

NOTE

READING ROBERTS: A CRITICAL FRAMEWORK FOR ANALYZING THE SUPREME COURT’S DECISION IN *LEEGIN CREATIVE LEATHER PRODUCTS, INC. V. PSKS, INC.**

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Once Justice Holmes's philosophy of jurisprudence became the Court's—under Chief Justice Charles Evans Hughes, who ended the Court's reliance on the freedom of contract by disallowing application of hard-line rules to individual cases⁵—the Court's standards for construing the Constitution changed.⁶ Thus, the Hughes Court reinvented the Constitution; and, for a generation, the Court had less involvement in the direction of American politics while New Deal reforms were pushed through Congress.⁷

The impact of Justice Holmes's judicial philosophy affirmed Thomas Jefferson's assertion that “it is for the peace and good of mankind” that each generation reinvent the Constitution.⁸ True to Jefferson's word, during the past century the Supreme Court changed its interpretation of the Constitution's limits every twenty years. While some would decry such reinvention as “judicial activism,”⁹ the changes evolved society's understanding of the Constitution to match deeply felt currents in public opinion.¹⁰ The most shape-shifting Courts were those under Chief Justices Hughes,¹¹ Earl

5. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (describing the Contract Clause as a “general,” as opposed to specific, clause necessitating a process of construction to “fill in the details”).

6. See Robert C. Palmer, *Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. L. REV. 631, 631 (1987) (describing the *Blaisdell* decision as the point where the Court shifted from a strict textual approach of discerning the intended meaning of words in the Constitution to an approach where the Court would “adjudicate in the spirit of the Framers”).

7. See A.E. Dick Howard, Professor of Law and Public Affairs, The Changing Face of the Supreme Court, Lecture for the University of Virginia's NewsMakers Lecture Series (May 3, 2000) (transcript available at <http://www.virginia.edu/uvanewsmakers/newsmakers/howard.html>) (noting that the Hughes Court of the New Deal era eventually changed course from the obstructionism of the *Lochner* era, allowing Roosevelt more freedom to implement New Deal legislation); cf. Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS (SPECIAL ISSUE: L. & ORD. OF CULTURE) 13, 36 (1990) (concluding that changes in the national ethos “will create a reconstituted political perspective that will in turn alter the character” of the Court).

8. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 123, 124 (Edward Dumbauld ed., 1955) (“Each generation is as independent of the one proceeding as that was of all which had gone before. It has then, like then . . . a right to choose for itself the form of government it believes most promotive of its own happiness, consequently, to accommodate to the circumstances in which it finds itself that received from its predecessors . . .”).

9. “A philosophy of judicial decisionmaking whereby judges allow their personal views about public policy . . . to guide their decisions;” suggesting that adherents “tend to find constitutional violations and are willing to ignore precedent.” BLACK'S LAW DICTIONARY 862 (8th ed. 2004).

10. See Jeffrey Rosen, *Supreme Mistake: How the Election Affects the Court*, NEW REPUBLIC, Nov. 8, 2004, at 18, 19 (arguing that the presence of “swing justices” on the Court has resulted in the extension of “the most popular liberal activist decisions of the Warren era while also endorsing conservative judicial activism as public support for the welfare state wanes”).

11. Hughes served as Chief Justice from 1930–1941 and ended the Court's reliance on hard-line rules such as the freedom of contracts, which ushered in an era of extreme judicial deference to legislatures. See James A. Henretta, *Charles Evans Hughes and the*

Warren,¹² and William H. Rehnquist.¹³ Twenty years after Chief Justice Rehnquist took office, Chief Justice John G. Roberts, Jr. aroused intense speculation into the ways in which his Court would reinvent the Constitution.¹⁴

Prior to his confirmation hearings, Roberts described his view of the Court's role: "When the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities."¹⁵ A strict formalist¹⁶ with regard to separation of powers, Roberts believes the Supreme Court's inquiry in any case is limited to "enforcing the limits the Constitution places on the

Strange Death of Liberal America, 24 L. & HIST. REV. 115, 116, 148, 150 (2006) (noting years on the bench); see also *supra* notes 6–7 and accompanying text (noting Chief Justice Hughes's effect on the Court).

12. Warren served from 1953–1969 and struck down many federal and state segregation laws, creating hard-line minority protection rules for adjudication, including ending segregated schooling in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). See Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203, 1215 (2002) (noting years on the bench); Howard, *supra* note 7 (commenting on the Warren Court's "unparalleled age of judicial activism").

13. Rehnquist served from 1986–2005 and prevented the Court from creating new hard-line rules while reexamining many of the broad constitutional parameters established by prior case law. See Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1333 (2006) (noting years on the bench); Howard, *supra* note 7 (documenting Rehnquist's rise to Chief Justice during the Reagan Administration); see also Jeffrey Rosen, *Sister Act: Is Rehnquist a Feminist?*, NEW REPUBLIC, June 16, 2003, at 14 (arguing Rehnquist's "most important legacy" is the "claim that Congress may only allow individuals to [challenge] those forms of discrimination the Court itself has already identified as unconstitutional").

14. See, e.g., Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 360 n.76 (2006) (questioning how Chief Justice Roberts's replacement of Chief Justice Rehnquist will affect the scope and application of Sixth Amendment rights); Rosen, *supra* note 10, at 19 (speculating, prior to George W. Bush's reelection in 2004, that he would nominate Supreme Court justices that would "strike at the core of the regulatory state for the first time since the New Deal").

15. Mike Allen & R. Jeffrey Smith, *Judges Should Have 'Limited' Role, Roberts Says*, WASH. POST, Aug. 3, 2005, at A5. Roberts further noted that it is "not part of the judicial function to make the law." *Id.*; see, e.g., *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1150 (D.C. Cir. 2004) (Roberts, J.) (writing "[n]o one is very happy" about a twelve-year-old girl's arrest for eating french fries on the subway but noting the only question presented to the Court was whether the policies leading to her arrest were supported by law).

16. See Responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Edward M. Kennedy 32 (Sept. 5, 2005), available at http://www.washingtonpost.com/wp-srv/nation/documents/roberts/kennedy_responses.pdf [hereinafter Responses of Roberts] ("[T]he proper role for the Court is to enforce the Amendment[s] to the Constitution) as the [F]ramers wrote [them]."). See generally Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 226 (1992) (arguing the formalist separation of powers approach is "used in evaluating (and invalidating) attempts by Congress" to exercise non-constitutionally granted power).

political branches.”¹⁷ But, as became evident during the 2006 Term,¹⁸ this philosophy also implies that any previous Supreme Court decision that overreached the Court’s judicial powers was wrongly reasoned and, therefore, ready to be thrown out or changed.¹⁹

When PSKS, Inc. (PSKS) first filed an antitrust claim against Leegin Creative Leather Products, Inc. (Leegin), Chief Justice Rehnquist presided over the Court.²⁰ While the Rehnquist Court consistently held against straight-line antitrust rules,

17. See Responses of Roberts, *supra* note 16, at 1; see also Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 505 (1991) (advocating a strict focus on separation of powers issues as the only way to protect individual rights).

18. See Responses of Roberts, *supra* note 16, at 41 (pledging commitment to the principles of stare decisis, including whether the prior decision was well reasoned, when deciding whether to overrule established precedent); see also *supra* note 15 and accompanying text (describing Chief Justice Roberts’s conviction that courts should interpret, rather than create, the law).

19. Cf. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (quoting Justice Stephen Breyer that “[i]t is not often in the law that so few have so quickly changed so much”). There are several instances in recent Supreme Court jurisprudence where rules derived from precedent have been limited so severely by the Court the precedent was effectively overruled. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664, 2674 (2007) (rejecting the notion that *McConnell v. FEC*, 540 U.S. 93 (2003), created a constitutional test for determining if an advertisement was express political advocacy); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) (ignoring the precedent set in *TVA v. Hill*, 437 U.S. 153 (1978), which states that the Endangered Species Act of 1973 admits of no exception for the primary missions of federal agencies); *Bowles v. Russel*, 127 S. Ct. 2360, 2366 (2007) (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), and *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam), to the extent they created an exception to the jurisdictional rules for timely filing of appeals). Notably, in *Bowles*, Justice Souter stated in his dissent, “By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.” *Bowles*, 127 S. Ct. at 2370 (Souter, J., dissenting). Additionally, there are several instances where the Court effectively overruled precedents by narrowing their rules. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767–68 (2007) (limiting the application of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (plurality opinion), to only *de jure* segregation, breaking with more than fifty years of precedent); *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553, 2565–66 (2007) (declaring that *Flast v. Cohen*, 392 U.S. 83 (1968), applies only to actions of the legislative, and not actions of the executive, branch of government); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2172–74 (2007) (restricting application of *Bazemore v. Friday*, 478 U.S. 385 (1986), factually to cases where an employee receives intentionally discriminatory, disparate paychecks and refusing to extend the holding to subsequent issuance of paychecks by a facially nondiscriminatory system); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626–27, 1635–38 (2007) (minimizing the effect of precedent affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and set in *Roe v. Wade*, 410 U.S. 113 (1973), that prevented states from banning abortion without making an exception for the health of the mother based on the factual circumstances in which medical uncertainty existed as to the safety of certain abortion procedures).

20. PSKS first filed in 2003. See Joint Appendix at 5, 15, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) (referring to relevant docket entries). Chief Justice Rehnquist presided until 2005. See *supra* note 13.

Chief Justice Rehnquist could not get a majority on board to overturn century-old precedent.²¹ There was little risk, therefore, that PSKS's district court victory against Leegin would be reversed by the Rehnquist Court.

Leegin's appeal of PSKS's award to the Supreme Court, however, was not heard until Chief Justice Roberts's tenure.²² This delay triply victimized PSKS: once by Leegin's price-fixing scheme and subsequent refusal to deal, once by Congress's statute and the Executive's inability to enforce it, and once by the Supreme Court's decision to buck a century of precedent. And what did PSKS do to deserve this strange honor of being singled out and punished by every branch of American government? It pursued the American Dream: it helped build a brand from nothing, only to be punished when it tried to compete with stores set up by the brand's manufacturer.²³ It filed an antitrust claim relying on a century of unbroken Court precedent, legislative pronouncements, and executive guidelines. Finally, its suit came under the watchful eye of Chief Justice Roberts, who reads no flexibility into statutory provisions²⁴ and who has no qualms about rejecting precedents that do.²⁵

21. During Chief Justice Rehnquist's tenure, when Justices Scalia and Thomas were the primary cheerleaders for overturning precedent, Justice Kennedy was unwilling to vote to outright reject longstanding rules of law; now that Chief Justice Roberts controls the narrative, Justice Kennedy is more easily convinced. *Compare Planned Parenthood*, 505 U.S. at 833 (Justice Kennedy joined Justice O'Connor's plurality opinion rather than Chief Justice Rehnquist's or Justices Scalia's and Thomas's partially dissenting opinions), *with Gonzalez*, 127 S. Ct. at 1627–28 (Justice Kennedy's majority opinion largely ignores the substance of the opinion he joined in *Planned Parenthood*). See also Nina Totenberg, *The Roberts Court and the Role of Precedent*, NPR: LEGAL AFFAIRS, July 3, 2007, <http://www.npr.org/templates/story/story.php?storyId=11688820> (quoting Michael Dorf, former Supreme Court clerk to Justice Anthony Kennedy, that “[p]art of what you're seeing may be that [Justice Kennedy] finds Roberts and Alito less scary than Justices Scalia and Thomas because they aren't bomb throwers, and it's possible that the Roberts strategy of incremental moves and not acknowledging when he's overturning precedents [appeals] to Justice Kennedy”).

