AN APPLE A DAY DOESN'T KEEP DOCTOR MILES AWAY: THE SECOND CIRCUIT'S MISUSE OF THE PER SE RULE IN *UNITED STATES V. APPLE*

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Abstract

In 2007, the Supreme Court fundamentally altered nearly a century of antitrust case law by ruling that long-term contracts between vertically oriented firms ought to be analyzed with economic factors in mind, rather than subject to per se liability. Yet, eight years later, the Second Circuit circumvented that economic analysis by classifying vertically collusive behavior as a hub-and-spokes conspiracy. In doing so, as this Note's title suggests, the Second Circuit misused the per se rule and missed an opportunity to rule on a truly novel legal issue.

Indeed, this Note will analyze that Second Circuit decision, United States v. Apple, in light of the larger history of antitrust law and prevailing economic thought. This Note will then use that examination to conclude that the Second Circuit erred in using the per se rule to analyze Apple's conduct. Rather, the Second Circuit should have used a broad-based rule-of-reason analysis that accounted for the Supreme Court's decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc. and the e-book market at the time of Apple's conduct. Ultimately, because the Second Circuit failed to consider the effect of Amazon's monopoly power, Amazon's potential for predatory pricing, and pro-competitive justifications for vertical contracting, the Second Circuit misread Leegin and missed its mark to add to the growing RPM odyssey in antitrust law.

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TABLE OF CONTENTS

I. INTRODUCTION 326
II. BACKGROUND 328
  A. Sherman Anti-Trust Act and Common Law 328
  B. Birth of the Rule of Reason 329
  C. Expansion of Federal Antitrust Policy 332
  D. The Peak of Federal Antitrust Policy in the Warren Court 335
  E. Rise of the Chicago School 338
  F. Modern Antitrust Law in the Post-Chicago Era 340
III. ANALYSIS 342
  A. Apple's Price-Fixing Scheme 342
  B. District Court's Analysis 347
  C. The Appeal to the Second Circuit 353
    1. Apple's Arguments on Appeal 353
    2. *Amici* Arguments on Appeal 356
  D. The Second Circuit's Decision 359
IV. EVALUATION 367
  A. Legal Analysis 367
    1. Horizontal or Vertical Price-Fixing 367
    2. *Leegin* Decision 372
  B. Economic Analysis 377
    1. Monopoly and Entry Barriers 377
    2. Predatory Pricing 379
    3. Vertical Integration and RPM 381
V. CONCLUSION 382

I. INTRODUCTION

On March 7, 2016, the Supreme Court denied certiorari to the Second Circuit's antitrust decision in *United States v. Apple*.[1] The decision came as a surprise to many in the media, ostensibly because it triggered a $450 million payout from Apple to its chief competitor in the quickly growing e-book market, Amazon.[2] Amazon and its Kindle, however, continue to have a stronghold over the e-book market, while other competitors, including Apple and Barnes & Noble, struggle to

1. Apple v. United States, No. 15-565, 136 S. Ct. 1376, at *1 (U.S. Mar. 7, 2016).
2. *See, e.g.*, Adam Liptak & Vindu Goel, *Supreme Court Declines to Hear Apple's Appeal in E-Book Pricing Case*, N.Y. TIMES (Mar. 7, 2016), http://www.nytimes.com/2016/03/08/technology/apple-supreme-court-ebook-prices.html?_r=0; Greg Stohr, *Apple Rejected by U.S. Supreme Court in $450 Million E-Book Case*, BLOOMBERG (Mar. 7, 2016), http://www.bloomberg.com/politics/articles/2016-03-07/apple-rejected-by-u-s-high-court-in-450-million-e-book-case.

catch up.[3] Likewise, Amazon's dominance as an e-book retailer continues to dry up profits for upstream suppliers.[4] As Mick Shatzkin, chief executive of a book publisher consultancy firm, put it: "There are still real hard times ahead for the publishers because Amazon's market share is so large that they are bound to take more and more margin from publishers."[5]

So how is it that Apple, a nascent competitor in the e-book market, will pay $450 million to a monopolistic retailer? This Note will answer and evaluate that very question. Indeed, the answer is ripe with many antitrust complexities, not the least of which include predatory pricing, a horizontal cartel, resale price maintenance, and long-term vertical contracts. Moreover, as this Note's title suggests, the Second Circuit's decision was legally erroneous, as it resuscitated back to life an otherwise dead and overruled U.S. Supreme Court decision. As complex and fascinating as these many issues are, this Note strives to untangle the Second Circuit's decision, while offering a fresh perspective and evaluation in light of both the history of antitrust law and economic theory.

This Note proceeds in four parts. Part II offers an overview of pertinent antitrust law in the United States, with a focus on major developments in the field that will shed light on later analysis. Part III provides a comprehensive and largely objective overview of the litigation at issue, beginning with an overview of the facts and concluding with Apple's unsuccessful petition for certiorari to the Supreme Court. Part IV then critically evaluates the Second Circuit's decision through a bipartite analysis: first considering the Second Circuit's decision against the backdrop of antitrust law, and second considering the decision against several, modern economic theories.

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3. *See* Lisa Dale Norton, *Amazon the Monopoly: Getting Smart About Books*, HUFFINGTON POST (Feb. 11, 2016, 5:48 PM), http://www.huffingtonpost.com/lisa-dale-norton/amazon-the-monopoly-getti_b_9203680.html ("The facts are sobering. . . . [as of January 2016] Amazon controls 75 percent of online sales of books and 65 percent of e-books sales."); Hannah Furness, *Government Must Help End 'Heartbreaking' Amazon Dominance, Former Number 10 Adviser Says*, TELEGRAPH (Feb. 21, 2016), http://www.telegraph.co.uk/news/shopping-and-consumer-news/12167545/Government-must-help-end-heartbreaking-Amazon-dominance-former-Number-10-adviser-says.html (arguing that Amazon's dominance in the e-book and publishing markets has snuffed out small publishing businesses in the United Kingdom); Simon Bowers, *European Commission to Investigate Amazon's Ebook Dominance*, GUARDIAN (June 11, 2015), http://www.theguardian.com/technology/2015/jun/11/european-commission-investigate-amazon-ebook-dominance.

4. *See* sources cited *supra* note 3.

5. Liptak & Goel, *supra* note 2.

Part V concludes by melding the evaluation together and examining the ramifications of the Supreme Court's denial of certiorari for the case.

II. BACKGROUND

To place the Second Circuit's decision in the appropriate context of antitrust law, this Note analyzes the relevant history of antitrust law. As *United States v. Apple* is a price-fixing conspiracy case, the following history places a particular emphasis on the Court's jurisprudence in both horizontal and vertical restraints on trade. The following history is broken down into six, broad-based categories: (i) early antitrust law following the passage of the Sherman Antitrust Act, (ii) the beginning of "rule-of-reason" analyses in price-fixing cases, (iii) the postwar expansion of federal antitrust policy, (iv) the height of policy-driven antitrust rationale under the Warren Court, (v) the rise of the Chicago School of Economics and its influence on antitrust law, and (vi) modern-day developments in antitrust law.

A. *Sherman Antitrust Act and Common Law*

Statutory antitrust law began in 1890 with the enactment of the Sherman Antitrust Act. Among other things, the Act broadly prohibits "[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[6] Conspicuously absent from the Act, however, are definitions for terms now commonplace in antitrust litigation, including "competition," "monopoly," or "restraint on trade."[7] The federal courts quickly interpreted the Sherman Act as an opportunity to break with state precedent and craft a new judicial antitrust law.[8]

Most famously, in *United States v. Addyson Pipe & Steel Co.*, then Circuit Judge Taft, in a lengthy opinion, relied heavily upon state and international law to distinguish between "naked" price-fixing contracts, which were void per se, and "ancillary" non-compete agreements.[9] As Justice Taft found:

> [W]here the sole object of both parties in making the contract . . . is merely to restrain competition, and enhance or

6. 15 U.S.C. § 1 (2012).
7. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 53 (3d ed. 2005) [hereinafter HOVENKAMP, ANTITRUST POLICY].
8. *Id.* at 53–54 ("[F]ederal courts very quickly deviated from the common law as it existed when the Sherman Act was passed.").
9. 85 F. 271, 281–83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

> maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void.[10]

By contrast, under state common law, Judge Taft noted several exceptions to anti-competitive contracts, including "relation[s] of partnership, or of vendor and vendee, or of employer and employee."[11] While harmonizing state precedent, Judge Taft also devoted much of the opinion to distinguishing state cases that he viewed as inapt to the Sherman Act's underlying policy of protecting competition.[12] While his attempt to do so may not have been legally sound, it signaled a clear departure from old common law.[13] Thus, *Addyson Pipe* not only laid the rudiments for legal distinctions between certain contractual relationships, but also marked the beginning of a distinctly federal interpretation of antitrust law.

B. Birth of the Rule of Reason

From *Addyson Pipe*, the next seventy years of antitrust law saw a remarkable expansion of federal law by both Congress and the courts.[14] Antitrust became a major issue in the early 1910s due to a wave of mergers among industrial giants.[15] The courts were the first to respond with a trilogy of cases in 1911, which carved out Judge Taft's nascent notions of a "rule of reason." In *Standard Oil Co. v. United States*, the Court held that a "standard of reason" would be applied to analyzing Standard Oil Company's monopolization of the oil industry through acquiring shares of other corporations.[16] In so holding, the Court noted that the Sherman Act could not have meant to make unlawful every contractual restraint on trade—rather, the Act's absence of a definition of "monopoly" meant that Congress envisioned that an individual's right

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10. *Id.* at 282–83.

11. *Id.* at 290; *see also id.* at 281–82 (noting six exceptions at common law and listing cases).

12. *See id.* at 281–94.

