dent, this is the congressional design."[95] Reserving its most forceful language to criticize one factor on the EPA's "laundry list" of impermissible reasons not to regulate, the Court declared that "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws."[96] In the context of the Bush White House's well-known ideologically driven approach to environmental policy,[97] such statements amount to a significant reprimand of political influence over administrative decisions.

Although *Massachusetts v. EPA* takes noteworthy steps away from a political conception of the administrative state, grounded in executive primacy, it is too early to tell whether these steps constitute a sea change in the administrative law akin to the one begun in the 1980s. The Supreme Court today is deeply divided, and in many of the most controversial cases, eight Justices' votes predictably fall along political lines,[98] canceling each other out. In this 5–4 Court, cases such as *Massachusetts v. EPA* often turn on the views of Justice Kennedy, meaning any predictions as to the larger significance or "direction" of the Court are at the mercy of a single Justice. Given the political overtones of the case, including its reference to Hurricane Katrina,[99] the Court may not have intended to further a trend of active judicial review, but rather simply to force a reluctant administration to act on a pressing problem whose solution had achieved widespread consensus.

Still, when coupled with the decisions in *Brown & Williamson*, *Mead*, and *Gonzales v. Oregon*, *Massachusetts v. EPA* highlights an emerging trend of heightened judicial oversight of executive agency actions. Suspicious of politically motivated administrative interpretation, the Court seems to believe that the administrative state is not merely an arm of the President, but rather that it still has some characteristics of a "fourth branch"[100] of government.

H. Sherman Act

Minimum Resale Price Maintenance. — For nearly a century, it was per se unlawful under the Sherman Act[1] for a manufacturer and its distributors or retailers to agree on minimum resale prices for the

[95] *Id.*

[96] *Id.* at 1462–63.

[97] *See supra* notes 1–4.

[98] For example, the *Brown & Williamson* dissenters were in the *Massachusetts v. EPA* majority. *See also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

[99] *Massachusetts v. EPA*, 127 S. Ct. at 1456 n.18.

[100] FTC v. Ruberoid, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

[1] 15 U.S.C. §§ 1–7 (2000 & Supp. IV 2004).

manufacturer's goods.[2] The economic case against minimum resale price maintenance (RPM), however, was never strong. The per se rule derived not from the economic effects of the practice, but rather from the nineteenth-century common law rule against "restraints on alienation."[3] Last Term, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[4] the Court overruled the per se rule established by *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[5] and held that minimum RPM agreements are to be judged by the rule of reason.[6] *Leegin*, however, alters only the federal rule governing minimum RPM, and state decisionmakers must now decide between retaining the per se rule and harmonizing their state's antitrust law with its federal counterpart. In making this decision, state courts and legislatures should look past the pricing effects of minimum RPM and focus on the general welfare effects of the practice, noting that minimum RPM enhances competition and that subjecting minimum RPM to rule of reason scrutiny eliminates the need for manufacturers to use inefficient, second-best practices to achieve these procompetitive gains.

Leegin Creative Leather Products is a successful business that designs, manufactures, and distributes women's fashion accessories under the Brighton brand name.[7] In order to differentiate itself from its competitors, Leegin sells its goods through boutique stores offering a level of service that consumers cannot easily find elsewhere.[8] In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy," under which it unilaterally decided to sell its products exclusively to those retailers that followed its suggested resale prices.[9] Subsequently, as part of a new marketing initiative, Leegin created the "Heart Store Program," which offered benefits to retailers who pledged to comply with its pricing policy.[10] Kay's Kloset, a retailer of Brighton products,

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[2] *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977) ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years . . . .").

[3] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404–08 (1911); *see also* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 687 (1962) (stating that hostility to restraints on alienation was, in part, the basis for *Dr. Miles*).

[4] 127 S. Ct. 2705 (2007).

[5] 220 U.S. 373.