22. Leegin's appeal was granted in 2006. See Joint Appendix at i, *Leegin*, 127 S. Ct. 2705 (No. 06-480). Chief Justice Roberts began presiding over the Court in 2005. *Supra* note 13 and accompanying text.

23. *Leegin*, 127 S. Ct. at 2711.

24. *Compare Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1150–52, 1159 (D.C. Cir. 2004) (Roberts, J.) (affirming the propriety of the arrest of a twelve-year-old girl for eating a french fry in the subway, Roberts wrote that “insisting on the exercise of discretion by an arresting officer would be an unfamiliar imperative under the Fourth Amendment . . . [g]iven the undisputed existence of probable cause” in the girl's case), *with* D.C. Code § 35-251(b)(2) (2000) (making it illegal to eat on the subway), *and* D.C. Code § 35-253 (2000) (outlining citation schedule for adults who eat on the subway), *and* D.C. Code § 16-2309(a)(2) (2000) (granting police authority to arrest juveniles who commit delinquent acts), *and* D.C. Code § 16-2301(7) (2000) (classifying eating on the subway as a delinquent act). Even holding as he held, Roberts states, “No one is very happy about the events that led to this litigation.” *Hedgepeth*, 386 F.3d at 1150.

25. See, e.g., *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2536–37 (ignoring the

This Note offers the *Leegin* decision as a model of the Robert Court's judicial philosophy. Part II will examine *Leegin*'s background and the Supreme Court's majority and dissenting opinions. Part III will illustrate *Leegin*'s ability to explain the present and model the future, focusing on two areas: (1) the resurgence of formalist separation of powers theory in the Court and its effect on judicial precedent, on executive overreaching, and on congressional intent; and (2) the avenues for redress left to retailers victimized by a manufacturer's vertical price restraints, whether through lawyer-led litigation, through narrowly-tailored lawsuits that do not require judicial flexibility, or through congressional lobbying. Finally, in Part IV, this Note will outline the present and future effects of the judicial philosophy behind *Leegin*. In the short run, litigants and the courts will be unable to rely on Supreme Court precedent; and in the long run, the power and influence of the Supreme Court will be greatly diminished (for a generation, at least).

II. CASE RECITATION

A. Background

1. Congress's Statutes.

a. The Sherman Act.²⁶ The Sherman Act was passed in 1890 in response to intense public concern over the growing number and size of trade combinations.²⁷ Its two substantive sections focus on preventing cartel behavior²⁸ and on limiting individual attempts to monopolize.²⁹ The Act does not define prohibited conduct.³⁰ Instead, the Act vests the federal district courts with jurisdiction "to prevent and restrain [antitrust] violations" and grants the U.S. attorneys power to bring charges

precedent set in *TVA*, 437 U.S. at 153, because the plain language of the Endangered Species Act of 1973 admits of no exception for the primary missions of federal agencies).

26. 15 U.S.C. §§ 1–7 (2006).

27. Cf. George Gunton, *The Economic and Social Aspect of Trusts*, 3 POL. SCI. Q. 385, 385 (1888) ("Our foremost journalists, essayists, orators and publicists unite in warning us against the evil consequences to be expected from the organization of trusts, syndicates and the like."); see also 21 CONG. REC. 2,460 (1890) (statement of Sen. John Sherman) (warning Congress that, due to trusts, the "popular mind is agitated with problems that may disturb social order").

28. 15 U.S.C. § 1 (2006).

29. 15 U.S.C. § 2 (2006).

30. See Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 265 (2003) (reviewing vagueness of the Sherman Antitrust Act and noting that it prohibits "conduct which unfairly tends to destroy competition' but neglected to define just what fairness means").

against violating companies.³¹ In other words, Congress delegated to the Executive and the Judiciary its authority to identify and punish conduct deemed anticompetitive under the Act.³² Antitrust regulation was subject entirely to the common law.³³

b. The Consumer Goods Pricing Act of 1975.³⁴ The Consumer Goods Pricing Act (CGPA) of 1975 repealed the Miller–Tydings³⁵ and McGuire³⁶ Acts, which previously amended the Sherman Act. The CGPA removed provisions of the Sherman Act that permitted states to pass fair trade laws protecting resale price maintenance contracts from antitrust challenges.³⁷

31. 15 U.S.C. § 4 (2006). The Department of Justice (DOJ), under the leadership of the Deputy Attorney General, manages the U.S. attorneys. Department of Justice Organization Chart, <http://www.usdoj.gov/dojorg.htm> (last visited Mar. 6, 2009).

32. Sen. John Sherman stated that “[i]t does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.” 21 CONG. REC. 2,456 (1890). Similarly, Sen. George Hoar stated, “We have affirmed the old doctrine of the common law in regard to . . . commercial transactions, and have clothed the United States courts with the authority to enforce that doctrine by injunction.” *Id.* at 3,146. Basically, Congress delegated policymaking authority to the U.S. attorneys, who were essentially tasked with defining the contours of anticompetitive behavior when determining what cases to prosecute. See WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 100–02 (1981).

33. See LETWIN, *supra* note 32, at 98 (“‘Restraints of trade,’ as the common law understood them, could only come about through agreement between persons; . . . ‘monopolize’ . . . [also] had a well-known meaning at common law.” (citation omitted)).

34. Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. §§ 1, 45).

35. Miller–Tydings Act, Pub. L. No. 314, ch. 690, Title VIII, 50 Stat. 693 (1937) (amending 15 U.S.C. § 1), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. § 1). See *generally* Mansel G. Blackford, *Small Business in America: An Historical Overview*, in SMALL FIRMS, LARGE CONCERNS: THE DEVELOPMENT OF SMALL BUSINESS IN COMPARATIVE PERSPECTIVE 47, 49 (Konosuke Odaka & Minoru Sawai eds., 1999) (“A retail price maintenance measure, the [Act] forbade chain stores from selling their goods at prices below those set by manufacturers.”).

36. McGuire–Keogh Fair Trade Enabling Act, Pub. L. No. 542, ch. 745, § 2, 66 Stat. 631 (1952) (amending The Federal Trade Commission Act of 1914, 15 U.S.C. § 45), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. § 45). The McGuire Act incorporated the same basic language as the Miller–Tydings Act, specifying types of non-violative resale price maintenance. See Blackford, *supra* note 35, at 49 (noting the Miller–Tydings Act was a “retail price maintenance measure”).

37. Pamela Jones Harbour, Comm’r, Fed. Trade Comm’n, Vertical Restraints: Federal and State Enforcement of Vertical Issues 6 n.13 (Mar. 18–20, 2004), *available at* <http://www.ftc.gov/speeches/harbour/0403vertical.pdf> (materials distributed at ALI–ABA Course of Study Product Distribution and Marketing). President Gerald Ford, upon passage of the CGPA, stated: “When this new legislation takes effect . . . , retailers will again be able to set prices on a more competitive basis, thereby enabling consumers in all 50 States to shop for the best products at the lowest possible prices. . . . I take particular

Essentially, the CGPA returned the Sherman Act to its 1890 form.³⁸

2. *The Department of Justice's Policy.* The Department of Justice (DOJ) has considered resale price maintenance agreements per se illegal since the Supreme Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*³⁹ in 1911.⁴⁰ Accordingly, the DOJ included a specific prohibition against resale price maintenance agreements in its guidelines for antitrust enforcement.⁴¹ This prohibition builds on the DOJ's earlier but less specific prohibition on vertical integration to the retail level, which also required proof of market concentration.⁴² The specific prohibition against resale price maintenance agreements speaks to the DOJ's longstanding policy that it will, with consistent bipartisan support, apply a per se rule of illegality to the restraint.⁴³

pleasure in signing this bill for the benefit of the American consumer." Statement on the Consumer Goods Pricing Act of 1975, 2 PUB. PAPERS 1966, 1967 (Dec. 12, 1975) [hereinafter Ford Public Papers].

38. See *supra* note 33 and accompanying text (noting the Sherman Act established that all antitrust cases were subject to the common law).

39. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

40. See U.S. DEP'T OF JUSTICE, PATENT/ANTITRUST (INTELLECTUAL PROPERTY) MATTERS § 5.2 (2007) ("Resale price maintenance is illegal when 'commodities have passed into the channels of trade are owned by the dealers.'" (quoting *Dr. Miles*, 220 U.S. at 408)); *id.* ("[T]he Agencies will enforce the per se rule against resale price maintenance."); Brief of the American Antitrust Institute as Amicus Curiae in Support of Respondent at 10–11, n. 13, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) ("[T]he federal . . . agencies, on a bipartisan basis, have invoked the per se rule in their guidelines and enforcement agencies." (citing U.S. DEP'T OF JUSTICE & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.2 (1995)); see also *infra* notes 42–43.

41. U.S. DEP'T OF JUSTICE, *supra* note 40, § 5.2.

42. See U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 4.221 (2007) ("Adverse competitive consequences are unlikely unless . . . a large percentage of the products produced [in the upstream market] are sold through vertically integrated retail outlets.>").

43. See *Interview with Former Assistant Attorney General James F. Rill*, 63 ANTITRUST & TRADE REG. REP. (BNA) 254, 255, 357 (1992) (proclaiming the personal view of the DOJ's outgoing chief of the antitrust division that resale price maintenance agreements are per se illegal and his prediction that the DOJ would continue to favor the policy of per se illegality for such agreements). Congress even included in several appropriation bills for the DOJ a specific warning that any challenge to resale price maintenance would result in the DOJ losing its funding. See, e.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102–03 ("None of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws . . ."). *But see* Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Leegin*, 127 S. Ct. at 2705 (No. 06-480) (arguing that the Court should subject resale price maintenance to the rule of reason). Either way, Justice Kennedy, writing for the majority, said this language was "ambiguous at best." *Leegin*,

3. *The Supreme Court's Precedent.*⁴⁴ The Court's decisions regarding vertical restraints begin by placing the agreement into one of two frameworks: one focuses on the category of agreement, while the other focuses on the agreement's present economic effects.⁴⁵ When the agreement represents concerted action to fix prices, it always tends to restrict competition.⁴⁶ Therefore, the agreement is per se illegal without further analysis by the Court of its economic effect.⁴⁷ When the agreement represents concerted action on nonprice restrictions—even if accompanied with an independent decision to fix prices—the nonprice restrictions may have procompetitive benefits greater than their competitive harms.⁴⁸ In these situations, the factfinder applies rule of reason analysis to determine whether the restraint on competition is unreasonable.⁴⁹

The first case in the per se category, *Dr. Miles*,⁵⁰ held that vertical price-fixing contracts between manufacturers and retailers were injurious to the public interest where the agreements prevented retailers from doing what they wanted with goods the retailers owned.⁵¹ Specifically, the opinion compared vertical resale price maintenance agreements to cartel

127 S. Ct. at 2724.

44. This Note will consider only those precedents the Court relied on in *Leegin* to arrive at its decision.

45. See *Leegin*, 127 S. Ct. at 2720 (noting “the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve[s] to meet the dynamics of present economic conditions” (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978))).

46. See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723–24 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761–63 (1984); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

47. *Bus. Elecs.*, 485 U.S. at 723.

48. *Monsanto*, 465 U.S. at 761–64. For a discussion on these procompetitive benefits, see, for example, RICHARD POSNER, *ANTITRUST LAW* 172–73 (2d ed. 2001) (discussing the benefits a manufacturer’s product will receive when showcased with retailers who invest in fine showrooms); Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 *RAND J. ECON.* 346, 347–49 (1984) (noting that products may experience a boost in sales if they are sold to retailers known for selling high-quality merchandise).

49. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977) (explaining the mechanics of the rule of reason).

50. *Dr. Miles*, 220 U.S. at 373.

