell Leegin's goods at its suggested prices and to follow other Brighton guidelines. Kay's became a participant in the "Heart Store Program," but lost this status when a Leegin representative rated the Kay's stores as being unattractive. *Id*.

Consequently, Kay's was no longer provided with Brighton merchandise, and its sales revenue declined. PSKS, Inc. (Kay's parent company) took legal action, alleging that Leegin had violated antitrust laws because "Leegin and its retailers had [vertically] agreed to fix prices."[45] The district court ruled that vertical agreements of this sort were *per se* illegal and, thus, Leegin had engaged in illegal price-fixing. The jury initially awarded PSKS $1.2 million; after accounting for damages and miscellaneous fees, that figure rose to $ 3.9 million.

On appeal, the Fifth Circuit affirmed the lower court's decision. The appellate court rejected Leegin's argument that the rule of reason should have been applied to vertical agreements instead of the *per se* rule. The Supreme Court granted certiorari to reexamine Leegin's argument, and in the process, the Court was asked to reconsider its longstanding classification of "vertical price-fixing agreements" as *per se* violations of the Sherman Act.

In a 5 to 4 decision, the *Leegin* Court overruled *Dr. Miles* by stating that vertical minimum price restraints should no longer be judged under the *per se* illegality rule. In *Dr. Miles*, the Court had treated vertical and horizontal restraints as if they were equally damaging forms of "resale price maintenance."[46] The *Leegin* Court, on the other hand, differentiated between vertical and horizontal restraints and their economic effects. The *Leegin* Court concluded that the rule of reason was the more appropriate standard for vertical restraints for three reasons:

(1) arguable pro-competitive justifications might outweigh the anti-competitive effects of a vertical agreement,

(2) administrative advantages of quicker trials are not sufficient to justify the use of the *per se* rule for an entire category of business relationships that might not all be inherently anticompetitive, and

(3) even prior case precedents should give way when their underlying reasoning is no longer supportable.

The Court then offered further analysis of each point.

[45] *Id.* at 2712.

[46] *Id.* at 2714. "Resale price maintenance" is defined as "a form of price-fixing in which a manufacturer forces or persuades several different retailers to sell the manufacturer's product at the same price, thus preventing competition." Black's Law Dictionary 1332 (8th ed. 2004).

*Possibility of Pro-Competitive Justifications*

First, to illustrate the flaws in judging vertical price restraints under the *per se* rule, the *Leegin* Majority considered examples of the potential pro-competitive and anti-competitive effects of "resale price maintenance" in the abstract.[47] To support the conclusion that resale price maintenance could have potential benefits strong enough to validate abandoning the *per se* rule, the Majority paid particular attention to the possible advantages of these vertical restraints. For instance, resale price maintenance could allow retailers to compete among themselves by offering a varied mix of retail services. If all retailers were selling the goods at the same fixed price, then this form of competition through expanded service offerings would be necessary to attract consumers, and these expanded services could benefit consumers overall. Consumers could pick and choose where to purchase goods based on the different services provided by each retailer.[48] Retailers could also offer newer products to differentiate themselves from one another, which would in turn create easier market entry for brand new producers. According to the Court, the presence of new producers is "essential to a dynamic economy" and should be encouraged.[49]

The *Leegin* Majority also considered the potential drawbacks of resale price maintenance, including the fact that the presence of fixed pricing within a distribution cartel[50] could discourage the manufacturer from cutting its own prices as a competitive strategy. Consumers would then be harmed because

[47] *Leegin*, 127 S. Ct. at 2715. The Majority explained that the rule of reason analysis was more appropriate because resale price maintenance could be either beneficial or detrimental to the consumer. Antitrust laws are meant to protect interbrand competition, meaning "the competition between retailers selling the same brand." Minimum resale price maintenance could help stimulate interbrand competition, but could also provide retailers with dangerous monopoly-like power through unlawful price-fixing. *Id.*

[48] *Id.*

[49] *Id.* at 2716. Inter-brand competition is helped by expanding a manufacturer's market share, "inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services," while still guaranteeing retailers their own profit margin. *Id.*