[6] *Leegin*, 127 S. Ct. at 2710. Rule of reason analysis requires the factfinder to "weigh[] all of the circumstances of a case" to determine whether "a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *GTE Sylvania*, 433 U.S. at 49. In contrast, per se rules treat certain categories of restraints as necessarily anticompetitive, eliminating the need to conduct a case-specific inquiry. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

[7] *Leegin*, 127 S. Ct. at 2710.

[8] *Id.* at 2710–11.

[9] *Id.* at 2711. Leegin adopted the policy to prevent harm to its brand image and to provide its retailers with profit margins that enabled them to offer a high level of customer service. *Id.*

[10] *Id.*

was enticed by Leegin's new offer and became a Heart Store soon after the program was created.[11] Leegin learned, however, that Kay's Kloset was discounting its Brighton products below the levels set in the policy, and ceased selling to the store.[12]

PSKS, which owns and operates Kay's Kloset, brought suit against Leegin in the Eastern District of Texas. PSKS alleged that Leegin's pricing policy was an unlawful agreement in restraint of trade under section 1 of the Sherman Act.[13] In its defense, Leegin sought to offer expert testimony that its Heart Store Program was in fact procompetitive.[14] Relying on *Dr. Miles*, the district court excluded the testimony on the ground that "[v]ertical minimum price fixing agreements . . . remain per se unlawful."[15] At trial, PSKS argued that the Heart Store Program constituted an unlawful agreement between Leegin and its retailers to fix prices; the jury agreed, and PSKS was awarded $3.6 million in trebled damages and $375,000 in attorney's fees.[16]

The Fifth Circuit affirmed. On appeal, Leegin did not dispute the finding that the company had entered into price-fixing agreements with its retailers; instead, Leegin challenged the continuing validity of the per se rule.[17] The court of appeals rejected this argument, explaining that it "remain[ed] bound by [the Supreme Court's] holding in *Dr. Miles*."[18] It therefore found that the district court had been correct to exclude the expert testimony, as the per se rule made it immaterial.[19]

The Supreme Court reversed and remanded. Writing for the Court, Justice Kennedy[20] first noted that the rule of reason "is the accepted standard for testing whether a practice restrains trade in violation of section 1"[21] and that the Court's use of per se rules "is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.'"[22] Under the Court's modern antitrust doctrine, any "departure from the rule of reason standard must

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[11] *Id.*

[12] *Id.* Kay's Kloset maintained that it discounted Brighton products to compete with nearby retailers who, it claimed, were also undercutting Leegin's suggested prices. *Id.*

[13] PSKS, Inc. v. Leegin Creative Leather Prods., Inc., No. 2:03-CV-107, 2004 U.S. Dist. LEXIS 30414, at *1–2 (E.D. Tex. Mar. 25, 2004).

[14] *Id.* at *3.

[15] *Id.* at *7.

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

[17] PSKS, Inc. v. Leegin Creative Leather Prods., Inc., No. 04-41243, 2006 U.S. App. LEXIS 6879, at *4 (5th Cir. Mar. 20, 2006) (per curiam).

[18] *Id.* at *5.

[19] *Id.* at *7–8.

[20] Justice Kennedy's opinion was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

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

[22] *Id.* at 2713 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

be based upon demonstrable economic effect."[23] Finding that the near-century-old decision in *Dr. Miles* rested primarily on formalistic line-drawing and not economic reasoning, Justice Kennedy concluded that that decision could not justify continued adherence to the per se rule.[24]

Accordingly, Justice Kennedy proceeded to examine the economic effects of minimum RPM. While conceding that "each side of the debate can find sources to support its position,"[25] He stated that the "economics literature is replete with procompetitive justifications" for the practice.[26] Specifically, Justice Kennedy found that minimum RPM "can stimulate *interbrand* competition — the competition among manufacturers selling different brands of the same type of product — by reducing *intrabrand* competition — the competition among retailers selling the same brand."[27] This finding was important because protecting interbrand competition is the primary purpose of antitrust law.[28] Justice Kennedy also noted that minimum RPM could help new firms and brands gain market share and could encourage retailers to offer services that would not otherwise be provided.[29] At the same time, Justice Kennedy did not ignore the possible anticompetitive effects of minimum RPM: he acknowledged that such arrangements could lead to manufacturer and retailer cartels,[30] but said that he could not state with any confidence that minimum RPM "always or almost always" restricts competition and decreases output.[31] He therefore concluded that minimum RPM agreements were "ill suited for *per se* condemnation."[32]