51. *Id.* at 408–09 (concluding that contracts were a restraint on alienation of moveable goods when the contracts prevented retailers from reselling goods purchased from a manufacturer at prices lower than the manufacturer’s set price). These agreements interfered with freedom of contract, a policy that pervaded pre-1934 Court decisions. See *id.* at 411 (Holmes, J., dissenting) (“The conclusion is reached by extending a certain conception of public policy to a new sphere.”); see also Farnsworth L. Jennings, *Freedom of Contract—Inquiries and Speculations*, 22 *CAL. L. REV.* 636, 652–53 (1934) (arguing that freedom of contract worked in *Dr. Miles* as a show of protest against legislation benefiting big business).

agreements, noting that the intended result of each was the same: no competition between competitors over price.⁵² The Court held that such agreements had no procompetitive justifications and were always illegal.⁵³ This rule was reaffirmed for over seventy years, such as in *Arizona v. Maricopa County Medical Society*,⁵⁴ which equated maximum price-fixing agreements with minimum price-fixing agreements, and which equated all vertical price-fixing agreements with horizontal price-fixing agreements.⁵⁵ In this line of decisions, once the plaintiff proved concerted action—by excluding all possibility that the manufacturer and retailers acted independently and by showing a conscious commitment to a common scheme to illegally restrain competition—the Court would find the activity per se illegal.⁵⁶

In the rule of reason line of cases, the first case is *United States v. Colgate & Co.*⁵⁷ There, the Court affirmed *Dr. Miles's* conclusion that manifest agreements to fix prices were per se illegal.⁵⁸ But it distinguished the contracts in *Dr. Miles* from the *Colgate* manufacturer's refusal to deal with noncompliant retailers.⁵⁹ When there was only a refusal to deal, the Court stated that the manufacturer was simply exercising its long-recognized right to choose its business partners.⁶⁰ Therefore, restraints related to, but not directly fixing, retail prices were reasonable in the eyes of the Court.⁶¹ In *Continental T.V., Inc. v.*

52. *Dr. Miles*, 220 U.S. at 407–09 (comparing the restriction on freedom of trade by a manufacturer or a dealer to similar restraints secured by agreements amongst dealers); see also Recent Development, *The Course Correction a Century in the Making: Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), 31 HARV. J.L. & PUB. POL'Y 855, 864 (2008) (analyzing *Leegin's* reversal of *Dr. Miles* and concluding that Justice Hughes's equation of vertical price constraints with cartel agreements was the fatal flaw of the *Dr. Miles* decision).

53. *Dr. Miles*, 220 U.S. at 408.

54. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (holding that an agreement between medical insurance companies and the doctors they cover to fix reimbursement fee schedules was per se illegal).

55. *Id.* at 348.

56. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 761–65, 767 (1984) (finding that concerted action to fix prices existed where competing retailers knew noncompliance constituted grounds for termination of the manufacturer–retailer relationship, and where competing retailers complained to the manufacturer of noncompliant, competing retailers).

57. *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (concluding no agreement to fix prices existed where a manufacturer refused to sell goods to retailers that did not follow its price guideline).

58. *Id.* at 307.

59. *Id.* at 307–08.

60. *Id.*

61. *Id.*

GTE Sylvania, Inc.,⁶² the Court built on this idea, concluding that all vertical nonprice restraints were subject to the rule of reason.⁶³ The opinion reasoned that in order for a restraint to be per se illegal, it must be manifestly anticompetitive with demonstrable economic effect.⁶⁴ Because nonprice restraints rarely demonstrate a consistent degree of economic effect, as compared to price restraints, the Court declined to draw a bright-line prohibition against restraints whose effects would depend on the type of restraint and the facts of each case.⁶⁵

This standard holds true even where nonprice restraints are related to the manufacturer's independent decision to fix prices.⁶⁶ In *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court held that concerted action against a low-price retailer did not constitute a per se agreement to fix prices when there was no agreement on price or price levels.⁶⁷ Similarly, in *Texaco Inc. v. Dagher*,⁶⁸ the Court held that concerted action to fix prices by two firms in a joint venture did not constitute an agreement because the law treats a joint venture as a single entity.⁶⁹ In every case, the Court's decision turned on whether there was concerted action to fix prices. As long as the agreement restrained something other than price, the agreement was subject to the rule of reason.

The exception to this standard was set into law in *State Oil Co. v. Khan*, a unanimous opinion.⁷⁰ The decision distinguished

62. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (finding that an agreement between a manufacturer and its retailers to sell products only within certain geographic territories may have procompetitive benefits).

63. *Id.* at 59.

64. *Id.* at 49–50.

65. *Id.* at 51–54, 57–58.

66. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 721–23, 735–36 (1988) (concluding that a determination to terminate a retailer relationship because the retailers prices were too low did not constitute price fixing where there was no agreement over price); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761–64 (1984) (reasoning that concerted action on nonprice restrictions were not price fixing even if they were tied to an independent decision to fix prices).

67. *Bus. Elecs.*, 485 U.S. at 733. Justice Scalia, who authored the majority opinion, distinguished the case from *Dr. Miles* because *Dr. Miles* required an agreement on price, whereas this case had no such agreement. *Id.* Justice Scalia assured Justice Brennan that the opinion would in no way be used to call into question *Dr. Miles*'s per se prohibition of resale price maintenance. William E. Kovacic, *Antitrust in the O'Connor/Rehnquist Era: A View from Inside the Supreme Court*, 20 ANTITRUST, Summer 2006, at 21, 24.

68. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

69. *Id.* at 5–6.

70. *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (finding a retail agreement that profits in excess of manufacturer-suggested price must be rebated to the manufacturer constituted maximum price fixing was not per se unlawful). The Court distinguished *Dr. Miles* as a ruling on minimum price restraints. *Id.* at 10–11, 15.

vertical minimum price restraints from maximum price restraints, the latter of which, the Court concluded, were not anticompetitive because they kept prices low.⁷¹ Therefore, every vertical restraint that did not constitute concerted action to fix minimum retail prices was subject to rule of reason analysis.⁷²

B. Leegin Creative Leather Products, Inc. v. PSKS, Inc.

1. *The Facts.* PSKS operates Kay's Kloset, a retail store for women's fashions, shoes, and accessories in Lewisville, Texas.⁷³ At Kay's Kloset between 1995 and 2002, PSKS sold the Brighton product line, which Leegin manufactured.⁷⁴ During this period, Brighton was PSKS's most important brand, accounting for millions of dollars in sales and forty to fifty percent of the store's total profits.⁷⁵

Across the United States, Leegin sells the Brighton line to five thousand small, mostly independent retail stores, seventy of which are partially owned by Leegin's president.⁷⁶ Beginning in 1997, Leegin adopted a "Retail Pricing and Promotion Policy," which applied suggested retail prices to its Brighton products.⁷⁷ Leegin enforced the price suggestions by soliciting agreements from retailers not to discount Brighton products unless authorized by Leegin senior executives.⁷⁸ If retailers sold Brighton products at prices below Leegin's suggested prices, Leegin stopped selling Brighton products to the retailer.⁷⁹

In December 2002, after receiving complaints from PSKS's competitors that PSKS was selling Brighton products for twenty percent below Leegin's suggested retail prices, Leegin demanded

71. *Id.* at 15–16. Maximum price restraints are different from minimum price restraints, and have different economic effects. Maximum restraints dictate the price over which retailers may not charge, keeping prices low, while minimum restraints dictate the price under which retailers may not charge, allowing retailers to charge monopoly prices. *See id.* at 15–16 (rationalizing the procompetitive and beneficial effects of maximum price restraints).

72. *Id.* at 17–18, 22.

73. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710–11 (2007).

74. *Id.* at 2711.

75. *Id.*; Joint Appendix at 13, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

76. *Leegin*, 127 S. Ct. at 2710.

77. *Id.* at 2711.

78. Joint Appendix at 13, *Leegin*, 127 S. Ct. 2705 (No. 06-480). Leegin claimed it enforced minimum retail prices so retailers of the Brighton product line would have sufficient margins to improve customer service, such as by hiring additional employees or improving the appearance of the retail store. *Leegin*, 127 S. Ct. at 2711.

79. *Leegin*, 127 S. Ct. at 2711.

that PSKS stop discounting the products.⁸⁰ When PSKS refused to stop discounting the products, Leegin stopped selling products to PSKS.⁸¹ The loss of the Brighton product line at PSKS's store threatened a future loss of \$200,000 in gross profits per year for PSKS.⁸²

2. *Procedural History.* Four months after Leegin terminated their business relationship, PSKS filed a diversity complaint against Leegin in the U.S. District Court for the Eastern District of Texas.⁸³ PSKS asserted a cause of action under the Sherman Act, among other things, for concerted action to fix prices.⁸⁴ Applying *Dr. Miles's* per se prohibition against such action, PSKS moved to exclude testimony from Leegin's expert witness who planned to advocate for the procompetitive benefits of vertical minimum retail price maintenance.⁸⁵ Judge John T. Ward granted the motion.⁸⁶ Based on the ruling, PSKS moved for summary judgment.⁸⁷ Judge Ward carried the motion under seal with the case to trial.⁸⁸ Upon finding concerted action to fix minimum retail prices, the jury awarded PSKS \$1.2 million.⁸⁹ Pursuant to the Sherman Act,⁹⁰ the district court trebled the damages award to \$3.975 million.⁹¹

Leegin appealed for a rehearing en banc to the Court of Appeals for the Fifth Circuit.⁹² Leegin argued that the rule of reason should be applied to vertical minimum price restraints.⁹³ Relying on *Dr. Miles* and the extensive and unbroken precedent

80. *Id.*; Joint Appendix at 13–14, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

81. *Leegin*, 127 S. Ct. at 2711.

82. Joint Appendix at 15, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

83. *Id.* at 5 (docketing filing date as April 25, 2003).

84. *Id.* at 12, 15–16.

85. *Leegin*, 127 S. Ct. at 2712; Joint Appendix at 6, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

86. *Leegin*, 127 S. Ct. at 2712; Joint Appendix at 7, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

87. Joint Appendix at 7, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

88. *Id.* at 8.

89. *Leegin*, 127 S. Ct. at 2712.; Joint Appendix at 8, *Leegin*, 127 S. Ct. 2705 (No. 06-480)

90. 15 U.S.C. § 15(a) (2006) (authorizing treble damages in antitrust suits).

91. *Leegin*, 127 S. Ct. at 2712. The \$375,000 in excess of the trebled damage award constituted PSKS's attorneys fees. *Id.*

92. *Leegin*, 127 S. Ct. at 2712; Joint Appendix at 2, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

93. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 171 Fed. Appx. 464, 466–67 (5th Cir. 2006) (Barksdale, Clement, and Engelhardt, JJ.), *rev'd sub nom. Leegin*, 127 S. Ct. at 2705.

that followed it, the Fifth Circuit rejected Leegin's argument and affirmed the district court's decision.⁹⁴

Leegin petitioned for a writ of certiorari to the Supreme Court, asking the Court whether vertical minimum resale price maintenance agreements should be evaluated under the rule of reason.⁹⁵ The Court granted the writ.⁹⁶ In a 5–4 decision, the Court reversed and remanded the Fifth Circuit's decision.⁹⁷

3. *The Supreme Court: Justice Kennedy's Majority Opinion.* In a five-member majority,⁹⁸ the Court concluded that all vertical price restraints would be judged under the rule of reason.⁹⁹ The Court arrived at this conclusion by dismissing entirely the distinction between vertical price and vertical nonprice restraints.¹⁰⁰ In so doing, the majority overturned *Dr. Miles* and, by proxy, overturned almost one hundred years of unbroken precedent regarding vertical minimum price maintenance agreements.¹⁰¹

Writing for the majority, Justice Kennedy isolated *Dr. Miles* as the common law relic of a bygone age.¹⁰² Citing *Continental T.V.*, he wrote that the Court's only concern was to determine the present economic effect of the restraint on competition.¹⁰³ Noting that the common law in 1911 could not justify a *per se*

94. *Id.*

95. Petition for a Writ of Certiorari at i, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

96. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 171 Fed. App'x 464 (5th Cir. 2006), *cert. granted*, 549 U.S. 1092 (2006).