[50] "Cartels" are defined as "a combination of producers or sellers that join together to control a product's production or price." Black's Law Dictionary 227 (8th ed. 2004).

they would not receive the downstream benefit of this competitive pricing.[51] In theory, a powerful manufacturer or retailer could also abuse the power of resale price maintenance by persuading other businesses not to sell goods to smaller rivals.[52]

Ultimately, the *Leegin* Majority believed that the potential benefits of resale price maintenance might outweigh the possible drawbacks in some cases; therefore, categorical application of the *per se* illegality rule would be inappropriate. Under the rule of reason, such cases would be heard and evaluated individually, instead of being automatically classified as *per se* illegal. Since potential effects on the marketplace could vary, the Majority determined that a case-by-case analysis under the rule of reason was more appropriate. Not only was the Court saying that the rule of reason should apply to the *Leegin* case, the Majority was willing to shift – categorically – to the rule of reason for *all* vertical restraint cases (as suggested in dicta[53]). The shift would allow future courts to sift through the various cases presented, thereby determining which *specific* vertical agreements were more pro-competitive than anti-competitive overall.

Justice Breyer wrote a dissenting opinion in *Leegin*, which was joined by Justices Stevens, Souter, and Ginsburg. He argued that Congress had heard similar economic arguments for over half a century, knowing full well that the courts were applying the *per se* rule to vertical minimum price restraints, yet had not found these arguments convincing enough to amend the Sherman Act.[54] Breyer also argued that the pro-competitive or anti-competitive effects of "resale price maintenance" could be extremely difficult to prove.[55] Under the pre-existing *per se* rule, these grey areas did not need to be analyzed in such detail.

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[51] Vertical price restraints "might be used to organize cartels at the retailer level." *Leegin*, 127 S. Ct. at 2717. According to the agreement, retailers with better distribution systems and lower cost structures could not charge lower prices. *Id.*

[52] *Leegin*, 127 S. Ct. at 2717.

[53] "Dicta" is defined as "opinions of a judge which do not embody the resolution or determination of the court. [These represent expressions] in the court's opinion which go beyond the facts before [the] court and therefore are … not binding in subsequent cases as legal precedent." Black's Law Dictionary 313 (6th abridged ed. 1991).

[54] *Leegin*, 127 S. Ct. at 2726 (Breyer, J., dissenting).

[55] *Id.* at 2731.

Justice Breyer argued at length that the rule of reason was not a practical alternative for such cases, offering concrete examples of his economic theory, in addition to the following summary:

> The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?[56] . . .
>
> How often can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*.… I recognize that scholars have sought to develop check lists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. But applying these criteria in court is often easer said than done.[57]

While Justice Breyer agreed with the Majority that resale price maintenance could have important consumer benefits, he thought it would be too difficult for litigants to "prove" how resale price maintenance could be conversely damaging. To him, that illusive harm should not be ignored, and a categorical shift to the rule of reason was therefore too dangerous.

*Inapplicability of Administrative Advantages*

In reaching the decision to change the legal standard, the *Leegin* Majority ruled that administrative advantages could not be used as a justification for continuing the *per se* rule. Administrative costs would be significantly lower under the *per se* approach – both for the parties and for the courts – because the large amount of expert evidence regarding anti-competitive effects would not be needed. The Majority acknowledged that adopting the rule of reason would significantly increase the time and money spent on a lawsuit.

However, the Majority found that the *per se* rule could also *increase* administrative costs by potentially "promoting frivolous suits against legitimate

[56] *Id.* at 2729 (citations omitted).
[57] *Id.* at 2730 (emphasis in original) (citations omitted).

[business] practices" since the burden for producing evidence was so low.[58] At a more abstract level, the Majority also noted that the *per se* rule could "increase the *total cost of the antitrust system* by prohibiting pro-competitive conduct the antitrust laws should encourage" rather than prevent.[59]

*Inapplicability of Stare Decisis*

The *Leegin* Majority also held that with regard to the *per se* approach, *Dr. Miles* had created an "erroneous rule" that *stare decisis* should not protect.[60] Even though the *Dr. Miles* ruling had represented the prevailing case authority for decades, the modern Court was not willing to blindly follow that authority any longer. According to the *Leegin* Majority, the *Dr. Miles* Court had based its view in large part on a common law legal treatise written in 1628, rather than taking a more contemporary view of business relationships and pricing strategies.[61] Thus, even the doctrine of *stare decisis* should not be used as a shield to protect such outdated reasoning; instead, the real issue at hand should be correct contemporary application of the Sherman Act.