After refuting PSKS's claim that the per se rule was economically justified, Justice Kennedy turned to the argument that the rule should be retained "on the basis of *stare decisis* alone."[33] Although he acknowledged the importance of stare decisis, he found it to be less sig-

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[23] *Id.*

[24] *Id.* at 2714 (noting that the *Dr. Miles* Court's reliance on the common law prohibition against restraints on alienation "evokes policy concerns extraneous to the question that controls here"). When the *Dr. Miles* Court did discuss the economic effects of minimum RPM, it relied on outdated economic assumptions. *Id.* (noting that *Dr. Miles* viewed vertical agreements as analogous to horizontal restraints, an approach that has since been rejected by the Court).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 2715 (emphases added).

[28] *Id.* (quoting State Oil Co. v. Khan, 522 U.S. 3, 15 (1997)).

[29] *Id.* at 2716.

[30] *Id.* at 2716–17.

[31] *Id.* at 2717 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)). The opinion describes at length the conditions under which the anticompetitive effects of minimum RPM are most likely to manifest themselves, and thus provides significant guidance for companies assessing how their agreements will be judged under the rule of reason. *See id.* at 2717–20.

[32] *Id.* at 2718.

[33] *Id.* at 2720.

nificant in the antitrust context because the Court had always treated the Sherman Act as a common law statute.[34] Thus, it was relevant that *modern* economics literature showed widespread agreement in opposition to the per se rule.[35] Moreover, Justice Kennedy noted that the Court, in following a common law approach, had gradually moved away from *Dr. Miles*'s strict treatment of vertical restraints.[36] Finally, he rejected PSKS's argument that Congress had ratified the per se rule.[37] He therefore held that "[v]ertical price restraints are to be judged according to the rule of reason."[38]

Justice Breyer dissented,[39] stating that he would have found the question of whether to apply the rule of reason to minimum RPM "difficult" had *Dr. Miles* not been etched into the Supreme Court Reporter.[40] Conceding that minimum RPM could yield procompetitive effects, Justice Breyer nevertheless declared that "antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views," as "law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers . . . ."[41] Justice Breyer then concluded that, were he writing on a blank slate, the administrative difficulties associated with the rule of reason approach would allow him to agree at most to a "slightly modified" per se rule.[42]

Justice Breyer then turned to the question of whether to retain *Dr. Miles* on the basis of stare decisis. He stressed that the arguments advanced by the majority had been well-known in the antitrust literature for close to half a century.[43] Thus, "every *stare decisis* concern th[e] Court has ever mentioned counsel[ed] against overruling" *Dr. Miles*,[44] notwithstanding the majority's argument that the Sherman Act is in-

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[34] *Id.*

[35] *Id.* at 2721. The Court also noted that both the Department of Justice and the Federal Trade Commission — the agencies charged with enforcing the antitrust laws — had "recommended that th[e] Court replace the *per se* rule with the traditional rule of reason." *Id.*

[36] *Id.* at 2721–22.

[37] *Id.* at 2723–25.

[38] *Id.* at 2725.

[39] Justice Breyer's dissent was joined by Justices Stevens, Souter, and Ginsburg.

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

[41] *Id.* at 2729.

[42] *Id.* at 2731.

[43] *Id.* at 2732–33.