97. *Leegin*, 127 S. Ct. at 2725.

98. Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. *Id.* at 2710.

99. *Id.* at 2725.

100. *Id.* at 2714. This decision fundamentally changed the first step of vertical restraint adjudication. *See supra* notes 45–47 and accompanying text (noting the Court's vertical restraint precedent begins by placing the restraint into a framework either for price agreements or nonprice agreements).

101. *See* Brief in Opposition at i, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (citing “an unbroken line of cases extending back to *Dr. Miles*, in which this Court has held that written contracts between a manufacturer and a retailer fixing the resale price of a product are illegal *per se* under Section 1 of the Sherman Act”). No traditional justification for granting a writ existed in *Leegin*: no conflicting circuit court decisions existed and the case did not conflict with the Court's precedent. *Id.* at 2. Leegin's petition “fail[ed] to provide any adequate reason for granting the writ.” *Id.* (citing SUP. CT. R. 10).

102. *See Leegin*, 127 S. Ct. at 2714 (“The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance.”). Justice Kennedy was referring to the rule against restraints on alienation of property. *Id.*

103. *Id.* (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.21 (1977)). *But cf. supra* notes 62–66 and accompanying text (noting *Continental T.V.* standards applied only to vertical nonprice restraints).

prohibition in 2007,¹⁰⁴ he reasoned that the rule against restraints on alienation of property was no longer valid.¹⁰⁵

Dr. Miles's only other justification for a per se rule against vertical minimum price restraints was based on recognition that the restraint forced competing retailers to agree with each other to fix prices, which constitutes a horizontal price restraint that remains per se illegal.¹⁰⁶ Relying on *Business Electronics*, which disallowed the analogy of horizontal restraints to vertical restraints on market allocation, the majority declared the price restraint comparison improper.¹⁰⁷ Both of *Dr. Miles's* justifications for sustaining the per se rule against vertical price restraints were thus invalid.¹⁰⁸ Consequently, the Court had to determine whether the restraint's economic effects in today's economy warranted continued application of a per se rule against it.¹⁰⁹

The majority argued that vertical minimum price restraints could be used to benefit competition, equating *Continental T.V.'s* procompetitive justifications for nonprice restraints and *Khan's* procompetitive justifications for maximum price restraints with *Leegin's* minimum price restraints.¹¹⁰ The Court balanced these benefits against the competitive harm that would arise if manufacturers used vertical minimum price restraints to organize cartels at the retailer level, as described in *Business Electronics* and *Texaco*.¹¹¹ Because the procompetitive benefits were greater than the competitive harm, the majority disagreed that the restraint would always or almost always restrict

104. *Leegin*, 127 S. Ct. at 2714.

105. *Id.* This ruling would have overjoyed Justice Holmes in 1911. Justice Holmes correctly recognized the *Dr. Miles* decision as an extension of the policy of freedom of contract. *See supra* note 51.

106. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407–08 (1911).

107. *Leegin*, 127 S. Ct. at 2714.

108. *Id.*

109. *Id.*

110. *Id.* at 2715. *But cf.* *State Oil Co. v. Khan*, 522 U.S. 3, 12 (1997) (noting Justice Harlan's dissenting claim in *Albrecht* that the "majority had erred in equating maximum and minimum price fixing" (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 156–68 (1968))); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977) (noting the Court was concerned "only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy.>").

111. *Leegin*, 127 S. Ct. at 2716–17 (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725–26 (1988)). *But see supra* notes 106–07 and accompanying text (establishing Justice Kennedy's rejection of the argument that minimum price fixing could encourage cartel behavior). In other words, Justice Kennedy changed positions within three pages, deciding that cartels were in fact a competitive harm. *Id.*; *cf. supra* note 67 (referring to Justice Scalia's promise to Justice Brennan that *Business Electronics* would not be used to call into question *Dr. Miles's* per se prohibition of resale price maintenance).

competition.¹¹² The Court concluded, therefore, that a per se prohibition against the restraint was improper.¹¹³

The Court then addressed whether *Dr. Miles* should be reaffirmed on the basis of stare decisis.¹¹⁴ Applying the Court's unanimous opinion in *Khan*, the majority argued the doctrine was not significant in antitrust cases.¹¹⁵ Instead, claiming the Court has treated the Sherman Act as a common law¹¹⁶ statute, the majority stated that the case-by-case adjudication anticipated by the rule of reason adheres to the common law more effectively than does the per se prohibition on categories of restraints.¹¹⁷ Stare decisis did not, therefore, compel the Court's continued application of *Dr. Miles*'s per se rule.¹¹⁸ Instead, Justice Kennedy claimed, the Court needed to realign its standard for adjudicating cases that alleged vertical restraints in violation of the Sherman Act.¹¹⁹

The Court decided the better standard was the rule of reason approach, beginning with *Colgate*'s distinction between vertical agreements and independent decisions to fix price.¹²⁰ It used

112. *Leegin*, 127 S. Ct. at 2717 (citing *Bus. Elecs.*, 485 U.S. at 723).

113. *Id.* at 2718.

114. *Id.* at 2720 (“We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of *stare decisis* alone.”). Stare decisis is “[t]he 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, *supra* note 9, at 1443.

115. *Leegin*, 127 S. Ct. at 2720 (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act.” (quoting *Khan*, 522 U.S. at 20)). The Court also rejected the notion that Congress’s passage of the CGPA codified per se illegality for vertical price restraints. *Id.* at 2724. Rather, the Court argued that the CGPA merely rescinded provisions making these restraints per se legal and returned analysis of the restraints to the judiciary’s interpretation and application of section 1 of the Sherman Act. *Id.* But see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1984, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (prohibiting the use of funds for activities promoting the overturning or alteration of per se prohibition on resale price maintenance); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 346 (1982) (“Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise If such a shift is to be made, it must be done by the Congress.” (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940))); *Cont’l T.V.*, 433 U.S. at 51 n.18 (“Congress . . . has expressed its approval of a *per se* analysis of vertical price restrictions No similar expression of congressional intent exists for nonprice restrictions.”).

116. The definition of common law is “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions.” BLACK’S, *supra* note 9, at 293. Compare *id.*, with *supra* note 114 (defining stare decisis).

117. *Leegin*, 127 S. Ct. at 2720.

118. *Id.* at 2721.

119. *Id.* at 2721–22.

120. *Id.* at 2721 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307–08 (1919)); see *supra* notes 57–71 and accompanying text (outlining the common-law evolution of the rule of reason approach to vertical nonprice restraints).

Continental T.V.'s distinction between price and nonprice restraints as a basis for the holding in *Monsanto Co. v. Spray-Rite Service Corp.*—that the plaintiff must prove the existence of the agreement—and for the holding in *Business Electronics*—that the agreement must be over price levels.¹²¹ To reaffirm its new standard, the Court claimed that *Khan*'s rejection of the per se prohibition against vertical maximum price restraints was proof it had long disapproved of *Dr. Miles*'s entire rule.¹²²

The majority concluded that its new standard, which interpreted the Sherman Act according to the present economic effects of the restraint at issue, would evolve along with the current economic circumstances.¹²³ Thus, the Court overruled its 1911 decision in *Dr. Miles*.¹²⁴ Going forward, vertical price restraints would be adjudicated according to the rule of reason.¹²⁵

4. *The Supreme Court: Justice Breyer's Dissenting Opinion.*¹²⁶ Justice Breyer chastised the majority's decision for abrogating the Court's precedent,¹²⁷ for denying deference to the DOJ's and the Federal Trade Commission's (FTC's) extensive studies about the harms of resale price maintenance,¹²⁸ and for thwarting Congress's intent.¹²⁹ The dissent declared that no relevant change had occurred in the U.S. economic market to

121. *Leegin*, 127 S. Ct. at 2721–22.

122. *Id.* at 2722. The majority's reliance only on *Khan*, which was decided in 1997—only ten years earlier than *Leegin*—is insufficient proof that the Court long disapproved of *Dr. Miles*'s rule. Moreover, dependence on *Khan*'s rule allowing maximum resale price maintenance provides scant guidance for the Court's opinion of *Dr. Miles*'s rule banning minimum price maintenance agreements. This statement of lengthy disapproval by the Court appears to have been made “tongue-in-cheek.” Or perhaps, it was merely Kennedy's way of affirming more recent precedent than *Dr. Miles*; he claimed that affirmation of *Dr. Miles* would call into question the entire line of cases stemming from *Colgate*. *Id.*

123. *Id.* at 2724.

124. *Id.* at 2725.

125. *Id.*

126. *Id.* (Breyer, J., dissenting).

127. *Id.* at 2731 (“I am not aware of any case in which this Court has overturned so well-established a statutory precedent.”).

128. *Id.* at 2731–32 (noting that, in 1975, the DOJ and the FTC urged application of the per se rule while rejecting every argument justifying resale price maintenance that the majority used in its opinion); *see also supra* notes 40–42 (highlighting the DOJ and FTC guidelines on per se prohibition of resale price maintenance). *But see Leegin*, 127 S. Ct. at 2721 (majority opinion) (noting both the DOJ and FTC currently argue in favor of the rule of reason); *id.* at 2737 (Breyer, J., dissenting) (remarking that while the FTC is well equipped to “gather empirical evidence” balancing the benefits and harms of a per se rule, it has not done so, giving the Court no reason to rely on its change of position).

129. *Leegin*, 127 S. Ct. at 2732; *see also supra* notes 34–37 (discussing the CGPA, wherein Congress expressed its clear intent to make resale price maintenance per se illegal).

justify abandoning as well-established an antitrust rule as the per se prohibition against minimum price fixing.¹³⁰

To support his position, Justice Breyer applied the Court's rules for overruling a case to *Dr. Miles*.¹³¹ First, because this was a statutory case, stare decisis should be applied "rigidly."¹³² Second, while the Court sometimes overrules recent cases that were decided wrongly, *Dr. Miles* was a century old and had been cited positively over 500 times.¹³³ Third, *Dr. Miles*'s per se prohibition on vertical minimum price maintenance had not engendered an "unworkable" legal regime that needed to be stopped.¹³⁴ Fourth, *Dr. Miles* did not "unsettle[] the law."¹³⁵ Fifth, *Dr. Miles* involved property rights, which the Court is heavily prejudiced against overruling.¹³⁶ Sixth, the per se rule against minimum resale price restraints formed the foundation of much American antitrust law.¹³⁷ In fact, Justice Breyer noted, the majority only raised one contrary stare decisis factor: the Court had previously overruled antitrust precedent.¹³⁸ These contrary cases, however, were easily distinguishable from *Dr. Miles*: one, *Khan*, overruled a fairly recent case on whose rule few lower courts had relied; the other, *Continental T.V.*, explicitly distinguished the rule in *Dr. Miles*.¹³⁹ Therefore, because every

130. *Leegin*, 127 S. Ct. at 2734.

131. *Id.* at 2734–36. Interesting to note, Justice Scalia discussed the rules during the 2006 Term in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2684–86 (2007).