According to the *Leegin* Majority, the rule of reason represented the more suitable tool for judging the anti-competitive and potentially pro-competitive impact of particular agreements on a case-by-case basis.[62] The Court held that "there is now widespread agreement that resale price maintenance can [potentially] have pro-competitive effects."[63] Moreover, when *Dr. Miles* had been decided in 1911, the Court had "little experience with

[58] *Id.* at 2718 (majority opinion).
[59] *Id.* (emphasis added).
[60] *Id.* at 2720. "Stare decisis" is defined as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary 1442 (8th ed. 2004).
[61] *Leegin*, 127 S. Ct. at 2714. According to the *Leegin* Majority: "The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that 'the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." *Id.* (quoting *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 53, n.71 (1977)).
[62] *Id*.
[63] *Id.* at 2721.

antitrust analysis."[64] Ninety-six years later, the Court felt it was better informed on the topic.

In his dissenting opinion, Justice Breyer argued that the law must be predictable and should not be dependent on the changing theories of competing economists, but instead on case precedents.[65] Breyer advocated an amendment to the *per se* rule, carving out a subsection of resale price maintenance cases to be analyzed differently, rather than starting completely anew.[66] He believed that overruling *Dr. Miles* would cause numerous consequences, since *Dr. Miles* had been cited hundreds of times by the lower courts as well as the Supreme Court.[67] Breyer explained that businesses, lawyers, and their clients had long relied on the *Dr. Miles* ruling and structured their business affairs accordingly. Strategic decisions with potential impact throughout the economy had been made in reliance on the Court's longstanding *Dr. Miles* precedent. For these reasons, Justice Breyer and the other dissenting justices disagreed with the Majority's change in the legal standard.

## ANALYSIS

The *Leegin* Court determined that the "*per se* illegality rule" was outdated with regard to vertical price-fixing and should be replaced by the "rule of reason." But for some inherently anti-competitive cases, instead of abandoning adherence to *stare decisis* and completely obliterating the *per se* rule, the *per se* rule should still apply. Section 1 of the Sherman Antitrust Act can then be applied to modern business agreements in a more appropriate manner. The following analysis examines an alternative to the *Leegin* Majority's controversial, categorical approach.

[64] *Id.*
[65] Justice Breyer also provided a separate analysis as to when a departure from case precedents ought to be justified, which is beyond the scope of this article. *Id.* at 2734-37 (Breyer, J., dissenting).
[66] Justice Breyer suggested that a "slight" modification to the *per se* illegality rule might be in order for resale price maintenance in the "more easily identifiable and temporary condition of 'new entry'" into an established market. *Id.* at 2731 (citations omitted). Further discussion of his economic theory on this point is beyond the scope of this article.
[67] *Id.* at 2731.

*The Problem:*

*Many Modern Business Agreements Are Not Easily Categorized*

With the complexity of modern business arrangements and the grey areas overlooked by the *per se* illegality rule, the rule of reason can, at times, be a better standard for evaluating vertical restraints. Under the *per se* rule, certain categories of manufacturer-imposed restraints (to wholesalers and retailers) were automatically deemed illegal.[68] On the other hand, the rule of reason examines cases on an individual basis, and decisions are based upon the actual market effect of the particular restraint at issue.[69]

The business sector has evolved greatly in the last decade in response to the growth of the Internet and other innovative technologies and business strategies. For example, online business has allowed manufacturers to sell directly to consumers, thus eliminating the traditional need for a wholesale middleman. Hence, today's distinctions between vertical and horizontal price restraints have become blurred as well. As a result, agreements that would have been theoretically considered *per se* illegal (under *Dr. Miles*) might have positive effects on the market and consumers today.