[44] *Id.* at 2737. Justice Breyer first reviewed the Court's precedent deeming stare decisis to apply more rigidly in statutory cases, and noted that although the Court does sometimes overrule incorrectly decided cases, *Dr. Miles* was 100 years old and had been reaffirmed repeatedly. *See id.* at 2734. He then argued that the per se approach did not create an "unworkable" legal regime, but rather was well-settled law that had engendered considerable reliance. *See id.* at 2734–36.

terpreted as a common law statute.[45] In reaching this conclusion, Justice Breyer was forced to confront the fact that the Court had unanimously overturned the per se rule against *maximum* RPM ten years earlier, in *State Oil Co. v. Khan*.[46] Because the case overruled by *Khan* had been decided only twenty-nine years prior,[47] "nowhere close to the century *Dr. Miles* ha[d] stood,"[48] and because it had not been supported by reliance interests or "traditional antitrust principles,"[49] Justice Breyer found his dissent to be perfectly consistent with his vote in *Khan*.

Like several of the Court's decisions last Term, *Leegin* is likely to result in a transfer of power from the federal government to the states.[50] *Leegin* alters only the federal antitrust rule, and the Supreme Court has held that state antitrust laws are generally not preempted by their federal counterparts.[51] Thus, businesses hoping to take advantage of their newfound ability to engage in minimum RPM not only must comply with the rule of reason guidelines set by the Court, but also must convince state legislatures and courts that they should follow the Court's lead and eschew the strict rule of *Dr. Miles*. In effect, then, *Leegin* acts only to shift the debate over minimum RPM to the states. Yet while proponents of the per se approach may find a more receptive audience at the state level, state decisionmakers should look beyond claims that minimum RPM will increase prices for consumers[52] and instead examine the practice's general welfare effects. Specifically, states should recognize that *Leegin* resolves a fundamental tension within antitrust law that worked to reduce social welfare.

In the short run, the fact that *Leegin*'s announced rule is unlikely to preempt state law will almost certainly result in confusion for the states. All states have enacted antitrust laws that mirror the federal

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[45] *See id.* at 2736–37. The majority opinion was not consistent with the common law approach because common law courts rarely overruled well-established cases without gradually eroding their scope over time. *Id.* at 2737.

[46] 522 U.S. 3 (1997); *see Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting).

[47] *See* Albrecht v. Herald Co., 390 U.S. 145 (1968).

[48] *Leegin*, 127 S. Ct. at 2736 (Breyer, J., dissenting).

[49] *Id.*

[50] *See, e.g.*, Uttecht v. Brown, 127 S. Ct. 2218 (2007); Carey v. Musladin, 127 S. Ct. 649 (2006).

[51] Because antitrust is an area of law that has traditionally been regulated by the states, state antitrust law will be preempted only if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). And because state antitrust law governing minimum RPM is consistent with the purposes and objectives of the federal rule — namely, "deterring anticompetitive conduct and ensuring the compensation of victims of that conduct," California v. ARC Am. Corp., 490 U.S. 93, 102 (1989) — the Court is unlikely to find such law preempted.

[52] *See Leegin*, 127 S. Ct. at 2737 (Breyer, J., dissenting) ("[One of t]he only safe predictions to make about today's decision [is] that it will likely raise the price of goods at retail . . . .").

antitrust statutes.[53] Further, state antitrust laws often contain harmonization provisions that instruct state courts to construe the state's antitrust laws in a manner consistent with the federal courts' interpretation of the federal laws.[54] The result of this deferential posture is that most states have modeled their minimum RPM laws on *Dr. Miles*. Several states have enacted statutes expressly prohibiting the practice.[55] In others, state courts have read *Dr. Miles* into their antitrust doctrine by interpreting their state's antitrust laws as making minimum RPM per se unlawful.[56] Thus, a tension presents itself: state legislatures and courts have expressed a general desire to harmonize state antitrust law with federal law, but many states also have statutes and case law expressly prohibiting minimum RPM.