13. *See, e.g.*, HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 54–55 (arguing that Judge Taft's reliance on state law in reaching his overall conclusion was misplaced: "Taft's interpretation of common law decisions to distinguish between 'naked' and 'ancillary' restraints was little more than indication that covenants not to compete should continue to be analyzed by a rule of reason under the federal antitrust law.").

14. *See id.* at 56–59.

15. *Id.* at 57 ("[F]ollowing the great merger wave, the United States became deeply involved in merger policy—a concern that has not subsided to the present day.").

16. 221 U.S. 1, 60 (1911).

to contract included some monopolistic behavior.[17] Indeed, the rule-of-reason analysis expressly cautioned against applying per se illegality, but rather required courts to "call[] into play [the judgments in every case] in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act."[18]

The Court continued the robustness of the rule of reason in *United States v. American Tobacco Co.*, which similarly dealt with American Tobacco Company's acquisition of several subsidiaries.[19] The Court enthusiastically upheld the use of the rule of reason because application of the rule "prevent[ed] that act from destroying all liberty of contract and all substantial right to trade, . . . which, on the very face of the act, [the Act] was enacted to preserve."[20] Critically, in applying the rule, however, the monopoly status of American Tobacco was not dispositive to a rule-of-reason analysis.[21] Rather, the Court considered a multitude of factors, including the pre-contractual context of the acquisitions (which was a series of trade wars), the intent of the parties involved, the purposeful creation of barriers to entry, and more.[22] Undoubtedly, this analysis provided the courts with more experience in engaging economic and market-oriented arguments.[23]

Both *Standard Oil* and *American Tobacco* stressed that the purposes of the parties and effects of the contract were critical to any rule-of-reason analysis. Indeed, a critical reading of both cases suggests that both were prototypical *Lochner* era cases that granted unbridled discretion to the liberty of contract.[24] The Court muddled that

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17. *Id.* at 60–62 ("[T]he omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly . . . .").

18. *Id.* at 63.

19. 221 U.S. 106, 142–43 (1911).

20. *Id.* at 180.

21. *Id.* at 181–82 ("Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established . . . .").

22. *Id.* at 181–84 (listing factors).

23. Indeed, the *American Tobacco* Court stressed its comprehensive and "independent" review of the record. *Id.*

24. The work of Professor Alan J. Meese examines the role of liberty-of-contract analysis in early antitrust case law. *See* Alan J. Meese, *Farewell to Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 466 n.20 ("While *Dr. Miles* reflected an ignorance of the possible economic benefits of vertical restraints, it seems unlikely that the decision accorded "liberty from contract" or "trader

narrative, however, through its decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[25] In that case, Dr. Miles Medical Company, a drug manufacturer, indiscriminately contracted with several drug wholesalers to sell its drugs at certain minimum prices.[26] One of those wholesalers sold Dr. Miles's drugs below the contractual rate, and Dr. Miles sought relief.[27] In sharp contrast to the libertarian compositions of the Court in *Standard Oil* and *American Tobacco*, where the Court took a largely deferential and expansive view of long-term contracts,[28] the *Dr. Miles* Court took a much more myopic view. Overtly denouncing the wholesaler agreements as unreasonable restraints on trade,[29] the *Dr. Miles* Court noted, "Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, *but upon agreement*."[30] Accordingly, the Court constrained its analysis to the wholesaler agreement itself.

In so finding, the Court rejected a rule-of-reason analysis and found the contracts void regardless of any beneficial effects.[31] As the Court

freedom" any independent normative significance."). *See generally* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 (1999).

25. 220 U.S. 373, 374 (1911).

26. *Id.* at 374–75.

27. *Id.* at 381–82.

28. *See, e.g.*, *American Tobacco*, 221 U.S. at 181 (distinguishing between a legal right to contract and an illegal right to devise a monopoly); *Standard Oil*, 221 U.S. at 51–56 (examining English antitrust law and finding that the antecedents to and influences on the Sherman Act covered unreasonable restraints "outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto").

29. 220 U.S. at 405 ("Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales.").

30. *Id.* (emphasis added).

31. For the Court, once the products as issue in the contracts entered the "channels of trade," the contract seized to be in effect. *See id.* at 408. Analysis of "whether [the products being contracted for] were produced by several manufacturers or one" or "whether [those products] were previously owned by one or by many" was irrelevant. *Id.* at 408–09. Rather, so long as the contract was for a sale of goods, "the public [wa]s entitled to whatever advantage may be derived from competition in the subsequent traffic." *Id.* at 409. In this way, *Dr. Miles* can be viewed as consistent with the Court's contemporaneous Commerce Clause jurisprudence that forbade restraints on traditional "channels" of commerce. *See, e.g.*, Houston, E. & W. Tex. R.R. Co. v. United States (*Shreveport Rate Cases*), 234 U.S. 342, 354 (1914) ("The use of *the instrument of interstate commerce* in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention." (emphasis added)); So. R.R. Co. v. United States, 222 U.S. 20 (1911) (holding that Congress had the power to regulate intrastate vehicles for safety reasons because of the "practical considerations"

analyzed, "But agreements or combinations between dealers, having for *their sole purpose the destruction of competition and the fixing of prices*, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer."[32] Thus, by 1911, the Court established an early dichotomy in long-term vertical contracting. Vertical mergers, and presumably other non-price, vertical agreements, underwent a rule-of-reason analysis to consider the economic realities of the contract. In contrast, vertical pricing agreements, more commonly known today as resale price maintenance (RPM), were per se illegal.[33]

C. Expansion of Federal Antitrust Policy

Antitrust law continued to expand in the half century following the 1911 trilogy of cases. Congress enacted the Clayton Act and the Federal Trade Commission Act in 1914, enhancing the public and private enforcement of the Sherman Act. [34] Judicially, the Court continued its moderate approach to vertical mergers, as well as its strict enforcement of vertical RPM through the 1920s.[35] By the mid-1930s, however, the

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that "the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others"); *cf.* Warren S. Grimes, *The Seven Myths of Vertical Price Fixing: The Politics and Economics of a Century-Long Debate*, 21 SW. U. L. REV. 1285, 1287–88 (1992) (arguing that *Dr. Miles* holding was initially "limited" and that its "greater impact came after the Court interpretations expanded the Commerce Clause's reach").

32. 220 U.S. at 408 (emphasis added).

33. Still, the initial scope of *Dr. Miles* was unclear at the time. *See* Grimes, *supra* note 31, at 1288; Michael D. McKibben, Note, *A Resale Price Maintenance Compromise: A Presumption of Illegality*, 38 VAND. L. REV. 163, 169–70 (1985). Eight years later, the Court decided *United States v. Colgate & Co.*, where it held, citing pre-*Dr. Miles* decisions, that the Sherman Act does not "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. 300, 307 (1919); *see also* McKibben, *supra* note 33, at 170 ("If the Court had employed the . . . logic that it used in *Dr. Miles*, *Colgate* would have been an inconsequential extension of the *Dr. Miles* progeny. . . . [Instead,] the Court created an exception to the per se rule."). Moreover, in 1926, the Court decided *United States v. General Electric Co.*, in which the Court distinguished from *Dr. Miles* a case in which a manufacturer instructed its agents to charge certain prices. 272 U.S. 476, 486–88 (1926). Thus, prior to the Great Depression, *Dr. Miles* seemed to be the exception to the Court's general acquiescence to long-term vertical contracting.

34. Clayton Antitrust Act, 15 U.S.C. § 12 *et seq.* (2012); Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* (2012).

35. *See, e.g.*, United States v. S. Pac. Co., 259 U.S. 214, 232 (1922) (holding that merger between Central Pacific and Southern Pacific Railroads violated the Sherman Act); United States v. U.S. Steel Corp., 251 U.S. 417, 457 (1920) (holding that a consolidation of steel companies into one steel conglomerate did not violate the Sherman

Roosevelt administration aggressively pursued what it saw as abuses in antitrust law.[36] Most pertinent to this analysis, the administration successfully litigated cases of vertical integration and horizontal collusion.[37] Specifically, in *Interstate Circuit, Inc. v. United States*, the Court found that a tacit non-compete agreement between competing movie theaters constituted an unlawful conspiracy.[38] The Court found the absence of a written agreement irrelevant.[39] Rather,

> [i]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.[40]

Similar to the *Interstate Circuit* reasoning, the Court in *United States v. Socony-Vacuum Oil Co.* condemned as per se unlawful the policy of price-posting.[41] Socony-Vacuum, among others, sold large portions of its oil reserves to several defendant oil companies at a competitive spot price.[42] The subsequent stockpiling caused an increase in retail gas prices, as well as a dip in quantity of barrels.[43] The Court found the spot-pricing agreement to constitute an unlawful restraint on trade and refused to entertain any arguments about the reasonability of the defendants' actions or the effect on the market.[44] In so holding, the

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Act).

36. *See* HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 58. President Roosevelt's ambitious head of the antitrust division at the Department of Justice, Thurman Arnold, pursued much of the expansionary antitrust policy. *Id.*

37. *Id.*

38. 306 U.S. 208, 232 (1939).

39. *Id.* at 226–27.

40. *Id.* at 227.

41. 310 U.S. 150, 223–24 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

42. *Id.* at 165–68.

43. *Id.*

44. *Id.* at 220–22. The Court was almost poetic in its defense of the per se rule for price-fixing conspiracies:

> [S]uch defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman

Socony-Vacuum Court rejected a rule-of-reason analysis.[45] Foreseeing a potent criticism to the rule of reason (and standard-based judicial rules in general), the Court presciently noted:

> [I]n the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival [economic] philosophies.[46]

Indeed, the market structure was largely irrelevant to the *Socomy-Vacuum* Court. What mattered was that the agreement, at its heart, temporarily fixed prices and had a detrimental effect on consumers.[47]

Thus, the per se rule flourished during the New Deal and World War II antitrust cases.[48] Such ubiquitous condemnation, however, came at the expense of judicial economic analysis, as the criticism in *Socony-Vacuum* made clear.[49] This problem was particularly acute in the

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> Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Id. at 220–21.