However, neither the courts nor the public completely understand the complexity behind some of these new business arrangements. For example, the Texaco plaintiffs (independent station owners) filed suit against Shell and Texaco as two separate entities. The station owners, confused by the "vertical or horizontal" categories, had difficulty with correctly labeling the business agreement when the two companies were operating under a joint venture that made them a single unit (Equilon). Thus, after overcoming the first hurdle of appropriately labeling the relationship, the courts and lawyers must then determine which analysis to apply – per *se* illegality or the rule of reason. What creates ambiguity within the current legal process is this difficulty of perfectly categorizing the type of business relationship, as well as the related confusion over determining which rule to apply.

When overruling *Dr. Miles,* the *Leegin* Majority iterated the importance of replacing the *per se* rule with the rule of reason. The Majority explained that allowing some businesses to practice resale price maintenance (i.e., price-

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[68] *Id.* at 2713 (majority opinion).
[69] *Id.* at 2712-13.

fixing) "has the potential to give consumers more options."[70] Consumers can then choose where to purchase their desired products, depending on stores' retail services, benefits, or selection of products. Retailers, even if they carry the same products as their competitors, can attract customers by highlighting their other service offerings and store differences.

However, even the Court noted that resale price maintenance can also have anti-competitive effects; manufacturers can be discouraged "from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers."[71] Despite potential anti-competitive effects, the *Leegin* Court stated that these were outweighed by the pro-competitive justifications. *Per se* illegality was therefore inappropriate in such cases. The Court attempted to alleviate overly aggressive use of antitrust litigation by eliminating the application of the *per se* rule in vertical price-fixing cases. However, the decision to restrict *per se* illegality to horizontal business agreements ultimately highlights the danger in failing to offer definitive criteria for what constitutes a "horizontal" as opposed to a "vertical" relationship. Though Justice Breyer did not believe in the drastic changes that the Majority proposed, he and all the members of the Court still agreed that some type of change was needed.[72] Justice Breyer would have amended the *per se* rule instead of abolishing it. According to Breyer, amending the *per se* rule would be more beneficial, and the Court would then be able to maintain the long-standing precedent established in *Dr. Miles*.

Furthermore, the Justices all acknowledged the pro-competitive and anti-competitive aspects of resale price maintenance. The *per se* rule treated vertical restraints as categorically anti-competitive. In writing the *Dr. Miles* opinion, Justice Hughes opted to use the *per se* illegality rule. He also wrote dicta that supported evolution of the standard. Hughes explained that the "question is, whether, under the particular circumstances of the case and the

[70] *Leegin*, 127 S. Ct at 2715.
[71] *Id.* at 2716.
[72] In his dissent, Justice Breyer agreed with the *Leegin* Majority when he recognized that the *per se* rule as applied in *Dr. Miles* was incorrect. Breyer wrote that he "might agree that the *per se* rule should be slightly modified." *Id.* at 2731 (Breyer, J., dissenting).

nature of the particular contract involved in it, the contract is, or is not, unreasonable."[73]

Though Hughes advocated the *per se* rule, a deeper examination of his words displayed his preference for flexibility in the law. At the same time, Hughes' opinion stated that the *per se* illegality rule would prove beneficial to future cases involving business arrangements that the courts recognize as being inherently anti-competitive.

When the *Dr. Miles* case was heard, antitrust law was quite new. Since 1911, the Court has had more experience with antitrust cases, and has witnessed the effects of its own decisions. The Court often relies on the testimony of experts in making decisions. However, this dependence can be dangerous. When the conflicting views of "specialists" veer in a different direction from long-standing precedents, past decisions could eventually be ignored. Decisions could be made according to what appears to make the most sense to the prevailing majority of those "experts" who happened to testify in connection with a particular case, and business decisions made in accordance with prior standards may become outdated or perhaps even illegal.