132. *Leegin*, 127 S. Ct. at 2734 (Breyer, J., dissenting) (noting that under *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), the Court is required to apply stare decisis "more 'rigidly' in statutory cases than in constitutional cases"). The consistent interpretation of statutes is necessary if a court wants citizens to rely on Congress's laws. *Cf. Glidden*, 370 U.S. at 543 (noting "the practical consideration underlying the doctrine of stare decisis" is "protection of generated expectations").

133. *Leegin*, 127 S. Ct. at 2734 ("[O]verruling a constitutional case decided just a few years earlier is far from unprecedented." (quoting *Wis. Right to Life*, 127 S. Ct. at 2685 (Scalia, J., concurring in part and concurring in judgment))). A Westlaw KeyCite search shows that, as of the time of this writing, of over 500 direct case cites to *Dr. Miles*, only five were negative, all of which occurred after the *Leegin* decision.

134. *Id.* at 2734 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

135. *Id.* at 2735 (quoting *Wis. Right to Life*, 127 S. Ct. at 2685 (Scalia, J., concurring in part and concurring in the judgment); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977)).

136. *Id.* at 2735; *see supra* notes 50–51 (highlighting *Dr. Miles*'s reliance on the rule against restraint on alienation of property); *cf. Leegin*, 127 S. Ct. at 2714 (majority opinion) (cautioning the Court against applying century-old property laws to support the per se rule).

137. *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting) ("The per se rule . . . has long been 'embedded' in the law of antitrust." (quoting *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000))).

138. *Id.*

139. *Id.* at 2736–37.

stare decisis concern the Court mentioned in *Leegin* argued against overruling *Dr. Miles*, the dissent concluded that the majority's decision was incorrect.¹⁴⁰

III. ANALYSIS

*O Muse, the causes tell! What sacrilege,
Or vengeful sorrow, moved the heavenly Queen
To thrust on dangers dark and endless toil
A man whose largest honor in men's eyes
Was serving Heaven?*¹⁴¹

While Justice Kennedy authored the *Leegin* opinion, due respect for its result belongs entirely to Chief Justice Roberts. In 1997 in *Khan*,¹⁴² the Court distinguished *Dr. Miles* and restated the per se prohibition on vertical minimum price restraints.¹⁴³ The only differences between the 1997 and the 2006 Courts were the substitutions of Chief Justice Roberts for Chief Justice Rehnquist and Justice Samuel Alito for Justice Sandra Day O'Connor.¹⁴⁴ Because Chief Justice Rehnquist and Justice O'Connor decided consistently against antitrust rules, their replacements cannot have altered the course of the Court's antitrust decisions.¹⁴⁵ On a similar note, Justice Kennedy's past decisions show a profound dislike for price-fixing schemes and a commitment to per se rules prohibiting their use in economic markets.¹⁴⁶ In *Leegin*, therefore, the Court's reversal of

140. *Id.* at 2737.

141. VIRGIL, *supra* note 1, at 1 ll.12–16; see Jeffrey Rosen, *Court Approval: Will John Roberts Ever Get Better?*, NEW REPUBLIC, July 23, 2007, at 9, 10 (noting Roberts “presumably understands that he can’t preside over a decade of five–four decisions. Far from going down in history as a unifier in the tradition of John Marshall, he would be perceived as the leader of a partisan conservative Court . . .”).

142. *State Oil Co. v. Khan*, 522 U.S. 3, 20–22 (1997) (overturning the per se prohibition on vertical maximum price restraints). *Khan* was the most recent case before *Leegin* to deal with resale price restraints.

143. *Id.* at 11, 16–18 (noting the difference in effect between maximum and minimum price fixing).

144. Compare *id.* at 5 (O'Connor, J., with whom Rehnquist, C.J., and Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, J.J., join), with *Leegin*, 127 S. Ct. at 2710 (Kennedy, J., with whom Roberts, C.J., and Scalia, Thomas, and Alito, J.J., join), and *id.* at 2725 (Breyer, J., with whom Stevens, Souter, and Ginsburg, J.J., join, dissenting).

145. See generally Kovacic, *supra* note 67, at 22–25 (describing several key antitrust cases during the Rehnquist–O'Connor era in which the court resisted strengthening antitrust formulations). Decisions during this era “softened the impact of facially draconian substantive rules by adjusting evidentiary, standing, and antitrust injury requirements that private plaintiffs must satisfy.” *Id.* at 25.

146. See, e.g., *FTC v. Tior Title Ins. Co.*, 504 U.S. 621, 632 (1992) (Kennedy, J.) (“The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom.” (citing *United States v. Topco Assoc.*,

Dr. Miles's well-established rule cannot be credited to any physical change in the Court's composition.

Instead, the decision in *Leegin* represents Chief Justice Roberts's ability to bend the Court's decisions to his will—and, more conspicuously, his ability to manipulate Justice Kennedy.¹⁴⁷ During oral arguments in *Leegin*, Justice Scalia's loaded questions to the attorneys showed he was going to overturn *Dr. Miles*,¹⁴⁸ while Justices Souter's, Ginsburg's, Breyer's, and Stevens's loaded questions showed they already decided to reaffirm *Dr. Miles* and its per se rule.¹⁴⁹ Justice Thomas took no part in the questioning.¹⁵⁰ And Chief Justice Roberts's pointed questions advocated overturning the per se prohibition in *Dr. Miles* from the start.¹⁵¹ The only two Justices who appeared on the fence—either by asking general, nonleading questions¹⁵² or by

Inc., 405 U.S. 596, 609 n.10, 610 (1972) (“In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.”)); *Arizona v. Maricopa County Med. Soc’y*, 643 F.2d 553, 560 (9th Cir. 1982) (Kennedy, J., concurring) (stating that “[p]er se rules should be derived from considerations of economic impact in particular cases illustrating the category of prohibited acts If the arrangements are proved [part of that category], they should be condemned” as per se illegal).

147. See *supra* note 21 (noting Justice Kennedy's preference for Chief Justice Roberts's style); cf. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 53 (describing how, in close cases, when Justice Kennedy appears undecided, Justice Kennedy's vote can be won by the side that assigns him the majority opinion, or by the side that writes its opinion in a way that flatters Justice Kennedy). If Stevens can manipulate Kennedy by allowing Kennedy to write the opinion or by writing the opinion in a way that flatters Kennedy, *supra*, Roberts must surely be able to manipulate Kennedy by using the same tactics—tactics made easier by Kennedy's attraction to Roberts's style.

148. See, e.g., Transcript of Oral Argument at 15, 28–30, 37, 40–41, 45–46, *Leegin*, 127 S. Ct. 2705 (No. 06-480), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-480.pdf (asking, for example, “If, in fact, [Leegin's actions] giv[e] the consumer a choice of more service at a somewhat higher price, that would enhance consumer welfare, so long as there are competitive products at a lower price, wouldn't it?”). An interesting question presented here regards why Justice Scalia broke his promise to Justice Brennan and helped use *Business Electronics* to overturn *Dr. Miles*. See *supra* note 67 (noting Justice Scalia's promise to Justice Brennan).

149. See, e.g., Transcript of Oral Argument at 4, 5, 18–23, 24–27, *Leegin*, 127 S. Ct. 2705 (No. 06-480). (asking for example, “Why should we overrule a case that's 96 years old, in the absence of any—any—congressional indication that that's a good idea . . . ?” (quoting J. Breyer)).

150. See *generally id.* (showing questions by every sitting Justice except Justice Thomas).

151. See, e.g., *id.* at 11, 24, 29–30, 33–35, 41–45, 47–49 (providing evidence of Roberts's questions, targeted to elicit responses favorable to his position).

152. See, e.g., *id.* at 14 (acknowledging that “if the retailers themselves have this resale price maintenance, it is invalid” and asking petitioner, “[I]f the manufacturer does this just for the convenience of the retailers, . . . then why shouldn't there be a per se rule? Why should we allow the manufacturer to do something that we wouldn't allow the

asking argument-specific questions¹⁵³—were Justices Kennedy and Alito.¹⁵⁴

Because Justice Kennedy's vote was up for grabs, determination of the side for which he would cast his vote depended on what each side would offer him.¹⁵⁵ On the side voting to reaffirm *Dr. Miles's* per se prohibition, Justice Stevens, who assigns authorship of opinions when his vote lies opposite of the Chief Justice's,¹⁵⁶ would most likely have assigned Justice Breyer to write the majority opinion.¹⁵⁷ In the alternative, Justice Stevens, an antitrust expert himself,¹⁵⁸ could have authored the opinion—but in so doing, he would have reaffirmed *Maricopa County*, which expressly condemned then-Circuit Judge Kennedy's concurrence in a Ninth Circuit case as unequivocally misunderstanding the law.¹⁵⁹ For these reasons, Justice Stevens likely would neither have assigned Justice Kennedy the majority opinion nor authored the opinion in such a way that flattered Justice Kennedy.¹⁶⁰ Chief Justice Roberts, recognizing that Justice Kennedy's undecided vote could be swayed by the assignment of authorship¹⁶¹—and recognizing that Justice

retailers to do, if it's for the retailers?" (quoting J. Kennedy)).

153. See, e.g., *id.* at 31 (questioning if there was "anything to suggest that the large-scale low-price retailers who were supposedly dependent on *Dr. Miles* [for their success] support its retention?" (quoting J. Alito)).

154. See *supra* notes 152–53 and accompanying text.

155. See *supra* note 147 (describing how Justice Kennedy would vote with the side that promised him authorship of the majority opinion or promised to flatter Justice Kennedy in the majority opinion).

156. See Rosen, *supra* note 147, at 2 (noting that Justice Stevens assigns authorship of opinions where he is the senior-most Justice on either side of the decision).

157. Justice Breyer has been the Court's undisputed leader on antitrust matters and is often the author of complicated antitrust opinions. Albert A. Foer, *Prosthetics After California Dental Association*, AM. ANTITRUST INST., June 8, 1999, <http://www.antitrustinstitute.org/Archives/31.ashx>; see, e.g., *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2397 (2007) (Breyer, J.) (determining that, in that case, securities laws were incompatible with antitrust laws).

158. See, e.g., John Paul Stevens, *Cost Justification*, 8 ANTITRUST BULL. 413 (1963) (revealing his knowledge of antitrust rulings to highlight competitive benefits of Sherman Act regulations); John Paul Stevens, *Defense of Meeting the Lower Price of a Competitor*, in 1953 FED. ANTITRUST LS. 129, 129 (1954) (discussing the good faith exception to prohibitions against price cutting).

159. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344, 347–48 (reaffirming that vertical price restraints are per se illegal for every industry), *rev'g* 643 F.2d 553, 560 (9th Cir. 1980) (Kennedy, J., concurring) (questioning whether the per se rule applied to all industries). Contrast this to Justice Kennedy's perception of *Maricopa County*, 457 U.S. at 348 n.18, cited in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2714 (2007), where he asserted that *Maricopa County* stood for the proposition that "horizontal restraints are generally less defensible than vertical restraints."