45. *Id.* at 213 ("Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.").

46. *Id.* at 213–14 (quoting United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927)).

47. In this way, *Interstate Circuit* and *Socony-Vacuum* are consistent with *Dr. Miles*. *Compare Socony-Vacuum*, 310 U.S. at 191 ("In essence the raising and maintenance of the spot market prices were but the means adopted for raising and maintaining prices to jobbers and consumers."), *with* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 394 (1911) ("[Dr. Miles's plan's] purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies."). *See also* Julian Chung, Note, *The Robinson-Patman Act Sections 2(D) and 2(E): Promotional Allowances and the Per Se Rule of Illegality*, 16 Cardozo L. Rev. 1795, 1828 (1995) ("[T]he [*Dr. Miles*] Court reasoned that the dealers' agreements with Dr. Miles to adhere to the same resale price was the functional equivalent of a horizontal agreement between the dealers themselves . . . .").

48. *See* HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 58.

49. *Socony-Vacuum*, 310 U.S. at 213–14. Critics of the *Socony-Vacuum* progeny fall into several camps, but some argue that judicial opinions should account for extralegal, particularly economic, considerations. *See generally* Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977) (arguing that understanding an economic

vertical RPM cases, which courts continued to subject to uncritical analysis.[50] The end result of the judicial hostility to economic theory, and its paranoia toward vertical schemes, was a policy-driven, overzealous antitrust policy, which reached its apex under the Warren Court.

D. *The Peak of Federal Antitrust Policy in the Warren Court*

Antitrust policy during the 1960s was animated by a hostility toward large businesses and judicial protection for small businesses.[51] Under the Warren Court, antitrust law and per se condemnation saw its largest expansion since the New Deal.[52] Three cases showcase the remarkable breadth of the per se rule under the Warren Court: *Brown Shoe Co. v. United States*,[53] *United States v. Arnold, Schwinn & Co.*,[54] and *Albrecht v. Harold Co.*[55]

Beginning with the first, while not dealing with the per se rule or even the Sherman Act, *Brown Shoe Co.* is significant because of the Court's newfound suspicion of vertical mergers and its hesitance to apply a strict rule-of-reason analysis.[56] Brown Shoe Co., a large shoe

understanding of antitrust law could help inform legal battles in the courtroom).

50. *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 143–44 (1948) (finding minimum RPM in vertical contracts between movie distributors and movie theaters per se illegal); United States v. U.S. Gypsum Co., 333 U.S. 364, 387–89 (1948) (finding minimum RPM in licensor-licensee contracts "sufficient to establish a prima facie case of conspiracy").

51. Many scholars have noted the Warren Court's preference for "social and political concerns" over market efficiency. *See, e.g.*, Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 430–31 (1988) (finding that populist views of antitrust were prevalent until the beginning of the Reagan administration); Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1196–1200 (1977) (noting that the underlying rationale of populist antitrust law was that "[w]holesale dissolution of firms that dominate[d] their industries would reduce concentration and work to achieve . . . small business equity").

52. Of course, evidence exists that both the lower courts and the Executive Branch also followed this same approach. *See, e.g.*, Elzinga, *supra* note 51, at 1196–97 (listing lower court and administrative cases that dissolved dominant firms in concentrated industries); Lande, *supra* note 51, at 431 n.6 ("Competition policy must sometimes choose between greater efficiency, which may carry with it the promise of lower prices, and other social objectives, such as the dispersal of power, which may result in marginally higher prices." (quoting M. Pertschuk, Chairman, Fed. Trade Comm'n, Remarks at the Eleventh New England Antitrust Conference, Boston, MA 10 (Nov. 18, 1977))).

53. 370 U.S. 294 (1962).

54. 388 U.S. 365 (1967).

55. 390 U.S. 145 (1968).

56. 370 U.S. at 296–97. *Brown Shoe Co.* dealt with a violation of the Clayton Act,

manufacturer, attempted to merge with one of the largest shoe retailers in the country.[57] However, the Court found the vertical merger contrary to congressional intent to stop "a rising tide of economic concentration."[58] Furthermore, the Warren Court did not require any direct evidence of monopolistic conduct or intent, like the Courts in *Standard Oil* and *American Tobacco*.[59] Instead, the Court required a much lower burden of proof: whether the effect of the merger "may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country."[60] Under such a standard, authorized by Congress in 1950 in Section 7 of the Clayton Act, virtually any large-scale vertical merger would likely not have passed statutory muster.[61]

Both *Albrecht* and *Schwinn* tackled the familiar judicial problems of

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which Congress amended in 1950 to make liable activity that "tend[ed] to create a monopoly." *Id.* (quoting 15 U.S.C. § 7 (2012)). Worth noting again is that "[t]he Supreme Court was not alone to blame" for its hostility toward vertical mergers. Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 865, 909–10 (2010) [hereinafter Hovenkamp, *Vertical Integration*]. As Professor Hovenkamp has argued:

> Brown Shoe represented a confluence of congressional, executive and judicial opinion. Congress had been concerned about the "rising tide of industrial concentration" and rewrote the merger provision in 1950 so as to make bigness for its own sake an offense. The government brought the case, which successfully challenged the acquisition as both a merger of competitors (both firms owned shoe stores) and as an acquisition by one manufacturer of another's retail shops.

Id. (footnote omitted).

57. *Brown Shoe Co.*, 370 U.S. at 297.

58. *Id.* at 315.

59. *Compare id.* at 333 ("[W]e consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress."), *with* United States v. American Tobacco, 221 U.S. 106, 181–83 (1911) ("[T]he history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid . . . ."), *and* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 82 (1911) (Harlan, J., concurring in part and dissenting in part) ("The evidence in this case overwhelmingly sustained that view . . . of the illegal combination between that corporation and its subsidiary companies.").

60. *Brown Shoe Co.*, 370 U.S. at 317 (quoting 15 U.S.C. § 7 (2012)).

61. *See* Hovenkamp, *Vertical Integration*, *supra* note 56, at 916 ("Because the only economic purpose of vertical integration is self-provision or self-distribution, the government's position was basically that vertical integration was legal *only if it made no economic sense to do so in the first place.*" (emphasis added)). Economists at the time also reflected the view that vertical integration was unjustifiable. *See id.* at 913–15 (finding that a leading Harvard industrial economist argued that vertical integration led to significant barriers to entry because new entrants would be competing with "firms operating at multiple production stages" (citing JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 142–66, 212 (1956))).

vertical price and non-price restraints, respectively.[62] Both Courts had little trouble finding the vertical restraints illegal.[63] In *Albrecht*, the Court condemned the practice of *maximum* resale price maintenance as anticompetitive.[64] In so holding, the Court relied on questionable economic arguments, including positing that maximum prices could be set well below what customers were willing to pay.[65] While questionable, the *Albrecht* decision represented the zenith of judicial hostility toward long-term pricing contracts. *Schwinn*, however, painted an even broader brush by outlawing per se vertical territorial agreements.[66] To the *Schwinn* Court, almost any vertical agreement, price or non-price, ought to be per se unlawful.[67] As the Court stated in

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62. Vertical price restraints occur where firms at different market positions (i.e., a manufacturer and a retailer) agree to "fix prices at one or both market levels at a set amount or within a prescribed range." WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:12 (2016). Non-price restraints are essentially the same but impose limitations on non-price activity, such as territory or exclusivity. *Id.* § 2:14.

63. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967); Albrecht v. Herald Co., 390 U.S. 145, 154 (1968).

64. *Albrecht*, 390 U.S. at 154. As the name suggests, maximum RPM is where a firms, generally a manufacturer and its distributors, agree to fix a maximum retail price. HOLMES & MANGIARACINA, *supra* note 62, § 2:12. For a history of the Court's treatment of maximum RPM, see generally James M. Fesmire, *Maximum Vertical Price Fixing from* Albrecht *Through* Brunswick *to* Khan*: An Antitrust Odyssey*, 24 SEATTLE U. L. REV. 721 (2001).

65. *Albrecht*, 390 U.S. at 152–53. Following the *Albrecht* decisions, many district courts struggled to determine whether an antitrust injury had actually occurred. *See* Fesmire, *supra* note 64, at 749–52 (listing cases); *cf.* Hovenkamp, *Vertical Integration*, *supra* note 56, at 907 (noting that in the 1970s, many antitrust cases were not brought by private parties but rather by the government presumably because little if any injury was suffered by a private party).

66. The territorial agreements in *Schwinn* involved agreements between Schwinn and its twenty-two distributors. 388 U.S. at 371. Schwinn assigned each distributor an exclusive territory and "instructed [each distributor] to sell only to franchised Schwinn accounts and only in their respective territories." *Id.*

67. *Id.* at 382 ("Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a per se violation of § 1 of the Sherman Act."). That is not to say that vertical territorial agreements *ought* not be subject to per se analysis. *See, e.g.*, Mark E. Roszkowski, *The Sad Legacy of* GTE Sylvania *and Its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 144–51 (1989) (analyzing, and ultimately finding unpersuasive, several pro-competitive justifications for vertical territorial restraints); Peter C. Carstensen & Richard F. Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justification For and Legal Analysis of Restricting Competition*, 1986 WIS. L. REV. 1. 67–70 (1986) (analyzing territorial agreements in the beer industry and finding that the justifications for such restraints are cartelistic behavior and price discrimination).

remanding the case:

> [U]pon remand, the decree should be revised to enjoin *any limitation upon the freedom of distributors to dispose of the Schwinn products*, which they have bought from Schwinn, where and to whomever they choose. The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers *upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products.*[68]

Thus, the Warren Court extended per se liability to the very outer bounds of contracting without any economic analysis. Firms were accordingly barred from contracting with horizontal competitors *and* vertical retailers in almost any capacity.