Ultimately, the judiciary is not the best equipped branch of government to interview competing experts and determine how to address various types of business arrangements. It is more appropriate for Congress to determine whether a case brought before the courts should be heard under the rule of reason standard, or whether it should automatically be categorized as *per se* illegal behavior. Chaos and confusion can result from overruling precedents that have been intertwined into society for decades. The court could also lose its credibility in the process. However, it is worth overruling precedents when a new and better precedent would replace an outdated one. If the time has come for such a change, Congress should be more involved in the process.[74]

[73] *Dr. Miles*, 220 U.S. at 406.

[74] Overruling *Dr. Miles* may create problems now, but for those who do business under the assumption that the Court does not automatically categorize cases as *per se* illegal based on horizontal or vertical agreements, delaying or foregoing the decision to overrule it would have an even greater effect. Business in the future may be more intricate and complex than it is today, which requires the development of a better process for evaluating relationships. Doing so would provide businesses the necessary opportunity and flexibility to be involved in creative agreements.

*The Solution:*

*A Comprehensive Three-Part Approach*

The *Leegin* decision created a policy in which: (1) vertical price restrictions are examined under the rule of reason, and (2) many horizontal price restrictions are still deemed *per se* illegal.[75] Under this standard, there is still room for much confusion as to which rule is to be applied in a given case. Considering the creativity and complexity of modern business ventures, it is unrealistic to leave the judicial branch to distinguish the "horizontal" and "vertical" elements of newly emerging business relationships and to categorize cases under the *per se* rule and the rule of reason.

In addition, the role of the judicial branch is not to make the law. Elected members of Congress – the lawmakers of the nation – best represent the public's needs. Antitrust law is a complicated topic, and the courts do not have the necessary time or expertise to be making continual value judgments regarding the usefulness of creative business models.

Congress, with the help of economic experts, has the authority, time, and resources to establish the framework for a new antitrust standard, and should therefore be entrusted with the job of determining which relationships are *per se* illegal, and which conversely deserve the individualized attention of the rule of reason. A group of economic experts, who collectively have extensive knowledge about antitrust law and business relationships, should be selected by Congress to create a committee of specialists. The sole responsibility of the committee would be to analyze a wide range of business relationships, and subsequently help Congress refine the Sherman Act to specify which price-fixing relationships are *per se* illegal.

As a matter of institutional design, Congress is also much better suited than the courts to stay abreast of new business methods. Unlike the courts, Congress is not tied to a pattern of following its own precedents, and when change is under consideration, members of the business community could receive notice and an opportunity to comment on any proposed legislative updates. Following this public notice and comment period, Congress would be able to best represent the public interest if changes to its prior list of *per se* illegal business arrangements are in order.

[75] *Leegin*, 127 S. Ct. at 2713-14 (majority opinion).

After Congress makes these revisions to the Sherman Act, the courts could follow a clear three-step analysis in order to eliminate the confusion surrounding price-fixing litigation. The court's involvement would proceed as follows:

1) When presented with a case, the court must first determine whether the business agreement at hand is actually "price-fixing." If the court finds that a case involves a "price-fixing" agreement, then the case will continue to the second step of the analysis.

2) The court will next determine whether a specific agreement falls under Congress' revised *per se* illegality list. If the agreement falls under the list, the agreement will automatically be considered an unreasonable "price-fixing" relationship and deemed *per se* illegal. Any cases that do not involve agreements on the revised list will continue on to the last step of analysis.

3) All remaining cases that have been categorized as "price-fixing" agreements and not found on the *per se* illegality list would then be analyzed under the rule of reason.

With this simplified process, neither the legislative nor the judicial branch will step outside the scope of its expertise or authority. Congress will preserve the public's interest alongside direct input from economic experts, and the courts will subsequently apply the law. Companies that feel they can offer sufficient pro-competitive justifications to move a creative business model off the "*per se* illegal list" can lobby before Congress *before* investing in such operations, rather than taking a chance on protracted litigation to test their case later. Furthermore, the new standard will eliminate the need for making "horizontal' or "vertical" relationship divisions; price-fixing agreements will either be deemed *per se* illegal because they are on the list, or they will be examined under the rule of reason. Courts will simply apply the new standard, and any case that passes all three steps will be considered a reasonable "price-fixing" agreement (thereby permissible under federal law).