160. See Rosen, *supra* note 147, at 53–54 (noting ways in which Justice Kennedy's vote could be swayed).

161. See RUPAL DOSHI, GEORGETOWN U.L. CENTER SUPREME CT. INST., SUPREME

Kennedy desires to “short-circuit [the] most important national debates through his jurisprudence”¹⁶²—knew Justice Kennedy would proudly overturn *Dr. Miles* and its precedent.¹⁶³ Chief Justice Roberts thus assigned authorship of the opinion to Justice Kennedy, molding the Court’s result to reflect his own judicial policy.¹⁶⁴

A. *The Roberts Court’s Formalist Separation of Powers Theory at Work*

Chief Justice Roberts’s legacy will arrive by way of returning “a degree of institutional and personal modesty and humility” to the Supreme Court.¹⁶⁵ His goal is to reinforce the constitutional idea that it is “not part of the judicial function to make the law,”¹⁶⁶ but only to “interpret[] the law and enforce[] the limits the Constitution places on the political branches.”¹⁶⁷ Regarding antitrust cases brought under the Sherman Act, Congress delegated its authority to prohibit conduct to the federal district courts.¹⁶⁸ Under a strict formalist separation of powers approach, violations of the Sherman Act must be determined on a case-by-case basis because, although only courts are permitted to prohibit conduct, courts are not allowed to make the law.¹⁶⁹ For this

COURT OF THE UNITED STATES OCTOBER TERM 2006 OVERVIEW 13 tbl.8 (2007) (showing that, in the 2006 Term, Chief Justice Roberts agreed with Justice Kennedy in 71.4% of cases that were decided by a divided vote in the judgment—more than with even Justice Thomas—and that Justice Kennedy wrote six of twenty-three five-vote majority decisions—the highest number of any Justice—and was in the split majority 100% of the time, compared with 68.8% in 2005 and 60.9% in 2004).

162. Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16, 22.

163. See DOSHI, *supra* note 161, at 7 (noting that *Leegin* asserted “sometimes the source of [the Court’s] error is the Court’s own precedent”).

164. See Transcript of Oral Argument at 43, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (questioning by Chief Justice Roberts wherein he asserted that any reference to congressional intent was improper because Congress had not enacted legislation supporting the per se prohibition on vertical price restraints).

165. Allen & Smith, *supra* note 15 (quoting Roberts).

166. *Id.*

167. Responses of Roberts, *supra* note 16, at 66.

168. 15 U.S.C. § 4 (2006); see *supra* notes 31–33 and accompanying text (noting the Sherman Act characterized anticompetitive conduct as determinative solely under the common law); see also *Sugar Inst. v. United States*, 297 U.S. 553, 600 (1936) (“We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts.”).

169. U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

reason, neither congressional intent, executive agency policy, nor Supreme Court precedent are determinative in the Roberts Court's antitrust analysis.

1. *Congressional Intent Does Not a Statute Make.* The Judiciary has power over all cases arising under the laws of the United States.¹⁷⁰ Before a bill becomes a law, both houses of Congress must agree to pass it before presenting it to the President for his signature.¹⁷¹ Until the President signs the bill, it is not a law.¹⁷² While a bill's proponents lobby their colleagues to pass it, much discussion of their intent—and negotiation over inclusion of their colleagues' intent—occurs in Congress.¹⁷³ The Court often looks to this intent to help decide a case if the law under which the case was brought is silent or ambiguous.¹⁷⁴ Chief Justice Roberts, however, disagrees that intent trumps a statute's plain language.¹⁷⁵

170. U.S. CONST. art. III, § 2, cl. 1.

171. U.S. CONST. art. I, § 7, cl. 2.

172. *Id.*

173. For a discussion on the congressional debates preceding passage of the Sherman Act, see LETWIN, *supra* note 32, at 95–98. “They could not tell how the courts would construe a statute that gave the government power to indict and sue the offenders, but they believed that the courts would experience little difficulty in recognizing the offense.” *Id.* at 96.

The congressional debates preceding passage of federal antitrust legislation in 1890 . . . indicate a widespread congressional commitment to the long-established ideals of economic opportunity, security of property, freedom of exchange, and political liberty, and considerable hope that antitrust law might prove to be an effective vehicle for their substantial, simultaneous realization.

James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 288 (1989).

174. See, e.g., 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 359 (1987) (O'Connor, J., dissenting) (looking to legislative history to determine congressional intent that repeal of the Miller-Tydings Act would not affect states' power “to impose resale price maintenance on liquor retailers”); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 769 (1984) (Brennan, J., concurring) (noting the Court's application of the per se rule to resale price maintenance cases is consistent with congressional intent for the Sherman Act); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (Stevens, J.) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.”). See generally THE FEDERALIST No. 80 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number.”).

175. See, e.g., Responses of Roberts, *supra* note 16, at 32 (stating the Framers' original intent for the Fourteenth Amendment is subsumed into the general principles that the plain language evinces).

The Sherman Act's goal is to protect consumer welfare.¹⁷⁶ Section 1 of the Act vows to achieve this goal by prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."¹⁷⁷ In *Leegin*, Justice Kennedy wrote that "[w]hile [Section 1] could be interpreted to proscribe all contracts, . . . the Court has never 'taken a literal approach to its language.'"¹⁷⁸ Justice Kennedy claimed that because federal courts act as common law courts with regard to cases brought under the Sherman Act, government branches other than Congress are not precluded from making legislative changes to the Act.¹⁷⁹

In the Roberts worldview, however, taking any approach but a literal one to statutory language is incorrect.¹⁸⁰ An analysis of the language in section 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade* or commerce among the several States,"¹⁸¹ provides clearer evidence of Roberts's approval of the decision in *Leegin*. While "contract," "combination," and "conspiracy" have specific definitions,¹⁸² the term "restraints of trade" has only a common law definition.¹⁸³ The common law principles by which the Act defines "restraints of trade" have changed much over time, and they promise to continue changing as long as people debate the nature of anticompetitive economic

176. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61 (1978) ("The legislative history of the Sherman Act . . . displays the clear and exclusive policy intention of promoting consumer welfare.").

177. 15 U.S.C. § 1 (2006).

178. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (internal citation omitted) (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

179. *Id.* at 2720.

180. See *supra* notes 24–25 and accompanying text (noting Roberts's unwillingness to look beyond what he considers unambiguous statutory language); see also Allen & Smith, *supra* note 15 (quoting Roberts that it is "not part of the judicial function to make the law"). But see Nat Hentoff, *The Real John Roberts*, VILLAGE VOICE, Aug. 30, 2005, <http://www.villagevoice.com/2005-08-30/news/the-real-john-roberts> (claiming that "John Roberts disregarded 'the plain text of the [Constitution's] Supremacy Clause' in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006), an opinion Roberts joined, to promote a legal isolationist agenda).

181. 15 U.S.C. § 1 (2006) (emphasis added).

182. *Contract*: "An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." BLACK'S, *supra* note 9, at 341; *Combination*: "An alliance of individuals or corporations working together to accomplish a common (usu. economic) goal." *Id.* at 283; *Conspiracy*: "An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective . . ." *Id.* at 329.

183. Although Black's Law Dictionary does contain a definition for "restraints of trade," *id.* at 340, the term has always been characterized—with regard to antitrust litigation—according to what the common law considers anticompetitive economic effects. See *supra* note 33.

effects.¹⁸⁴ Therefore, according to the Sherman Act's plain language, the Roberts Court is correct to deny application of a per se rule when a statutory mandate exists for case-by-case analysis.¹⁸⁵

But resale price maintenance agreements of the type in *Leegin* are exceptional. As Justice Breyer noted, Congress passed the CGPA specifically to amend section 1 of the Sherman Act and to make these agreements per se illegal.¹⁸⁶ Per Congress's intent, then, *Leegin*'s "Brighton Retail Pricing and Promotion Policy," which instituted minimum retail prices for all stores selling its Brighton products, was per se illegal.¹⁸⁷ In effect, however, the CGPA only removed language from the Sherman Act that permitted state authorization of otherwise illegal resale price maintenance agreements; it did not add any specific prohibition against the restraints.¹⁸⁸ From Chief Justice Roberts's perspective, because the Sherman Act's plain language evidences Congress's choice for its scope, Congress's intent for the statute is irrelevant.¹⁸⁹ If, on remand, the Fifth Circuit determines that

184. President Ford discussed these changing principles after repeal of the fair trade laws, *supra* notes 35–36, describing them as "restraints on competition [that] no longer make sense"—but restraints that were a reasonable "response to the unique economic conditions of the Depression." See Ford Public Papers, *supra* note 37, at 1966–67. Similarly, in *Leegin*, the majority reaffirmed that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us." *Leegin*, 127 S. Ct. at 2714 (quoting *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 53 n.21 (1977)).

185. See *Leegin*, 127 S. Ct. at 2714 ("Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements . . ."); *supra* notes 31–33 and accompanying text (noting the Sherman Act's designation as a common law statute).

186. *Leegin*, 127 S. Ct. at 2731–32 (Breyer, J., dissenting). When the CGPA was passed, Rep. Van Deerlin noted that "[c]learly, fair trade is an idea whose time has gone." 121 CONG. REC. 23,661 (1975) (statement of Rep. Van Deerlin). Along the same line, Rep. John Seiberling stated, "In an economic system built on the principle of competition, [resale price maintenance laws] are an anachronistic anomaly whose repeal is long overdue." *Id.* at 23,662 (statement of Rep. Seiberling).

187. *Leegin*, 127 S. Ct. at 2711; see S. Rep. No. 94-466, at 3 (1975) ("The repeal of the fair trade laws does not affect the use of suggested prices by a manufacturer. However, the use of suggested prices in such a way as to coerce adherence to them would be illegal."); *supra* note 43 (noting Congress's warning to the DOJ that any argument advocating the abolition of per se illegality with regard to resale price maintenance agreements would result in the DOJ losing its funding).

188. See *supra* notes 34, 37–38 and accompanying text (noting that the CGPA repealed prior amendments to section 1 of the Sherman Act, removing barriers to preventing resale price maintenance agreements that restrained trade).

189. See Transcript of Oral Argument at 43, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (implying that any reference to congressional intent was improper because Congress did not enact legislation supporting the per se prohibition on vertical price restraints). See generally *supra* note 175 (noting Roberts's plain-meaning philosophy). Justice Stevens expressed fear that this philosophy would be used to overturn all per se prohibitions under the Sherman Act. Transcript of Oral Argument at 36, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

Leegin's resale price maintenance agreements restrained trade in any way, then the plain meaning of section 1 of the Sherman Act will be satisfied.¹⁹⁰ Otherwise, because the Sherman Act does not specifically prohibit vertical price restraints, Leegin's conduct will not be punishable under current antitrust law.¹⁹¹

2. *Executive Department Expertise Does Not Replace Statutory Language.* The Supreme Court's authority to interpret Congress's statutes is unquestioned.¹⁹² The Court's authority to interpret regulations promulgated by executive agencies is less clear.¹⁹³ The general rule is that if an agency's enabling statute is ambiguous, and if the agency's interpretation of the ambiguous statute is reasonable, then the Court will defer to the agency's interpretation.¹⁹⁴ The DOJ is not an executive agency, however; it is an executive department.¹⁹⁵ Therefore, the Court's obligation to extend deference to the DOJ's policy depends on whether Congress specifically delegated power to interpret a particular statute.¹⁹⁶

The Sherman Act is ambiguous with regard to specific congressional delegation of interpretive authority to the DOJ.¹⁹⁷ But for Roberts, who believes government intrusion into the

190. See *Leegin*, 127 S. Ct. at 2713 (noting that the correct "inquiry into market power and market structure [is] designed to assess [a restraint's] actual effect" (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984))). Justice Ginsburg hinted to PSKS's attorneys to argue under a horizontal conspiracy theory, which PSKS ultimately alleged in its complaint and which should win. Transcript of Oral Argument at 39, *Leegin*, 127 S. Ct. 2705 (No. 06-480).

191. See *Leegin*, 127 S. Ct. at 2720 ("The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints.")

192. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

193. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (explaining that an agency's reasonable interpretation of a statute it is charged with administering and the resulting policy changes are deserving of judicial deference); cf. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008) (arguing that the Court does not apply deference rules in a consistent manner).

194. See *Chevron*, 467 U.S. at 841–44. As experts in their fields, agencies need flexibility to change regulations to better serve the public.