E. Rise of the Chicago School

The excesses of the Warren Court did not go unchecked, however. Revolutionized by economists at the University of Chicago, the aptly named Chicago School of Economics gained a foothold in the more conservative courts of the 1970s and 1980s.[69] The Chicago School had a distinctly libertarian streak and revived many pre-Great Depression neoclassical concepts with a renewed vigor.[70] Among its more prominent (and controversial) tenets was the idea of a self-correcting market and limited governmental intrusion in the marketplace.[71] As Herbert Hovenkamp notes: "The Chicago School antitrust scholar is likely to believe that courts should not intervene unless the economic case against a practice is so strong that all reasonable dissenting voices have been squelched. When in doubt, let the market take care of itself."[72] The Chicago School provided an analytical framework to counter the perceived overreaching of the Warren Court and also reinvigorated the role of economics in antitrust analysis.

Schwinn was the first to fall. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court expressly overruled the sweeping per se rule articulated in *Schwinn* and returned to a rule-of-reason analysis for vertical non-price agreements.[73] The Court justified its decision through

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68. *Id.* at 378 (emphases added).
69. *See* HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 59-71.
70. *See id.* at 62–64 (outlining ten basic principles of Chicago School economics).
71. *Id.*
72. *Id.* at 65.
73. 433 U.S. 36, 57–60 (1977).

a strong repudiation of the per se rule: "Per se rules of illegality are appropriate only when they relate to conduct that is *manifestly anticompetitive*."[74] Furthermore, the Court buttressed its return to the rule of reason through a strong, economic defense of vertical contracts.[75] To the Court, vertical contracts could be pro-competitive because of the resulting increases in inter-brand competition (competition between horizontally aligned firms, usually retailers).[76] Although intra-brand competition (competition between vertically aligned buyers and sellers) is inevitably reduced through vertical contracts, the likelihood of specialized retailers, additional product services, and efficiency gains in the manufacturing process convinced the Court that a rule-of-reason analysis was necessary to weigh anti- and pro-competitive effects.[77]

Furthermore, the Court through a series of decisions added several procedural hurdles for invocation of the per se rule. In *Monsanto Co. v. Spray-Rite Service Corp.*, the Court required plaintiffs to definitively show the existence of a price-fixing agreement—inferences were insufficient.[78] Moreover, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court continued to wither away the applicability of the per se rule to vertical contracts.[79] The Court not only utilized a rule-of-reason analysis when dealing with non-price restraints, it established a presumption in favor of rule-of-reason analysis in such settings.[80] The Court also drew a sharp, formalistic distinction between horizontal and vertical agreements—horizontal agreements were the product of competitors whereas vertical agreements were the product of

74. *Id.* at 49–50 (emphasis added).

75. *Id.* at 51–57.

76. *Id.* at 56–57; *see also infra* Section III.B.3.

77. *GTE Sylvania*, 433 U.S. at 54–55 ("Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." (citing Richard Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975))).

78. 465 U.S. 752, 763–64 (1984) (further noting that the evidence needed to "tend[] to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.").

79. 485 U.S. 717, 735–36 (1988).

80. *Id.* at 726 (drawing from both *GTE Sylvania* and *Monsanto*).

firms at different market positions.[81] This distinction was significant to the Court because "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."[82] Thus, the Court not only imposed procedural hurdles for vertical-contract litigation, it also laid the groundwork for excluding facially horizontal agreements from the per se analysis altogether.

Although the robustness of the Chicago School's effect cannot be overlooked, the Court did limit its influence to an extent. In *Arizona v. Maricopa County Medical Society*, in which a ring of doctors agreed to fix maximum medical prices to insurance policyholders, the Court refused to adhere to strict Chicago School ideology, instead finding that horizontal, price-fixing agreements were per se illegal.[83] Although the Court did justify the per se rule through economic rationales, rather than policy ones, the Court still saw a need for government intervention in areas that posed a serious threat for patently anticompetitive behavior.[84]

F. Modern Antitrust Law in the Post-Chicago Era

Modern antitrust law has largely continued to erode the underpinnings of the Warren Court's decisions by recognizing the economic vitality of vertical contracts. In *State Oil Co. v. Khan*, the Court formally overruled *Albrecht*, finding that maximum RPM had a significant potential for increased inter-brand competitive effects, and further that "the antitrust laws' primary purpose is to protect inter-brand competition."[85] Thus, the only remaining vertical contract subject

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81. *Id.* at 729–30; *see also id.* at 730 n.4.
82. *Id.* at 730 n.4.
83. 457 U.S. 332, 336-37, 347–38 (1982).
84. *Id.* at 348. ("The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'" (quoting James Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U. L. REV. 137, 142 (1962))). The Court went on to find that the doctors' conspiracy violated the per se rule, not because of any policy-driven concern, but rather because of the economic ramifications of the agreement:

> In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

Id.
85. 522 U.S. 3, 7 (1997).

to per se condemnation following the *Khan* decision was minimum RPM, which had been near universally outlawed for almost a century.

In 2007, however, the Court surprised many legal observers by expressly overruling *Dr. Miles*.[86] In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court saved minimum RPM from per se illegality, finding that the potential pro-competitive effects could outweigh the anti-competitive effects.[87] The Court articulated several, familiar benefits of minimum RPM, including: (1) Vertical price restraints can stimulate inter-brand competition by decreasing intra-brand competition; (2) RPM can give consumers more options by offering high-cost, high-quality options and low-cost, low-quality options; (3) Discounting retailers can free ride on high-quality retailers absent vertical price restraints; and (4) Vertical price restraints can also facilitate the market entry for new firms.[88] Although the Court also cautioned that minimum RPM could facilitate cartels at one or more market levels and lead to abusive practices by dominant players, the *Leegin* Court stressed the significance of a rule-of-reason analysis.[89] To the Court, the rule of reason was a necessary ingredient to a proper antitrust analysis: "As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[90]

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86. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881 (2007); *see also* Stephen Labaton, *Justices End 96-Year-Old Ban on Price Floors*, N.Y. TIMES (June 29, 2007), http://www.nytimes.com/2007/06/29/business/28cnd-bizcourt.html; Debra Cassins Weiss, *Court Permits Price Agreements*, ABA JOURNAL (June 28, 2007, 08:20 PM), http://www.abajournal.com/news/article/court_reconsiders_price_fixing_precedent/; Zachary Weil, *Supreme Court Overturns Century-Old Precedent*, LAW360 (June 27, 2007, 12:00 AM), https://www.law360.com/articles/28117/supreme-court-overturns-century-old-precedent.

87. *Leegin*, 551 U.S. at 881.

88. *Id.* at 889–92. These rationales, along with others, are well-studied and well-cited. *See, e.g.*, Alan J. Meese, *Assorted Anti-*Leegin *Canards: Why Resistance is Misguided and Futile*, 40 FLA. ST. U. L. REV. 907, 933–66 (2013) (defending the *Leegin* decision by using pro-competitive rationales to undermine traditional criticism of minimum RPM); Thomas A. Lambert, Dr. Miles *is Dead. Now What? Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937, 1950–60 (2009) (evaluating the several pro-competitive aims of vertical RPM). *See generally* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (asserting, without expressly saying so, that avoidance of transaction costs provides an incentive for firms to vertically integrate).

89. *Id.* at 892–94; *see also* Section III.A.2, *infra*.

90. *Id.* at 898.

III. ANALYSIS

A. *Apple's Price-Fixing Scheme*

Like all antitrust cases, *Apple* is highly fact sensitive and requires a thorough rehashing of the facts. The story begins in 2007 when Amazon released the Kindle, a device which could display electronic books, or "e-books."[91] Because Amazon was the first to market an e-book reader, it quickly dominated the nascent market for e-books, selling ninety percent of all e-books by November 2009.[92] To promote sales of the Kindle, Amazon purposefully priced all e-books sold on it at the below-market price of $9.99.[93] Because of Amazon's dominance in the market, by the time other e-book retailers entered the market, primarily Barnes & Noble with its Nook, they had no choice but to also charge $9.99.[94]

The $9.99 price point irked the publishers of print and electronic books. Six firms dominate the publishing industry—Hatchette and Hatchette Livre, HarperCollins, Macmillan, Penguin, Random House, and Simon and Schuster, known collectively as the Big Six.[95] The Big Six firms operated with retailers such as Amazon through wholesale agreements, whereby they would sell print and electronic books at an adjustable wholesale cost, often proportionate to the list price.[96] The retailer could then choose whatever list price it preferred.[97] For e-books, the Big Six firms offered a twenty percent discount on the equivalent print book wholesale cost.[98] By pricing at $9.99, Amazon priced its e-books at around its wholesale cost from the Big Six.[99] The Big Six firms feared this price point for several reasons. First, they worried that

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91. United States v. Apple, Inc. (*Apple I*), 952 F. Supp. 2d 638, 648–49 (S.D.N.Y. 2013).

92. *Id.* at 649; *see also id.* at 649 nn. 6, 7 (noting that the Nook was only released in November of 2009 and that few other competitors existed).

93. *Id.* ("Amazon was staunchly committed to its $9.99 price point and believed it would have long-term benefits for its consumers.")

94. *Id.*

95. *Id.* at 645, 647.