*Application of the Proposed Three-Part Standard*

Revision to the Supreme Court's traditional approach to price-fixing litigation must be considered in light of its practicality. The following section demonstrates how the proposed three-step process would apply to the *Texaco, Dr. Miles*, and *Leegin* cases.

*(1) Texaco Inc. v. Dagher*

In theory, if two or more competitors agree to fix the price of one product, price-cutting competition would end, and consumers would be harmed. This could also lead to inefficiency and a decrease in the quality of the products being sold. However, not all apparent instances of "cooperation" among competitors may be anti-competitive price-fixing after all. Despite the fact that the service station owners filed suit against Texaco and Shell as *individual* entities, the issue at hand concerned the pricing policy set by a single entity (Equilon Enterprises) and "not a pricing agreement between competing entities with respect to their competing products."[76] Since the single entity (Equilon) was then setting the price of its product, the relationship between the two producers would not be considered a "price-fixing" relationship.[77]

Under the new proposed standard, a court would apply the first step and hold that the business agreement could not be labeled "price-fixing." Therefore, Equilon Enterprises, being a joint venture, would not be subject to suit for price-fixing under the new legal standard. No further deliberation or categorization would be needed, and the case would be dismissed.

*(2) Dr. Miles v. Park & Sons*

This case involved the legality of Dr. Miles' "price-fixing" at various distribution stages. Dr. Miles' contracts froze the prices of its goods and stifled competition. These contracts, which Dr. Miles required wholesalers and retailers to sign, controlled the prices set by "the designated Retail Agents of said Proprietor" and only allowed sales "to the said Retail or Wholesale Agents of said Proprietor."[78] By requiring other businesses to agree to these terms, Dr. Miles tried to control all aspects of pricing for its products. The Court determined that Dr. Miles' actions should be considered a *per se* violation of antitrust law.[79]

Under the new proposed standard, a court would have first determined that Dr. Miles was in fact creating price-fixing agreements. After satisfying this first step, the court would then look to see if this type of business

[76] *Texaco*, 547 U.S. at 6.
[77] *Id.* at 7.
[78] *Dr. Miles*, 220 U.S. at 396-97.
[79] *Id.* at 407.

agreement was on Congress' revised *per se* list. It is reasonable to assume that this type of aggressive action would be considered a *per se* violation by the committee of economic experts, because complete domination of all levels of the market eliminates the possibility of naturally-occurring competition. If this type of business arrangement did appear on Congress' revised *per se* list, then Dr. Miles' contracts would be found *per se* illegal. The Court and the plaintiff would be spared the investment of time and resources necessary to analyze the case under the rule of reason.

*(3) Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

The *Leegin* case involved contracts which the Court did not view as "manifestly anti-competitive."[80] Leegin refrained from selling Brighton products to Kay's after repeatedly asking the store to stop discounting Brighton goods.[81] Utilizing the proposed standard, a court would first hold that this case involved a price-fixing agreement, because Leegin kept vendors of its products under minimum resale price contracts. Second, the court would look to see if this type of business agreement was on the newly revised *per se* list. Since these types of agreements are not necessarily considered "manifestly anti-competitive," and may also have pro-competitive effects, it is unlikely they would be found on Congress' revised *per se* illegality list.[82]

After passing the first two steps of the proposed standard, the *Leegin* case would then be analyzed under the rule of reason. Under the rule of reason, pro-competitive justifications must be weighed against anti-competitive effects to see whether the agreement in question would harm the public interest. In applying the rule of reason, the court might then find that Leegin's business agreement created multiple pro-competitive factors, including the stimulation of inter-brand competition and improvement in the quality of service or promotions that retailers offered to consumers. In terms of anti-competitive factors, the agreement could lead to the formation of cartels or the abuse of minimum price setting by powerful retailers.

[80] *Leegin*, 127 S. Ct. at 2718.
[81] *Id.* at 2711.
[82] If Congress *had* added this behavior to the list, then *Leegin's* actions would be deemed illegal, despite what any court might think, and the plaintiff would prevail without the extended evidentiary analysis.