195. 28 U.S.C. § 501 (2006).

196. See *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001) (noting that specific congressional authorization is "a very good indicator of delegation meriting *Chevron* treatment").

197. See 15 U.S.C. § 4 (2006) (granting power to U.S. attorneys to bring charges against companies in order to "prevent and restrain" antitrust violations).

public sphere should be limited,¹⁹⁸ any departure from a statute's plain language is undeserving of deference.

During oral arguments in *Leegin*, amicus curiae for PSKS argued that Congress expressly delegated powers to the FTC and DOJ.¹⁹⁹ They found proof of this delegation in the FTC's and in the DOJ's merger guidelines.²⁰⁰ Even though the DOJ argued to overturn *Dr. Miles* in *Leegin*,²⁰¹ PSKS wanted the Court to apply the prior expressions of legislative intent prohibiting the DOJ from overturning *Dr. Miles*.²⁰² Chief Justice Roberts disagreed, however, noting that the legislative expression was likely no longer applicable.²⁰³ Because Congress had not passed any law recently that prohibited the DOJ from arguing to overturn *Dr. Miles*, the DOJ was allowed only to enforce law according to its enabling statute, the Sherman Act.²⁰⁴ Chief Justice Roberts, therefore, foreclosed discussion on the propriety of the DOJ enforcing policies by any interpretation other than that derived from the Sherman Act's initial language.²⁰⁵

3. *Stare Decisis*²⁰⁶ *Is Not Absolute*. For judges, lawyers, and politicians, precedent indicates what the law requires: it implies

198. Larry Kudlow, *A Supreme Pick for Business*, NAT'L R. ONLINE, July 21, 2005, <http://www.nationalreview.com/kudlow/kudlow200507210901.asp>.

199. Transcript of Oral Argument at 51, *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) (noting that "[t]here was a legislative expression of position on this particular issue"); see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1984, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102-03 ("None of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws."); *supra* note 43 (illustrating the manner in which Congress has attempted to influence the DOJ's maintenance of a per se illegality policy).

200. DEPT OF JUSTICE, *supra* note 40, § 5.2; DEPT OF JUSTICE, *supra* note 42, § 4.221.

201. Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (arguing that the Court should subject resale price maintenance to the rule of reason).

202. Transcript of Oral Argument at 52, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting Barbara D. Underwood, Solicitor General, New York, as amicus curiae support respondent PSKS); see *supra* note 199 (noting DOJ guidelines for enforcing the per se rule against vertical price restraints as an example of Congress's intent).

203. See Transcript of Oral Argument at 42-47, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (debating the continued applicability of Congress's ban on the DOJ from arguing against pro se illegality of resale price maintenance agreements).

204. See Brief for the United States as Amicus Curiae Supporting Petitioner at 6-7, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (describing the Court's reluctance to extend the power of the DOJ through the adoption of per se rules); *supra* note 28 and accompanying text (noting Sherman Act's prohibition of all restraints of trade); *supra* note 183 and accompanying text (describing "restraints of trade" as a strict common law term).

205. See *supra* notes 28, 33 and accompanying text.

206. "Latin to stand by things decided." BLACK'S, *supra* note 9, at 1443; see also THE FEDERALIST NO. 78 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("To avoid

that prior decisions were correct and that they may be relied upon to craft, challenge, and interpret the law.²⁰⁷ In antitrust law, which was statutorily designed as a common law doctrine, *stare decisis* was necessary to the evolution of the Court's interpretation of the Sherman Act.²⁰⁸

But *stare decisis* is not absolute.²⁰⁹ Expressing a respectful, albeit reserved, appreciation for precedent,²¹⁰ Chief Justice Roberts told the Senate Judiciary Committee during his confirmation hearing that he would overrule prior decisions that were not well reasoned.²¹¹ And for Roberts, no decision wherein the Court added to Congress's statutory language, thereby legislating from the bench, was well reasoned.²¹²

Leegin provided the perfect opportunity for Chief Justice Roberts to put this philosophy to work.²¹³ Antitrust common law

an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . .").

207. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 512 (2000). Harrison argues that while "*stare decisis* is justified on the need for uniformity and stability," it does not always provide the "right answer." *Id.* at 513.

208. See *supra* note 168 and accompanying text (discussing the Sherman Act's violation definitions statutorily designated under common law).

209. See *Payne v. Tennessee*, 501 U.S. 808, 848–49 (1991) (Marshall, J., dissenting) (noting that "[a]lthough the doctrine of *stare decisis* is not an 'inexorable command,' it still merits respect (quotation omitted)). In the case of antitrust litigation, perhaps abdication of precedent is not such a bad thing. See 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21*, at 165–66 (1984) (quoting James C. McReynolds, Attorney General and Associate Justice of the Supreme Court, that, regarding judicial interpretation of the Sherman Act, "much depends on the general economic views entertained by the Judges").

210. See Jeffrey Rosen, *Stare Decisis: Liberals Shouldn't Fight Roberts*, NEW REPUBLIC, Sept. 19, 2005, at 12, 13 (noting that Chief Justice Roberts wrote in his Supreme Court questionnaire: "Precedent plays an important role in promoting the stability of the legal system . . ."). *But see supra* note 19 (listing recent Supreme Court jurisprudence where rules derived from precedent have been limited so severely by the Court the precedent was effectively overruled).

211. Responses of Roberts, *supra* note 16, at 41.

As with any case where a precedent was called into question, I would look to the principles of *stare decisis* that the Court has set forth. These principles include whether there has been reliance on the earlier decision, whether the earlier decision was well-reasoned, whether its rationale has been eroded by subsequent legal or practical developments, and whether the rule announced in the earlier decision has proven workable.

Id.

212. See *supra* notes 16, 19. Unless Roberts convinced the Court to agree on narrow, unanimous opinions that did not affirm bad precedents, he permitted the majority to overturn them. See Rosen, *supra* note 141, at 9, 10 (explaining that members of the Court consider many of the five–four decisions handed down by Roberts Court to be either overturning or distorting precedent).

213. See DOSHI, *supra* note 161, at 7 (noting that the upshot of *Leegin* is that "sometimes the source of [the Court's] error is the Court's own precedent").

regarding vertical restraints forked into one rule—a *per se* prohibition on price restraints—and into one standard—a rule of reason-based analysis of nonprice restraints.²¹⁴ *Dr. Miles*'s rule added to the Sherman Act's plain language by proscribing a category of agreement that would always restrain trade.²¹⁵ This proscription flew square in the face of the Sherman Act's contemplation of restraints of trade.²¹⁶ *Colgate*'s standard, on the other hand, applied a rule of reason analysis to a case similar to *Dr. Miles*.²¹⁷ The only difference between *Dr. Miles* and *Colgate* was that *Colgate* did not concern an express agreement to fix prices.²¹⁸ From Chief Justice Roberts's perspective, to say that something restrains trade every time an agreement exists—but restrains trade only sometimes when an agreement does not exist—is to find inconsistent results from the same problem.²¹⁹ Because one result added to the Sherman Act's statutory language—creating a permanent category of restraints—while the other result affirmed the Sherman Act's plain language—stating that every restraint should be examined according to its economic effects—only the standard affirming the Sherman Act's plain language could stand.²²⁰ Therefore, the case-by-case approach contemplated by the *Colgate* line of cases implemented the Sherman Act's common law approach; for Chief Justice Roberts, it was the only proper line of Sherman Act precedent.²²¹

4. *The Roberts Court's Undeniably Formalist Separation of Powers Approach.* The majority's opinion in *Leegin* illustrates the effect Chief Justice Roberts's formalist separation of powers

214. See *supra* note 52 and accompanying text (noting *Dr. Miles*'s 1911 *per se* prohibition on price restraints); *supra* note 57 (noting *Colgate*'s 1919 rule of reason approach to refusals to deal related to unilateral price-fixing decisions).

215. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404, 408–09 (1911) (describing vertical price restraints as a restraint on alienation and therefore invalid under federal common law).

216. See *supra* notes 33, 183 (defining restraints of trade according to federal common law).

217. See *United States v. Colgate & Co.*, 250 U.S. 300, 306–07 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman A]ct does not restrict the long recognized right . . . [to] announce in advance the circumstances under which [a manufacturer] will refuse to sell.”).

218. *Id.* at 307–08.

219. Transcript of Oral Argument at 44, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480) (quoting Chief Justice Roberts: “Well, it’s also been settled law for 90 years under the *Colgate* doctrine that manufacturers can achieve the same results, albeit more inefficiently. Doesn’t it make sense to allow them to adopt the most efficient means to an end that is already completely legal?”).

220. *Id.*; see also *Leegin*, 127 S. Ct. at 2714 (“The reasons upon which *Dr. Miles* relied do not justify a *per se* rule.”).

221. *Leegin*, 127 S. Ct. at 2720.

philosophy will have on the Court's cases for the next twenty to thirty years. Where a party's argument to the Court relies on any interpretation other than derived from the statute's plain language, the argument will be rejected by a Roberts majority regardless of whether an alternate interpretation is supported by Court precedents, the Executive's interpretations, or Congress's intent.²²² For the near future, at least, lawyers must change their strategies if they hope to be successful in protecting competition.

B. Pro- or Anti-Trust?

According to the plain meaning of the Sherman Act,²²³ to successfully challenge a vertical price restraint as unlawful, a lawyer must prove the restraint's negative economic effects were greater than its benefits to competition.²²⁴ Due to the Court's decision in *Leegin*, one should anticipate an increase in express agreements between manufacturers and retailers to fix prices.²²⁵ Because courts will not have any real precedent on which to base their decisions, a wide variety of outcomes will come from courts across the country.²²⁶ In the short term, lawyers must lead the charge and take on cases for small retailers injured by price-fixing agreements. These attorneys must plead their cases with specificity, sticking as close to the plain language of the Sherman Act as possible until it becomes clear to Congress that the Act's plain language is untenable and in need of amendment.

1. *Let Lawyers Lead.* Because manufacturers will begin enforcing price-fixing agreements with retailers, many instances of direct economic effect will present themselves for analysis.

222. Roberts's influence is undeniable: hoping to go "down in history as a unifier in the tradition of John Marshall," he will "avoid the radicalism of Scalia and Thomas and try to unify the Court . . . around narrow, unanimous opinions." Rosen, *supra* note 141, at 10–12.

223. See *supra* notes 33, 183 (defining restraints of trade according to federal common law).

224. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (stating that an injured plaintiff must show demonstrable economic effect to prove violation of antitrust laws).

225. See *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting) ("The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable turbulence as lower courts seek to develop workable principles.").

226. *Leegin* only advocated for rule of reason analysis on each case according to its facts; it provided no guidance to courts. Judicial discretion will dictate resale price maintenance adjudication until Congress steps in and lays down a hard-line rule. See generally Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 383 (2007) (arguing that "judges' goals and therefore their strategies, will vary depending upon whether they seek to influence law development or merely to shape case outcomes").