It is by no means assured that the states will resolve this tension in favor of harmonization, as they have shown a willingness in the past to break with federal antitrust precedent.[57] One factor that may weigh heavily with a state legislature or court is the politically sensitive reality that subjecting minimum RPM to rule of reason analysis may lead to higher retail prices for consumers. Notably, the thirty-seven states that jointly filed an amicus brief in *Leegin* relied almost exclusively on this fact when asking the Court to uphold the per se rule.[58]

State decisionmakers, however, would be mistaken to rely on the pricing effects of minimum RPM alone without examining the general welfare effects of maintaining the per se rule. Proponents of the per se approach generally criticize *Leegin* in a vacuum and neglect to place *Dr. Miles*'s formalistic rule within the Court's broader antitrust juris-

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[53] Deborah A. Coleman, *Antitrust Issues in the Litigation and Settlement of Infringement Claims*, 37 AKRON L. REV. 263, 267 (2004).

[54] *See, e.g.*, N.J. STAT. ANN. § 56:9-18 (West 2001) ("This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes . . . .").

[55] *See, e.g.*, *id.* § 56:4-1.1 ("Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.").

[56] *See, e.g.*, Rice v. Alcoholic Beverage Control Appeals Bd., 579 P.2d 476, 482, 491 (Cal. 1978).

[57] For example, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court held that plaintiffs who did not purchase directly from alleged price fixers were generally barred from seeking damages under federal antitrust laws. *Id.* at 725–26, 745. The states, however, disagreed sharply over whether to adopt the Court's ruling, and a number of states enacted legislation preserving the right of indirect purchasers to sue under state antitrust law. *See* S. Scott Parel, *Removing the* Illinois Brick *Standing Barrier From the Texas Free Enterprise and Antitrust Act — A Matter of Choice*, 50 SMU L. REV. 409, 418–19 (1996).

[58] Brief for the States of New York et al. as Amici Curiae Supporting Respondent at 2–3, *Leegin*, 127 S. Ct. 2705 (No. 06–480), 2007 WL 621851. *But see* Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions*, 3 COMPETITION POL'Y INT'L (forthcoming Autumn 2007) (arguing that the empirical evidence only suggests that a rule of per se legality for minimum RPM leads to higher prices — and that "the price effects of switching from per se illegality to per se legality are not the same as switching from a rule of per se illegality to a rule of reason").

prudence. Although *Dr. Miles* stood for nearly a century, manufacturers were nonetheless able to achieve the procompetitive gains associated with controlling resale prices through second-best alternatives to minimum RPM that ultimately lowered social welfare.[59]

Understanding how this inefficiency came about begins with the text of the Sherman Act. Section 1 of the Act applies only to contracts, combinations, or conspiracies among two or more actors — not to unilateral actions.[60] The Supreme Court, however, has struggled ever since *Dr. Miles* to incorporate this concerted action requirement into its vertical price restraint doctrine.[61] In *United States v. Colgate & Co.*,[62] the Court attempted to clarify the type of conduct that would satisfy the concerted action requirement in this context. The Court held that the Sherman Act did "not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal."[63] Distinguishing *Dr. Miles*, the Court stated: "In *Dr. Miles* . . . , the unlawful combination was effected *through contracts* which undertook to prevent dealers from freely exercising the right to sell."[64] *Colgate* thus set a trap for unwary manufacturers — agreements to set retail prices were per se unlawful, while unilaterally controlling those same prices was outside the reach of the Sherman Act.

After *Colgate*, the Court spent considerable effort attempting to determine precisely what conduct satisfied the concerted action requirement.[65] The result was a set of incoherent cases that provided little practical guidance to manufacturers attempting to exercise their *Colgate* right. The cases attempting to distinguish between the type of conduct that constitutes a unilateral policy protected under *Colgate* and that constituting an agreement that is per se unlawful under *Dr. Miles* created nothing for the average company but a need for a good antitrust lawyer.[66] As a result, businesses exercising their *Colgate* right

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[59] For an outline of the procompetitive gains, see *Leegin*, 127 S. Ct. at 2714–16.

[60] *See* 15 U.S.C. § 1 (2000 & Supp. IV 2004).

[61] *See* Terry Calvani & Andrew G. Berg, *Resale Price Maintenance After* Monsanto*: A Doctrine Still at War with Itself*, 1984 DUKE L.J. 1163, 1165–74.

[62] 250 U.S. 300 (1919).