96. *Id.* at 649; *see also* Wan Cha, *A New Post-*Leegin *Dilemma: Reconciliation of the Third Circuit's* Toledo Mack *Case and the Second Circuit's Apple E-Books Case*, 67 RUTGERS U. L. REV. 1547, 1568 (2015) (noting that the Big Six's business model was "arguably an obsolete business model" because it never sold books directly to consumers (citing Ken Auletta, *Publish or Perish: Can the iPad Topple the Kindle, and Save the Book Business?*, THE NEW YORKER (Apr. 26, 2010), http://www.newyorker.com/magazine/2010/04/26/publish-or-perish)).

97. *Apple I*, 952 F. Supp. 2d at 649.

98. *Id.* (noting that such discount accounts for the fact that "no cost for the printing, storage, packaging, shipping, or return of e-books" exists).

99. *Id.* ("With a digital book discount, Amazon's $9.99 price point roughly matched the wholesale price of many of its e-books.").

Amazon's loss leading would accustom consumers to lower print book prices, thus lowering the publishing firms' profits in the long term.[100] Second, they further worried about their short-term profits, which they felt Amazon was eroding by providing customers with cheap, electronic alternatives to traditional print books.[101] Finally, the Big Six firms also feared that Amazon might leverage its monopolistic position in the e-book market to either ignore wholesalers[102] altogether or renegotiate its pre-existing wholesale agreements.[103]

The Big Six firms often worked collectively, refusing to compete with each other on price and often holding strategy meetings to deter industry threats.[104] The Big Six attempted several methods to persuade Amazon to change its loss leading strategy, none of which proved successful. First, the Big Six simply eliminated the twenty percent discount offered to Amazon, but that maneuver failed to deter Amazon from pricing at $9.99.[105] More ambitiously, the publishers attempted to collectively delay the release of the e-book for some months after the hardcover release of the same book, a practice known as "windowing."[106] While widely publicized,[107] windowing failed to persuade Amazon to budge on its price and may have actually hurt the Big Six firms by

100. *Id.*

101. *Id.* (noting that the publishers' hardcover books "were often priced at thirty dollars or more, and threatening the viability of the brick-and-mortar stores in which hardcover books were displayed and sold").

102. This process is known as disintermediation and there existed some evidence that Amazon intended to negotiate directly with authors, rather than go through a publisher. *Id.* at 649 n.8.

103. *Id.* The Big Six thought that Amazon represented such an existential threat to its way of doing business that one Big Six officer stated emphatically that the publishers had to "defeat Amazon's $9.99 pricing policy" and stop the "wretched $9.99 price point becoming a de facto standard." *Id.* at 649–50 (alterations omitted).

104. *Id.* at 651 ("[W]hile they were serious competitors, their preferred fields of competition were over authors and agents. Thus, they felt no hesitation in freely discussing Amazon's prices with each other and their joint strategies for raising those prices.").

105. *Id.* at 650.

106. *Id.* at 651–52. By December 2009, four of the Big Six engaged in windowing vis-à-vis Amazon, which the publishers knew required collective action to be effective. *Id.* ("That several Publishers synchronized the adoption and announcement of their windowing strategies was thus no mere coincidence.").

107. *See, e.g.*, Jeffery A. Trachtenberg, *Two Major Publishers to Hold Back E-Books*, WALL STREET J., http://www.wsj.com/articles/SB10001424052748704825504574584372263227740 (last updated Dec. 9, 2009, 12:01 AM); Motoko Rich, *Publishers Delay E-Book Releases*, N.Y. TIMES: ARTS BEAT (Dec. 9, 2009, 4:12 PM), https://artsbeat.blogs.nytimes.com/2009/12/09/publishers-delay-e-book-releases/?_r=0.

encouraging piracy and lowering overall sales for windowed books.[108]

Enter Apple. By the end of 2009, Apple was poised to unveil its new iPad, a multipurpose tablet that could support communication, third-party applications, and productivity tools.[109] The iPad, however, did not have e-reading capabilities, like Amazon's Kindle or Barnes & Noble's Nook.[110] Planning to launch the iPad in January 2010, Apple determined to release the tablet with a fully functional e-reader, which would be known as the iBookstore.[111] After researching several options, Apple determined that the most expedient and profitable way to enter the e-book market was through the Big Six, and, accordingly, to force Amazon to raise its e-book prices.[112] Spearheaded by its Senior Vice President of Internet Sales, Eddy Cue ("Cue"), Apple first met with the Big Six on December 15, 2009.[113] At this meeting, Apple assured the Big Six that it did not intend to enter the e-book market as a loss leader, to which the publishers enthusiastically welcomed.[114] To this end, Apple first decided to use an agency model, in which the publishers would set the list price for all e-books, but Apple would receive thirty percent of the profits.[115] However, Apple quickly realized that Amazon's $9.99 problem would still pose a problem because the publishers would inevitably price the e-books above $9.99.[116]

To counteract this problem, Apple, again spearheaded by Cue, engineered two solutions. First, it negotiated price caps with the publishers between $12.99 and $14.99, depending on the list price of the

108. *Apple I*, 952 F. Supp. 2d at 653. As Macmillan's CEO put it,

> "[w]indowing is entirely stupid," and "actually makes no damn sense at all really." As a Penguin study showed, when a Publisher delayed the release of e-books, its sales never recovered. The lost customers neither bought the print book at a higher price nor returned to purchase those e-books when they finally became available.

Id.

109. *Id.* at 654.

110. *Id.*

111. *Id.* at 654–55.

112. *Id.* (noting that a business outlook prepared by Apple showed that selling e-books as apps was "flawed," and further noting that Apple needed a quick solution by November 2009 for a January 2010 launch).

113. *Id.* at 655–56.

114. *Id.* at 656–58 (noting that Apple also told the Big Six that it opposed windowing and wanted to lower the publishers' wholesale costs on many titles).

115. *Id.* at 659 ("Apple settled on an agency model with a 30% commission, the same commission it was using in its App Store. Agency would give the Publishers the control over e-book pricing that they desired, and ensured that Apple would make a profit from every e-book sale in its iBookstore without having to compete on price.").

116. *Id.* ("While Apple was willing to raise e-book prices by as much as 50% over Amazon's $9.99, it did not want to be embarrassed by what it considered unrealistically high prices.").

hardcover equivalent of the e-book.[117] Second, and perhaps most critically to the subsequent litigation, Apple negotiated a most-favored-nation ("MFN") clause in all of its agency agreements with the publishers.[118] Essentially, "[t]he MFN guaranteed that the e-books in Apple's e-bookstore would be sold for the lowest retail price available in the marketplace."[119] Thus, any publisher that signed the agency agreement would be forced to renegotiate its wholesale agreement with Amazon—else, all e-books on the iBookstore would sell at $9.99 and the publishers would be left with a hardened duopoly and no long-term control over pricing.[120]

After intense negotiations,[121] all but Random House agreed to Apple's agency agreements with agreed upon price caps and MFN clauses (collectively "publisher defendants").[122] By late January, the publisher defendants began negotiations with Amazon to switch their wholesale agreements to agency agreements, keeping each other informed of their bargaining positions with Amazon.[123] Cue also kept close tabs on the publisher defendants to ensure their success in negotiating Amazon's switch to agency.[124] Amazon, believing that it could not hold out against five of the Big Six, began agreeing to agency agreements with the five publishers.[125] As evidence of the publisher defendants' collusive conduct, one of Amazon's officers testified:

> [W]henever Amazon "would make a concession on an important deal point," it would "come back to us from another publisher asking for the same thing or proposing similar language." For example, when Amazon agreed with one Publisher Defendant to forego any promotional activity in exchange for assurance that it would never be disadvantaged on price, it received a call the

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117. *Id.* at 661–62. The publishers were not entirely happy with this price point and wanted greater leverage over the price, especially for hardcovers over thirty dollars. *Id.* at 660–61.

118. *Id.* at 662.

119. *Id.*

120. *Id.* at 662–63 (noting that the MFN was an "elegant solution").

121. While not a focal point of the litigation presumably because "although the Publisher Defendants were able to negotiate around the edges, none of the material terms of the contract changed," the negotiations between Apple and the Big Six were heated. *Id.* at 664-670.

122. *Id.* at 669–70 (finding that the final agreements included provisions with price caps up to $19.99).

123. *Id.* at 670–73.

124. *Id.*

125. *Id.* at 673.

> next day from another saying, "so I understand . . . you're willing to forego promotions."[126]

The effect on the e-book market was swift and dramatic. The Second Circuit surmised the result perhaps the best, noting:

> Based on data from February 2010—just before the Publisher Defendants switched Amazon to agency pricing—to February 2011, an expert retained by the Justice Department observed that the weighted average price of the Publisher Defendants' new releases increased by 24.2%, while bestsellers increased by 40.4%, and other ebooks increased by 27.5%, for a total weighted average ebook price increase of 23.9%. Indeed, even Apple's expert agreed, noting that, over a two-year period, the Publisher Defendants increased their average prices for hardcovers, new releases, and other ebooks.
>
> Increasing prices reduced demand for the Publisher Defendants' ebooks. According to one of Plaintiffs' experts, the publishers who switched to agency sold 77,307 fewer ebooks over a two-week period after the switch to agency than in a comparable two-week period before the switch, which amounted to selling 12.9% fewer units. Another expert relied on data from Random House to estimate how many ebooks the Publisher Defendants who switched Amazon to agency would have sold had they stayed with the wholesale model, and concluded that the agency switch and price increases led to 14.5% fewer sales.
>
> Significantly, these changes took place against the backdrop of a rapidly changing ebook market. Amazon introduced the Kindle in November 2007, just over two years before Apple launched the iPad in January 2010. During that short period, Apple estimated that the market grew from $70 million in ebook sales in 2007 to $280 million in 2009, and the company projected those figures to grow significantly in following years.[127]

Thus, e-book prices rose and produced quantities dropped, two critical indicators for lessened competition.[128] Even more alarming was

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126. *Id.* at 681.