Additionally, because termination of the per se rule against vertical price-fixing affects predominantly small, independent retail stores,²²⁷ the data required to prove a restraint's negative economic effect will not be as numerous and unwieldy as it is for cases involving large public companies, to which rule of reason analysis applies.²²⁸ With increased evidence of negative economic effect combined with a reduced cost to prove such effect, the environment should be ripe for lawyers to bring challenges against the restraint. Once courts are bombarded with cases proving negative economic effects due to the termination of *Dr. Miles's* per se prohibition,²²⁹ Congress may be forced to draw a hard-line distinction to provide guidance to the business and legal community.²³⁰

The drawbacks to this approach are many. First, suing large manufacturers, which likely have litigation war chests that far exceed those of the retailers they service, will prove costly. Also, by pooling retailers into a class action suit, attorneys may lose some of the cost and effort efficiencies achieved through reduced caseloads for small retail clients. Additionally, the unpredictability of lower courts' discretion makes bringing a costly antitrust case to trial fairly unattractive, especially if the lawyer takes the case on contingency. Finally, ignoring every other negative factor, the current Court disdains lawyer-led litigation.²³¹ Still, lawyer-led litigation, no matter the outcome, is the best way to signal to Congress that a law is not working.²³²

227. See Transcript of Oral Argument at 30, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting counsel for Respondent PSKS: "It is the small mom-and-pop operation like my client that wants to innovate and expand and pass on efficiencies and compete with the big discounters who might have power of their own in order to secure discounts.").

228. See PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1511 (Supp. 2008) (noting that "plaintiff[s] need not necessarily address the full range of issues regarding market conditions" in a quick-look analysis).

229. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972) (noting that, without a per se rule, courts will "ramble through the wilds of economic theory in order to maintain a flexible approach").

230. See Transcript of Oral Argument at 47, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting Chief Justice Roberts in pointing out that Congress can always pass a law to change the Court's approach).

231. Greenhouse, *supra* note 19.

232. See Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 481, 483-84, 492-93, 495 (1999) (describing lawyer-led litigation "strategies [that] include[] lobbying for beneficial legislation and regulations, communicating with the press, organizing grass-roots campaigns and training clients seeking to influence the implementation of government policies, training other lawyers and defendants, and building coalitions and bargaining with other interest groups."). Through litigation, lawyers send a multitude of signals that a law is flawed.

2. *Plead with Specificity.* Going forward, PSKS's greatest risk is that its lawyers do not plead its claim with specificity when on remand to the Fifth Circuit.²³³ At trial, PSKS's attorneys were not required to argue that Leegin's agreement created a horizontal cartel between its own retail stores and independent retailers because PSKS had a century of per se precedent on which to rely.²³⁴ Fortunately for PSKS, it claimed horizontal cartelizing anyway, maintaining its ability to argue the claim before the Fifth Circuit.²³⁵

For attorneys who bring antitrust cases that allege competitive harm from vertical minimum price restraints, the Court in *Leegin* suggested that proof of a vertical agreement setting minimum resale prices—if shown that the agreement was entered upon to facilitate a cartel—would be illegal under the rule of reason.²³⁶ A lawyer need only prove the existence of the agreement,²³⁷ the existence of unlawful intent,²³⁸ and the existence of the horizontal cartel²³⁹ to meet the Court's burden.

The drawbacks to this approach are that, similar to vertical per se rules, horizontal per se rules—although reaffirmed in *Leegin*²⁴⁰ and supported by Justice Scalia,²⁴¹ who brought *Leegin* to the attention of the Court—do not align perfectly with the plain language of section 1 of the Sherman Act.²⁴² Justice Stevens made a cautionary statement to this effect during oral arguments.²⁴³ And judging by Chief Justice Roberts's approach to decisions that follow any interpretation other than that derived

233. See Transcript of Oral Argument at 39, *Leegin*, 127 S. Ct. at 2705 (No. 06-480) (quoting Justice Ginsburg as implying that PSKS still has a valid claim against Leegin for horizontal price fixing); see also *Leegin*, 127 S. Ct. at 2717 (noting the type of agreement that would be useful to a plaintiff trying “to prove the existence of a horizontal cartel”).

234. See Transcript of Oral Argument at 35–36, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting Robert W. Coykendall in discussing PSKS's earlier claim that Leegin used resale price maintenance to create a horizontal cartel).

235. *Id.*

236. *Leegin*, 127 S. Ct. at 2717.

237. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

238. *Id.*

239. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982).

240. *Leegin*, 127 S. Ct. at 2717.

241. Transcript of Oral Argument at 37, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting Justice Scalia, “I cannot imagine why a horizontal conspiracy among dealers could ever produce consumer welfare.”).

242. See *supra* notes 33, 183 (defining restraints of trade according to federal common law).

243. Transcript of Oral Argument at 36, *Leegin*, 127 S. Ct. 2705 (No. 06-480) (quoting Justice Stevens, “[B]ut if we say the rule of reason should apply to all cases that just affect intrabrand competition, I'm not sure why we should keep this outmoded rule about horizontal conspiracies that only affect intrabrand competition.”).

from the plain language of the law, Justice Stevens's warning may not be far from the mark.²⁴⁴ If such is the case, the only real recourse for injured retailers may be to lobby Congress to amend the Sherman Act.²⁴⁵

3. *Lobby Congress to Amend the Sherman Act.* Lawyers who try but remain unable to bring antitrust cases against price-fixing manufacturers may have no choice except to lobby Congress to amend the Sherman Act.²⁴⁶ The drawback to this approach, with regard to formalist separation of powers theory, is that it pits the Court and Congress against each other, making short shrift of Hamilton's political axiom.²⁴⁷

Furthermore, Chief Justice Roberts has previously expressed his view that the Judiciary is constitutionally insulated from popular pressure.²⁴⁸ When an act of Congress appears designed specifically to overrule a decision made under his leadership, the Roberts Court will likely view Congress's law as an "impermissible intrusion on [its] authority."²⁴⁹ There were signs in the past that Congress contemplated amending the Sherman Act.²⁵⁰ Once a confluence of cases evidencing the competitive harm of vertical price restraints clogs the courts, Congress may again pass legislation enacting a per se prohibition against vertical price restraints.²⁵¹ But if, as in the 1980s, Congress only asserts its will via limitations to the DOJ's and the FTC's appropriations bills, the Roberts Court will not feel restrained from overturning Congress's limitations, which it will perceive as improperly intruding on the Executive's

244. See *supra* notes 203–21 (noting Chief Justice Roberts's penchant for overruling precedent based on anything but the plain meaning of the statute).

245. Chief Justice Roberts appears to advocate just such a result. Transcript of Oral Argument at 47, *Leegin*, 127 S. Ct. 2705 (No. 06-480) ("But of course, [Congress] could always pass a law saying that if their intent is so clear. They didn't do that here.").

246. See Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62, 64 (2007), <http://www.harvardlawreview.org/forum/issues/120/feb07/cummings.pdf> (arguing that failed court challenges were "political assets that could be used to provoke legislative reform . . . or mobilize community participation") (internal quotation marks omitted).

247. See THE FEDERALIST NO. 80, *supra* note 174, at 500 ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be marked among the number.").

248. Responses of Roberts, *supra* note 16, at 1.

249. See Harrison, *supra* note 207, at 542 (referring specifically to the Rehnquist Court).

250. See *supra* notes 34–36 (noting Congress's amendments to the Sherman Act to restrict prior state immunity for resale price maintenance agreements).

251. See *supra* notes 223–32 and accompanying text (predicting a surge in lawyer-led court cases challenging vertical price restraints).

authority to enforce the law as it sees fit.²⁵² And when the Court strikes down a congressional enactment as a violation of the separation of powers doctrine, “we may see a showdown [with] Congress that makes the New Deal crisis—in which Congress rebelled against the Court’s attacks on its authority—look tame by comparison.”²⁵³

4. *So Pro- or Anti-Trust?* The most troubling effect of the Roberts Court’s formalist separation of powers approach is that it legitimates all that results from it.²⁵⁴ At the same time the Court overruled *Dr. Miles*’s per se rule against vertical agreements, it rewarded *Leegin* for failing to follow a century of well-documented antitrust law.²⁵⁵ In so doing, the Court created an atmosphere wherein businesses believe laws do not apply to them, making it nearly impossible for law-abiding business owners to know on what laws and regulations to rely.²⁵⁶ This misinformation will lead to *Leegin*’s most frightening possible result: chaos in the courts.²⁵⁷ But perhaps chaos is what Congress needs before it is convinced to finally amend the Sherman Act’s ambiguous text.²⁵⁸

252. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102–03 (“None of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws.”). See generally Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 551–52 (2005) (listing historical arguments for a unitary executive); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606 (2005) (tracing the legal and normative arguments in support of a unitary executive).

253. Rosen, *supra* note 13, at 16. After the New Deal crisis, the Court had relatively little power for a generation. See *supra* notes 3–7 and accompanying text (discussing Justice Holmes’s effect on the Court).

254. David Fontana, *Pyrrhic Victory: Hamdan v. Rumsfeld*, NEW REPUBLIC, May 4, 2007 (on file with Houston Law Review).

255. And in so doing, they subverted the entire idea of precedent and stare decisis. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972) (“Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.”).

256. *Id.*

257. See *supra* notes 223–32 (outlining the confluence of court cases sure to arise from an increase in allegations of vertical price restraints).

258. See *supra* notes 33, 183 (defining restraints of trade according to federal common law). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 92 (1980) (arguing the Constitution’s obsession with structure left it silent with regard to specific substantive values).

IV. CONCLUSION

*“Come, illustrious guest,
Begin the tale,” she said, “begin and tell
The perfidy of Greece, thy people’s fall,
And all thy wanderings. For now,—Ah, me!”*²⁵⁹

Eschewing the Supreme Court’s most established principle—that interpretation of the law does not disrespect the coordinate branches²⁶⁰—the Roberts Court’s formalist separation of powers decision in *Leegin* jerked so tight the belt upholding the Supreme Court’s jurisdiction it threatens society with “[t]he specter of the Federal Government brought to a halt.”²⁶¹ In a ruling that alternated between the inconsistent, the nonsensical, and the intellectually dishonest, the Roberts majority reversed one hundred years of Court precedent, rejected an executive agency’s interpretation of its controlling statute, and ignored Congress’s intent.

Attorneys now must rein in the Court’s jurisprudence. Whether through lawyer-led litigation or through new pleading strategies, attorneys need to find ways to protect competition from the harms of vertical price restraints. Where these strategies fall short, lawyers must look to Congress to protect individual rights.

Chief Justice Roberts’s formalist separation of powers approach may protect the country from the radical conservatism of Justices Scalia and Thomas, but it does not bode well for the future of the Court: in the short run, lawyers, judges, and politicians will be unwilling to rely on the Court’s precedent; and in the long run, it will severely diminish the power and influence of the Court.²⁶² The question that remains is whether this drastic restriction of the Court’s reach was Chief Justice Roberts’s goal for his tenure. It certainly etched Justice Holmes’s memory into

259. VIRGIL, *supra* note 1, at 37 ll.751–54.

260. *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979).

261. *Id.* at 1001. *See supra* note 253 and accompanying text (mentioning the congressional reactions to the New Deal crises).

262. *See* David Von Drehle, *Inside the Incredibly Shrinking Role of the Supreme Court: And Why John Roberts Is O.K. With That*, TIME, Oct. 22, 2007, at 40.

The image of the Supreme Court as a great righter of wrongs, ingrained among liberals by the stirring cases of the Warren Court—school desegregation; one man, one vote; right to counsel; and so on—has no power over a judge [such as Roberts] so rooted in the conservatism of the 18th century, of Samuel Johnson and Edmund Burke, a mind-set always focused on the fact that even well-intended changes often go awry.

Id.

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the public consciousness.²⁶³ Our only hope is that Chief Justice Roberts takes his heritage in the direction that best suits America's national ethos.²⁶⁴

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263. See *supra* note 3 (referring to Justice Holmes's legacy). As Justice Holmes remarked, "I know . . . the Sherman Law is damned nonsense, but if my country wants to go to hell, I am here to help it." *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE*, at xii (Fred S. McChesney & William F. Shughart II eds., 1995).

264. See *supra* note 7 (describing constitutional interpretation as a popular product of America's national ethos).