[63] *Id.* at 307; *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) ("Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."). *Leegin* should not affect this rule, as Congress has made clear that the Sherman Act does not apply to unilateral conduct.

[64] *Colgate*, 250 U.S. at 307–08 (emphasis added).

[65] *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 44–47 (1960); *cf. Monsanto*, 465 U.S. at 762–63 (holding that a plaintiff must present proof sufficient to show the existence of an agreement without relying on "highly ambiguous evidence").

[66] *Cf.* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 14 (1981) ("The Court's distinction [in its vertical restraint

ran the risk that a jury would infer the existence of an agreement from their "course of dealing or other circumstances."[67] Worse still, juries often found the existence of such agreements based on "insignificant — and often fortuitous — facts having little or nothing to do with" the conduct's effect on competition.[68]

This uncertainty left manufacturers wishing to unilaterally establish retail prices in a precarious position. Even though the economic effects of unilateral and concerted price setting "are in general the same,"[69] a jury verdict finding that certain conduct amounted to an explicit or implicit agreement subjected businesses to treble damages and potential criminal liability. Thus, under the *Dr. Miles–Colgate* regime, businesses wishing to establish unilateral pricing floors were forced to engage in inefficient practices and spend significant resources creating *Colgate* compliance programs.[70] These programs were designed to ensure adherence to the Court's arbitrary distinctions and to allow businesses to walk the fine line between per se legal and per se illegal conduct.

Such programs represented a needless and wasteful diversion of resources. For example, in an amicus brief, PING, Inc. described at length its attempts to unilaterally establish a retail price list and summarily terminate retailers that sold below its listed prices.[71] To ensure that it did not enter into an "agreement" with any one of its nearly 10,000 retailers, PING adopted intricate and costly internal procedures and subjected its employees to immediate termination if they communicated in any way with retailers about the company's pricing policy.[72] Communications were funneled exclusively to PING's antitrust attorneys, who carefully worded each conversation to avoid any "unintended perception" of an agreement.[73] "These efforts [were] undertaken at great expense . . . . Rather than contributing to the quality of PING's products, the efficiency of its production systems, the development of new products to increase consumer choice, or the provision of consumer services, these measures serve[d] *only* to help PING avoid an antitrust lawsuit."[74]

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doctrine has] no intuitive meaning to the businessman, and makes his fortunes ever more dependent on whether he, his dealers, and his distributors, have good antitrust lawyers.").

[67] United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99–100 (1920).

[68] Calvani & Berg, *supra* note 61, at 1203.

[69] *Leegin*, 127 S. Ct. at 2722.

[70] *See* Brief of CTIA — The Wireless Association as Amicus Curiae in Support of Petitioner at 14, *Leegin*, 127 S. Ct. 2705 (No. 06–480), 2007 WL 160782.

[71] *See* Brief for PING, Inc. as Amicus Curiae in Support of Petitioner, *Leegin*, 127 S. Ct. 2705 (No. 06–480), 2007 WL 173680.

[72] *Id.* at 3, 10.

[73] *Id.* at 3.

[74] *Id.* at 4.

By holding that the legality of a manufacturer's use of minimum RPM should turn on its actual effects on competition, and not on whether the manufacturer engaged in unilateral or concerted activity, *Leegin* removed the need for these *Colgate* compliance programs. Businesses using price controls to achieve procompetitive gains can now focus their resources on research and development to the benefit of consumers, distributors, and producers, thereby eliminating unnecessary deadweight losses. In his dissent, however, Justice Breyer argued that the majority's approach would usher in an equal amount of inefficiency.[75] Because applying the rule of reason was "often easier said than done," Justice Breyer suggested that the rule of reason approach was likely to impose significant litigation costs on companies seeking to determine the legality of individual RPM agreements.[76]