127. United States v. Apple, Inc. (*Apple II*), 791 F.3d 290, 310 (2d Cir. 2015) (internal footnotes and citations omitted).

128. ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 4 (2d ed. 2008) ("[W]here a firm . . . gains a significant amount of control over the market price, . . . social

the fact that e-book prices rose while the e-book market quadrupled in size. One would normally have expected lessening prices as new firms enter the profitable market and increase competition.[129]

B. District Court's Analysis

The district court analyzed Apple's price-fixing scheme by making a threshold determination that characterized Apple as "a vertical player [that] participates in and facilitates a horizontal conspiracy."[130] In so doing, the court implicitly discounted Apple's role as solely a vertical supplier to the publisher defendants.[131] Such a determination was critical to the court's analysis because it allowed the court to rely on *Interstate Circuit* and its progeny,[132] which have a much more expansive scope of anticompetitive behavior.[133]

Accordingly, the court articulated the proper burden of proof as follows: "[P]laintiffs must demonstrate both that a horizontal conspiracy existed, and that the vertical player was a knowing participant in that agreement and facilitated the scheme."[134] To prove the existence of a horizontal conspiracy, the Government needed to "present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."[135] Because evidence showing horizontal conspiracies tends to be ambiguous, "a plaintiff 'must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.'"[136] Likewise, a successful plaintiff must "present evidence that is sufficient to allow the fact-finder 'to infer that the conspiratorial explanation is more likely than

welfare will fall below its maximum feasible level as the monopolist restricts output in order to sustain the higher price and the profits that go with it.").

129. *Id.* at 19 (noting that new firms would be drawn to a profitable market resulting in increased supply and decreased consumer prices).

130. *Apple I*, 952 F. Supp. 2d at 690.

131. *See id.*

132. *Id.* at 690–91.

133. *See supra* Section I.C.

134. *Apple I*, 952 F. Supp. 2d at 690–91 (citing Toys "R" Us v. Fed. Trade Comm'n, 221 F.3d 928, 936 (7th Cir. 2000); Interstate Circuit v. United States, 306 U.S. 208, 225–29 (1939)).

135. *Id.* at 689 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)); *see also id.* (noting that horizontal conspiracies "tend to form in secret," and that proof of such unlawful conspiracies often "require[s] a factfinder to draw inferences to reach a particular conclusion" (citation omitted)).

136. *Apple I*, 952 F. Supp. 2d at 689–90 (quoting Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)).

not.'"[137]

Having articulated a plaintiff's burden of proof, the district court determined that the Government proved that Apple "forcefully facilitated" publisher defendants' horizontal price-fixing conspiracy.[138] Tackling the evidence of the horizontal conspiracy first, the court found "overwhelming evidence" of its existence.[139] The court then spent considerable time analyzing the evidence that Apple facilitated the horizontal conspiracy. First, the court focused on Apple's knowledge of the publisher defendants' frustration with Amazon's $9.99 price point, and its subsequent opportunistic behavior.[140] Specifically, the court noted that "Apple won [publisher defendants'] rapt attention," and in so doing, "understood that it was setting the new retail prices at which e-books would be sold" by negotiating higher price caps for e-books.[141] Thus, "Apple convinced the Publisher Defendants that Apple shared their goal of raising e-book prices, and helped them to realize that goal."[142]

Second, the court honed in on the onerous terms the MFN provisions imposed on the publisher defendants, which induced the publishers' collective action in forcing Amazon to switch to an agency model.[143] The court found that "[t]he economics of the [MFN provisions] were . . . 'terrible' for the Publishers," and that the publishers "would be in significantly worse terms financially" if they failed to renegotiate

137. *Id.* at 690 (further noting that parallel conduct among horizontal parties "alone cannot suffice" without the presence of "plus factors," which include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators," "evidence of a high level of interfirm communications," the "use of facilitating practices like information sharing," "abrupt shift[s] from defendants' past behavior and near-unanimity of action[s] by several defendants," and "complex and historically unprecedented change[s] in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason." (citations and internal quotation marks omitted)).

138. *Id.* at 691.

139. *Id.* In terms of the requisite plus factors, *see supra* note 8 and accompanying text, the Court seemed to rely most heavily on the publisher defendants common motive to conspire. *See id.* ("[The publisher defendants] *shared a common motivation*: the elimination of the 'wretched' $9.99 retail price that Amazon, the chief distributor of their e-books, chose for many of their New Releases, including NYT Bestsellers." (emphasis added)).

140. *See id.* at 691–92 (finding that Apple "was fully aware that the Publishers were adamantly opposed to Amazon's $9.99 price point and were actively searching for an effective means . . . to pressure Amazon to raise its prices" and Apple "[knew] full well . . . that the Publisher Defendants wanted to raise e-book retail prices significantly above the $9.99 price point").

141. *Id.* at 692.

142. *Id.*

143. *Id.* at 692–93.

agency relationships with Amazon.[144] Critically, the court found that the MFN provisions not only induced parallel conduct among the publisher defendants, but also collective conduct because the publishers could only unhinge Amazon from its superior pricing position if they *all* renegotiated their contracts with Amazon.[145] Indeed, the court found that as further inducement for collective conduct, Apple "promised each Publisher Defendant that it was getting identical terms in its Agreement in every material way."[146] The promise of collective action served as a safeguard against an individual publisher unilaterally raising its e-book prices irrespective of the other publishers, and further assured that "the Publisher Defendants understood that each of them shared the same set of risks and rewards."[147]

Finally, having analyzed the substantive means that Apple employed, the court found substantial circumstantial evidence that Apple facilitated the horizontal conspiracy through its procedural methods.[148] According to the court, Apple hastened the collective action by setting "its own internal deadline," which achieved the price-fixing conspiracy "in a matter of weeks."[149] The court further articulated several other procedural advantages that Apple employed, along with the relevant circumstantial evidence that showed the plus factors of an unlawful conspiracy:

> [E]ach of the Publisher Defendants shared the identical goal to raise the $9.99 price point to protect its physical book business; the agency Agreements represented an "abrupt shift" from the past model for the distribution of e-books; the Publisher Defendants each demanded that Amazon adopt this new model within days of each other; the agency model protected Apple from price competition; the rise in trade e-book prices to or close to the price caps established in the Agreements was large and

144. *Id.* at 692.

145. *Id.* ("[U]nless the Publisher Defendants joined forces and together forced Amazon onto the agency model, their expected loss of revenue would not be offset by the achievement of their ultimate goal: the protection of book value.").

146. *Id.*

147. *Id.* at 692–93.

148. *Id.* at 693–94, 693 n.59 (focusing on "the *ways* in which the publisher defendants' frequent discussion are relevant" to the Court's analysis, including "the pattern of their coordination in meetings and telephone calls" (emphasis added)).

149. *Id.* at 693 (additionally pointing to evidence that Apple pressured the publisher defendants in accordance with this deadline by "remind[ing] th[e] Publisher Defendant[s] that Apple's entry into the market represented a once-in-a-lifetime opportunity to eliminate Amazon's control over pricing.").

> essentially simultaneous; in adopting a model that deprived each of them of a stream of expected revenue from the sale of e-books on the wholesale model, the Publisher Defendants all acted against their near-term financial interests; and each of the Publisher Defendants acted in identical ways even though each was also afraid of retaliation by Amazon.[150]

After providing an extensive list of circumstantial evidence, the district court concluded that not only had the Government proven its case by a preponderance of the evidence but also through "compelling direct and circumstantial evidence."[151] Accordingly, the court concluded that Apple's behavior constituted a per se violation of the Sherman Act and did not need to continue the analysis under the rule of reason.[152]

Apple vigorously disputed the characterization that it facilitated a horizontal conspiracy.[153] Presenting several counterarguments to the trial court, Apple first argued that the Supreme Court's decisions in *Monsanto* and *Matsushita* required the Government to prove that Apple had no "legitimate, independent business reasons for executing the [a]greements with the Publisher Defendants."[154] Specifically, Apple argued that the Government "must present evidence that tends to exclude the possibility that the alleged conspirators acted

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150. *Id.* at 693–94 (citing Toys "R" Us v. Fed. Trade Comm'n, 221 F.3d 928, 935–36 (7th Cir. 2000); PepsiCo., Inc. v. Coca-Cola Co., 315 F.3d 101, 110 (2d Cir. 2002)).

151. *Id.* at 694 (citing Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 346–47 (1982); *Toys "R" Us*, 221 F.3d at 936). It is unclear what the Court meant by this statement; presumably it was analogizing to the district court's reasoning in *Toys "R" Us*, rather than intonating that Plaintiffs proved their case by clear and convincing evidence. *Compare id.*, *with Toys "R" Us*, 221 F.3d at 935 (noting that substantial circumstantial evidence, including abrupt shifts from past behavior and direct evidence of interfirm communication, "present[ed] a more compelling case for inferring horizontal agreement than did *Interstate Circuit*").

152. *Apple I*, 952 F. Supp. 2d at 694 (concluding that "Plaintiffs would also prevail" under a rule-of-reason analysis). The district court further discounted Apple's evidence of pro-competitive effects on the market, including the beneficial effects of the iPad and iBookstore, because both parties "defined the relevant market as trade e-books," not the overall publishing and tablet market. *Id.* at 694, 694 n.60. Furthermore, for the Court, the evidence clearly showed a lower quantity of e-books in the market, along with a concomitant increase in overall e-book prices. *Id.*

153. Apple presented six arguments at various points throughout the trial. This Note will only analyze the most significant arguments, as many of Apple's contentions are duplicate or derivative arguments.