Under a holistic evaluation, the pro-competitive benefits of Leegin's Pricing Policy might outweigh the possible anti-competitive effects. If so, after working through all three steps of the proposed legal standard, a court would rule that the Leegin agreement was permissible and Leegin would prevail. Although the case would involve complex expert testimony, the public interest would ultimately be served and a creative new business model could survive.

## CONCLUSION

This article presented the Court's changing precedents for antitrust price-fixing cases. Two general legal standards were illustrated: *per se* illegality and the rule of reason. This article first illustrated the use of *per se* in the Court's legal reasoning from the *Dr. Miles* case. The Court held that Dr. Miles' attempt to govern the entire trade of its goods through restrictive pricing agreements was a *per se* violation of the Sherman Act. *Dr. Miles* thereby set the precedent that minimum resale price restraints were to be evaluated categorically under the *per se* illegality rule. The *Texaco* case involved the joint venture, Equilon, which set a single price for gasoline sold under the two different brand names. The *Texaco* Court ruled that it was not *per se* illegal for a joint venture, as a single entity, to determine the price for its goods. Thus, the categorization of "vertical" and "horizontal" business relationships became the Court's burden in the process.

Finally, the *Leegin* case involved Brighton's Retail Pricing and Promotion Policy, which prohibited the sale of discounted Brighton goods below a certain price. The Supreme Court ruled that minimum resale price agreements were no longer to be examined under the *per se* rule, but would instead be judged under the rule of reason, thus effectively overruling the precedent previously set in *Dr. Miles*. The *Leegin* Court decided to abolish the *per se* rule, finding that a case-by-case assessment under the rule of reason was more appropriate for such arrangements. Under the rule of reason, the evidentiary burdens and analysis for vertical minimum price restraints will become much more complex in the future.

Throughout the various antitrust cases examined in this article, the Supreme Court has used categories such as "vertical" and "horizontal" price-fixing in an effort to choose the appropriate legal standard. However, neither the *per se* rule nor the rule of reason should be used exclusively, and the courts do not have the resources, expertise, or time to truly evaluate the benefits behind all price-fixing relationships.

The proposed three-step approach provided in this article eliminates the need for categorizing business relationships as "vertical" or "horizontal" to determine their legality. The courts need only first determine whether a business agreement is actually based on price-fixing. If so, the court can then check to see whether the price-fixing agreement is under Congress' list of *per se* illegal agreements, which represents a shift in the regulatory emphasis back to the branch of government best suited to make such decisions in the first place. Lastly, if necessary (meaning a business model satisfies the price-fixing definition but does not appear on Congress' revised *per se* illegality list), the case would remain in court to be evaluated under the rule of reason. This new three-part standard provides more precise rulings and promotes creative business agreements; it also saves businesses from spending millions of dollars in legal fees, which ultimately would be passed down to the consumer in the form of higher priced goods.

The need for clarity in this area of law will only become more critical in the coming years. According to the U.S. Department of Education, the number of MBA graduates has increased from 94,000 in 1996 to 116,000 in 2001.[83] Following an MD and a JD, the MBA is the most sought-after graduate degree in this country. With new technologies offering a wide array of new business relationships and access to a global marketplace, careful assessments of these new business models must be made. Considering the potential for creative contributions by the large number of tech-savvy MBA graduates entering the field, it is imperative that the legal standard allow flexibility for a broad spectrum of business agreements.

As creativity within the business world continues to expand, Congress – as the elected representatives of the general public – must create clear and comprehensive legislation for the courts to follow. Without such clarity, businesses will be left in continuous doubt about the validity of their agreements and consumers will ultimately shoulder the expense of protracted legal fees. Such an outcome undermines the very goals behind American antitrust protection. The time has come for Congress to revise its outdated legislation, rather than leaving this delicate task in the hands of the judiciary.

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[83] Randy Dotinga, *US Business Schools Reinvent the MBA*, Christian Science Monitor, Nov. 2, 2004, *available at* http://www.csmonitor.com/2004/1102/p11s02-legn.htm. The "MBA" is a master's degree in business administration, the "JD" is a doctorate degree in law (jurisprudence), and the "MD" is a doctorate degree in medicine.