The empirical evidence, however, belies Justice Breyer's concerns. Recent judicial experience makes clear that it is the per se rule, not the rule of reason, that is most likely to create needless litigation expense. For example, between 1967 and 1977, non-price vertical restraints were treated as per se unlawful.[77] The result of this rule was a "plaintiffs' picnic" and a voluminous amount of meritless antitrust litigation.[78] In *Continental T.V., Inc. v. GTE Sylvania Inc.*,[79] the Court abandoned the per se approach and placed non-price vertical restraints under the rule of reason — thus forcing courts to assess the actual competitive effects of each challenged restraint.[80] In the fourteen years after *GTE Sylvania*, plaintiffs prevailed in only four of the forty-five reported decisions involving non-price vertical restraints; in the vast majority of cases, plaintiffs did not even allege an anticompetitive effect.[81] There is no reason to expect that the aftermath of *Leegin* will be any different — empirical studies show that cases in which minimum RPM is used for procompetitive purposes are "far more common" than instances in which it is used anticompetitively.[82] Subjecting minimum RPM to rule of reason scrutiny will reduce the incentives for plaintiffs to engage in meritless litigation and will ensure that manu-

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[75] *See Leegin*, 127 S. Ct. at 2729–31 (Breyer, J., dissenting).

[76] *Id.* at 2730.

[77] *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379–80 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977)

[78] Douglas H. Ginsburg & Leah Brannon, *Determinants of Private Antitrust Enforcement in the United States*, 1 COMPETITION POL'Y INT'L 29, 37–39 (2005).

[79] 433 U.S. 36 (1977).

[80] *See id.* at 47–50.

[81] Ginsburg & Brannon, *supra* note 78, at 42.

[82] Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J.L. & ECON. 263, 282 (1991).

facturers engaging in procompetitive practices will not be subject to antitrust liability.[83]

Finally, eliminating the need for *Colgate* compliance programs will not be the only positive consequence of *Leegin*. In an attempt to avoid the costs and inefficiencies of these programs, many businesses sought to achieve the procompetitive gains associated with minimum RPM through other legal but inefficient means. For example, manufacturers might have been able to duplicate the effects of minimum RPM by integrating downstream and selling their products directly to consumers.[84] Similarly, manufacturers could impose territorial restrictions on their distributors, and allow only one distributor to sell their products in a given region.[85] Yet while the economics literature suggests that such vertical non-price restraints can have economic effects similar to those of vertical price restraints,[86] these methods may be less efficient for a particular manufacturer to establish and sustain. The per se rule of *Dr. Miles*, however, made these second-best alternatives more attractive for manufacturers, and forced companies wishing to protect their brand and promote interbrand competition to use inefficient business practices.

For these reasons, state decisionmakers should not assume that *Leegin* and minimum RPM are injurious to the interests of consumers simply because they may lead to higher prices. The general perception is that a rule leading to higher retail prices benefits corporate interests at the expense of consumers. However, the effects of minimum RPM go far beyond prices. Under the flawed antitrust doctrine that *Dr. Miles*'s per se rule created, manufacturers were forced to take wasteful measures to shield themselves from liability, and to engage in second-best business practices to achieve the procompetitive gains associated with minimum RPM. States interested in promoting consumer interests and social welfare should take notice of these effects when deciding whether to follow *Leegin*'s lead.

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[83] It can also be argued that subjecting minimum RPM to rule of reason scrutiny will provide *less* guidance to manufacturers than did the per se rule and thus will cause greater inefficiency. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 335–39 (3d ed. 1990). This argument, however, overstates the problems associated with the rule of reason approach. Antitrust scholars have developed checklists that can help courts easily distinguish between procompetitive and anticompetitive uses of minimum RPM, *see* 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1633c–1633e, at 330–39 (2d ed. 2002), and the Court dedicated a large portion of its *Leegin* opinion to helping lower courts apply the rule of reason, *see Leegin*, 127 S. Ct. at 2719–20. At the same time, courts have shown an ability to develop a workable rule of reason analysis in the aftermath of *GTE Sylvania*. *See* Ernest Gellhorn & Teresa Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. L. REV. 155, 170–75 (1985).

[84] *See Leegin*, 127 S. Ct. at 2723.

[85] *See id.*

[86] *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 728 (1988).