154. *Id.* at 696. Apple offered several legitimate, independent business reasons for its actions, including successfully entering into a nascent e-books market without sustaining losses, avoiding windowing, and successfully and logically negotiating with multiple publishers in accordance with standard business practices. *Id.* at 698.

independently."[155] In response, the district court limited the Supreme Court's "tends to exclude" language as a recitation of the familiar preponderance-of-the-evidence standard. As the district court stated,

> [t]he Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer that the conspiratorial explanation is more likely than not.[156]

Thus, the court concluded that the Government needed only to prove that Apple's facilitation of a horizontal conspiracy was the most likely explanation based on the "totality of the evidence."[157] The evidence, taken individually, was not per se unlawful, as the court noted, "the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is [not] inherently illegal."[158] Rather, the evidence, taken collectively, from Apple's negotiations to the launch of the iBookstore, showed a common scheme to raise e-book prices, thus foreclosing the likelihood that any of Apple's purported legitimate, business reasons were the more likely explanation for the collective action.[159]

Apple next proffered two derivative arguments: first, that it never intended to raise e-book prices, and second, that it ended windowing in the e-book market through its entry.[160] While the court did not discount

155. *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)).

156. *Id.* at 697 (quoting *In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012)); *see also In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655–56 (7th Cir. 2002) (finding that the critical inquiry is whether "it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices"); PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 14.03(b), at 14–25 (4th ed. 2011) (discussing the Court's holding in *Matsushita*, "the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not"), *quoted in Publ'n Paper*, 690 F.3d at 63.

157. *Apple I*, 952 F. Supp. 2d at 698–99 ("The totality of the evidence leads inextricably to the finding that Apple chose to join forces with the Publisher Defendants to raise e-book prices and equipped them with the means to do so.")

158. *Id.* at 698 ("Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers. Lawful distribution arrangements between suppliers and distributors certainly include agency arrangements. It is also not illegal for a company to . . . negotiate with all suppliers at the same time, or share certain information with them.").

159. *Id.* at 698–99.

160. *Id.* at 699–702.

Apple's putatively noble intentions, it concluded that such intentions did not preclude its greater intent to raise e-book prices. "Apple's desire to create a profitable iBookstore on a superior e-reader does not obliterate the abundant record evidence that Apple made a commitment to act as the Publisher Defendants' partner in raising e-book prices materially above $9.99."[161] The court likewise found that although Apple's intent behind the MFN provisions may very well have been self-preservation, another intent behind such provisions was "forc[ing] the Publishers to convert all of their e-book distribution arrangements to agency arrangements and to raise e-book prices."[162] As to its admirable intention of preventing windowing, the district court found no evidence that the publisher defendants would have engaged in windowing but for Apple's entry into the market.[163]

Perhaps most pertinent to its appeal, Apple argued that it was a vertical supplier vis-à-vis the publisher distributor and, thus, a finding of per se illegality would contravene the Supreme Court's central holding in *Leegin*.[164] The district court dismantled this argument by noting that, while Apple was not involved in a "traditional 'hub and spokes' conspirac[y]," it "directly participated in a horizontal price-fixing conspiracy."[165] Implicitly, the court found the relationship between Apple and the publisher defendants to be an informal hub-and-spokes conspiracy, where Apple was neither horizontally aligned with the publishers, nor was it the dominant player in the publishing market.[166] Such a critical assumption undergirds the court's finding that the pertinent inquiry was not the dominance of any one player in the relevant market, but whether the hub was aware of the conspiracy and the spokes consented to that conspiracy.[167] Given the overwhelming

161. *Id.* at 700.

162. *Id.* at 700–01.

163. *Id.* at 701–02 (noting that the publishers "realized that the delayed release of e-books was a foolish and even dangerous idea," presumably because it "encouraged piracy and posed an existential threat to the legitimate e-book industry"). Apple additionally advanced an argument that the Government mischaracterized the evidence, and that the evidence was insufficient to find that Apple formed a conspiracy. *Id.* at 702–06. The Court relied on much the same evidence that this Note has analyzed in discounting these evidentiary arguments. *Id.*

164. *Id.* at 706–07. The district court characterized the *Leegin* holding as subjecting "vertical restraints . . . to review under the rule of reason," *id.* at 706, and went on to characterize Apple's relationship with the publisher defendants as "at root, a horizontal price restraint." *Id.* at 707 (quoting *In re* Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 685 (S.D.N.Y. 2012)).

165. *Id.* at 706–07 (citing Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010)).

166. *See id.* at 690, 706–07; Cha, *supra* note 96, at 1573.

167. *See Apple I*, 952 F. Supp. 2d at 707.

evidence that both Apple and the publisher defendants knew and affirmatively acted toward the end of fixing prices in the e-book market, the district court had little trouble concluding that Apple deserved per se condemnation.[168]

Thus, the district court found that Apple violated Section 1 of the Sherman Act because it had facilitated a horizontal conspiracy. Critical to its analysis was its finding that Apple's relationship with the publisher defendants was best analogized to the *Interstate Circuit* line of cases. Such a finding allowed the district court to evade the Supreme Court's prescription for dealing with antitrust violations among vertical suppliers—applying the rule-of-reason analysis—and instead rely solely on the per se rule. This judgment served as the crux of the subsequent appeal, as well as the outcry of several attendant amici.

C. *The Appeal to the Second Circuit*

1. Apple's Arguments on Appeal

Shortly after the district court's decision, Apple filed an appeal to the Second Circuit. In its brief, Apple maintained that the district court's central assumption—that Apple was the center of an informal hub-and-spokes conspiracy—was fundamentally flawed.[169] Furthermore, Apple argued that the district court's per se treatment of its activity was legally erroneous, pursuant to the Supreme Court's decision in *Leegin*.[170]

Beginning with the former argument, Apple characterized the district court's opinion as outlawing otherwise legal and pro-competitive activity. Specifically, Apple noted that it did not enter the e-book market intending to raise prices, but rather had the legitimate business purpose of dislodging a monopolistic loss leader from its position so that it could profit from its iBookstore.[171] Because agency agreements with

168. *Id.* Apple also advanced a related policy argument that finding Apple liable for antitrust violations would have a chilling effect on contracts between vertical suppliers and horizontal distributors. *Id.* at 707–08. The district court dismissed this argument by again noting that it was not finding any individual provision or contract that Apple made illegal, *id.* at 708, and that "antitrust laws were enacted for 'the protection of *competition*, not *competitors*,'" *id.* at 709 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); *see also supra* Section I.D.

169. Brief for Petitioner-Appellant Apple, Inc. at 15–46, United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) (Nos. 13–3741–cv, 13–3748–cv, 13–3783–cv, 13–3857–cv, 13–3864–cv, 13–3867–cv).

170. *Id.* at 46–59.

171. *Id.* at 21–23.

the attendant MFN provisions and negotiated price caps, which Apple described as "[t]he lynchpin of the district court's conspiracy ruling," are not illegal, Apple argued that the district court's holding was baseless.[172] Given that vacuum of evidence, Apple concluded that the district court found liability solely because of price increases for e-books following Apple's entry into that market.[173] But as Apple noted, price increases are not automatic evidence of illegal conspiracies, nor are they necessarily anti-competitive:

> The district court did not cite a single case finding a conspiracy where an agent merely enabled its principal to raise price or unwittingly facilitated others' joint conduct. In fact, the Supreme Court has specifically *warned against* assuming that "actions violate the Sherman Act because they lead to higher prices." Such actions are commonplace and normally benign because "prices can be increased in the course of promoting procompetitive effects." Indeed, the possibility of earning higher prices is "an important element of the free-market system" that "induces risk taking that produces innovation and economic growth."[174]

Furthermore, Apple distinguished its behavior from those of the "hub" defendants in *Interstate Circuit* and *Toys "R" Us*, noting that those defendants "had preexisting market relationships that gave them choke-holds over the alleged horizontal conspirators."[175] In contrast, Apple entered a market based on publicly available knowledge that Amazon engaged in loss leading[176] and without any pre-existing

172. *Id.* at 20–21. Apple further argued that simultaneous discussions of price levels "do not transform market entry via lawful agreements into unlawful price-fixing," particularly in the post-*Monsanto* era. *See id.*; *Monsanto*, 465 U.S. at 762 ("[T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are [in a conspiracy with vertical suppliers]").

173. Brief for Petitioner-Appellant Apple, Inc., *supra* note 169, at 23–25 ("When Apple entered the market, there was *no* history of retail price competition: Amazon 'dominated' the market and was setting a uniform loss-leader price for the publishers' most important titles, suppressing interbrand competition.").

174. *Id.* at 23 (internal citations omitted).

175. *Id.* at 25–26 (further noting that the district court "attempted to squeeze this case into the hub-and-spokes line of cases").

176. *See, e.g.*, Holly Sanders Ware, *Re-Kindle-ing sales*, N.Y. POST (Oct. 8, 2009, 4:00 AM), http://nypost.com/2009/10/08/re-kindle-ing-sales/ ("[B]ook publishers are chafing at Amazon's one-price-fits-all structure, where every book is $9.99"); Brad Stone, *Simon & Schuster to Sell Digital Books on Scribd.com*, N.Y. TIMES (June 11, 2009) http://www.nytimes.com/2009/06/12/technology/internet/12books.html; Motoko Rich, *Steal*

relationships with the Big Six.[177]

Next, Apple advanced an evidentiary argument, essentially rehashing its "tends to exclude" argument at the trial level.[178] Apple argued that "[t]he district court blinded itself to the ambiguity in the evidence," and, in so doing, applied an incorrect legal standard.[179] According to Apple, because the district court found evidence of legitimate, business interests, the court was too quick to find Apple liable for antitrust violations.[180] Had the court taken a more deliberate approach, according to Apple, it would have found, at best, highly ambiguous direct and circumstantial evidence of facilitating a horizontal conspiracy.[181] Furthermore, Apple pointed to convincing economic analysis that showed the MFN provisions to be much less onerous than the district court characterized.[182] As Apple's experts noted, because of Apple's negligible market share in the publishing market and because the MFN provisions only applied to a subset of titles, the economic impact of enforcement of the MFN provisions on the publishers would have been relatively minor.[183] As one of Apple's experts put it, the "economic effects of the Apple MFN on publishers [were] so demonstrably small that it is an economic fiction to claim that such effects compel[led] or control[led] publisher conduct vis-à-vis Amazon."[184]

Apple's second prong in its assault on the district court's opinion was the court's disregard for the Supreme Court's holding in *Leegin* and

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This Book (for $9.99), N.Y. TIMES (May 16, 2009), http://www.nytimes.com/2009/05/17/weekinreview/17rich.html?_r=0.

177. Brief for Petitioner-Appellant Apple, Inc., *supra* note 169, at 25–26.

178. *See id.* at 29–30.

179. *Id.* at 31.

180. *Id.* at 32–33 (arguing that the district court was "required to hesitate" after substantiating Apple's legitimate, business interests according to *Monsanto* and its progeny).

181. *Id.* at 34–45. Indeed, Apple points to numerous pieces of evidence, such as testimony from Apple and Big Six executives that disputed the existence of a conspiracy as well as acrimonious negotiations between Apple and the publisher Defendants over the MFN provisions. *Id.* at 36–37, 42. Apple further drew a distinct contrast between its case and *Monsanto* and *Publication Paper*, where there was direct evidence of a bargained-for exchange for price increases and direct testimony from a co-conspirator of price increases, respectively. *Id.* at 35–38; *Monsanto*, 465 U.S. at 765; *In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 64 (2d Cir. 2012).

182. Brief for Petitioner-Appellant Apple, Inc., *supra* note 169, at 43–44 (additionally chastising the district court for ignoring proper economic analyses and "conduct[ing] no objective evaluation of the MFN 'penalty' theory").

183. *Id.*

184. *Id.* at 44 (alteration in original) (quoting Affidavit of Dr. Benjamin Klein at 720 ¶ 5).

its adoption in other circuits.[185] Apple argued that the *Leegin* Court "expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious," and expressly forbade per se condemnation in cases of vertical price restraints.[186] According to Apple, the district court failed to adopt the *Leegin* rule because Apple's contracts with the Big Six "were *vertical* agreements that in no way set prices or otherwise limited competition among the (horizontal) publishers, and are therefore governed by the rule of reason."[187] That the relationship between Apple and the publisher defendants resembled a hub-and-spokes conspiracy was of no moment to Apple—indeed, as Apple argued, several other circuit courts adopted the *Leegin* rule in similar situations.[188] Predictably, Apple concluded its argument by pointing out the benefits its vertical agreements had on the publishing market, namely ending Amazon's price monopoly, introducing an alternative and innovative e-reader and e-retailer, and ending the threat of windowing.[189]

2. *Amici* Arguments on Appeal

In addition to Apple's brief, several *amici* filed briefs on Apple's behalf. Several industrial economists filed the first *amicus* brief, arguing that the district court overlooked several critical economic arguments, and that its holding would adversely affect a vertical supplier's contracting ability with horizontal distributors.[190] Critical to the economists' argument was the notion that agency agreements, with MFN provisions and price caps, can lead to competition.[191] According to

185. *Id.* at 47–53.

186. *Id.* at 47–48 (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887 (2007)); *see also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–52 (1977) (noting vertical restrictions' "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition").

187. Brief for Petitioner-Appellant Apple, Inc., *supra* note 169, at 48–49 (citing *Leegin,* 551 U.S. at 907; State Oil Co. v. Khan, 522 U.S. 3, 17–18 (1997); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 730 (1988)).

188. *See, e.g.*, Gorlick Distrib. Ctrs., L.L.C. v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1025 (9th Cir. 2013); *In re* Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012); Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008).

189. Brief for Petitioner-Appellant Apple, Inc., *supra* note 169, at 51–53.

190. Brief for Economists as Amici Curiae Supporting Petitioner-Appellants Apple, Inc. at 1–2, United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) (Nos. 13–3741–cv, 13–3748–cv, 13–3783–cv, 13–3857–cv, 13–3864–cv, 13–3867–cv).

191. *Id.* at 3–15. Indeed, the economists argued that Apple's freedom to contract agency agreements was critical to market efficiency. *Id.* at 3–6 ("Firms' pursuit of their

the economists, Amazon's sole presence in the e-book market stifled competition because it made the market prohibitively expensive for new entrants.[192] Thus, Apple needed certain downside protections to ensure that it would "run a profitable e-book retail platform" without "losing money on e-book sales."[193] These downside protections took shape in three forms: the MFN provisions, the negotiated price caps, and agency agreements.

All three, according to the economists, stimulate the entry of new competitors, irrespective of higher consumer prices. "[T]he MFN clauses allowed Apple to address a dynamic in the e-book retailing sector that otherwise would have made successful entry virtually impossible."[194] That dynamic was Amazon's loss-leading strategy that allowed it to price its e-books at supra-competitive prices. Likewise, "[t]he price caps . . . were a device to promote Apple's independent business interest in protecting itself against prices set by publishers that would reduce e-book sales below Apple's profit-maximizing level . . . ."[195] Apple carried out the MFN provisions and the price caps through the agency agreements, which the economists describe as mutually beneficial for both parties: "Apple was able to give publishers greater control over pricing, while at the same time ensuring Apple a predictable margin over its wholesale price."[196] In short, the means Apple employed were in line with its reasonable business interests because those means protected Apple from a market with unrealistically low prices.

The economists further argued that failure to overturn the district court's decision would "stifle procompetitive behavior."[197] To the economists, Apple's means were pro-competitive because it spurred investment and dislodged an entrenched monopolist.[198]

> Tools such as agency agreements, MFNs, and price caps can spur the challenger firms to make the required investments by helping the challenger address market conditions and divergent

independent business self-interests is the engine that makes markets work efficiently, to the benefit of competition and consumers.").

192. *Id.* at 5–6.

193. *Id.* at 9–10.

194. *Id.* at 10.

195. *Id.* at 13.

196. *Id.* at 14–15.

197. *Id.* at 20–21 (noting that courts' interference with legitimate business interests "risks becoming a mechanism for stifling, rather than promoting, vigorous competition" (citing William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985))).

198. *Id.* at 20–22.

> trading partner incentives *that could otherwise inhibit investments in entry—especially in the face of an entrenched competitor with monopoly power.* These contracting techniques—particularly when coupled with an agency model—enable market entry that might otherwise be unprofitable or too risky. In those circumstances, agency agreements, MFNs, and price caps can drive competition and innovation.[199]

The economists noted that their model was not simply theoretical in nature, pointing to "real-world evidence that condemning [Apple's] mechanisms ha[d] lessened rivalry in U.S. e-book retailing."[200] That evidence was the experience of Kobo, "a small e-book retailer."[201] Following the district court's decision and subsequent enforcement, Kobo experienced declining revenues, it stopped marketing in the United States, and it closed its Chicago location.[202] This real-world evidence was telling to the economists: without certain downside protections for putative entrants into a monopolistic market, the monopolist could not be challenged.[203] On the other hand, facilitating such protections has the upshot of dislodging the monopolist and allowing smaller firms, like Kobo, to compete.

The Washington Legal Foundation (WLF)[204] also filed an *amicus* brief in support of Apple.[205] Without rehashing the same arguments as

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199. *Id.* at 21–22.

200. *Id.* at 22.

201. *Id.* at 22–23 (further noting that more established retailers like Sony and Barnes & Noble had either pulled out of the e-book market altogether or experienced heavy losses).

202. *Id.*

203. *Id.* at 23–24 ("[A]ntitrust laws should encourage new entry. Indeed, this Court has affirmed time and again the social value of challenges to entrenched dominant firms: '[P]ossession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; . . . immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; . . . the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.'" (alteration in original) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945))).

204. WLF is a Washington, D.C.-based legal think tank. Its mission is to "preserve and defend America's free-enterprise system by litigating, educating, and advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law." *WLF Mission*, WASH. LEGAL FOUND., http://www.wlf.org/org/mission.asp (last visited Mar. 1, 2017).

205. Brief of Washington Legal Foundation as Amicus Curiae in Support of Appellant Apple, United States v. Apple, 791 F.3d 290 (2d Cir. 2015) (Nos. 13–3741–cv, 13–3748–cv, 13–3783–cv, 13–3857–cv, 13–3864–cv, 13–3867–cv). WLF is well-known for filing *amicus* briefs in high-profile litigation involving large businesses. *See, e.g.*, Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 4148648; Brief of Washington Legal

above, WLF argued that the per se rule was a limited one and cautioned against "pigeonhol[ing Apple's] case into the horizontal price-fixing category."[206] Further, WLF argued that the courts had hardly considered whether switching from wholesale models to agency models were anticompetitive; thus, the district court should have used a rule-of-reason analysis to determine anticompetitive economic effects.[207] Likewise, WLF found the district court's cursory analysis of the rule of reason to be wanting because of its failure to consider several pro-competitive effects—specifically, ending windowing and Amazon's below-cost pricing.[208]

D. The Second Circuit's Decision

In essence, the Second Circuit doubled down on the district court's decision. Analyzing through the lens of Section 1 of the Sherman Act, the circuit court concluded that Apple created a conspiracy with the publisher defendants, and further determined that that conspiracy alone was an unreasonable restraint on trade.

Beginning with the court's first conclusion, the Second Circuit determined that Apple not only facilitated a conspiracy among the publisher defendants, but rather "consciously orchestrated a conspiracy among the Publisher Defendants."[209] Pointing to much the same evidence that the district court relied upon, the circuit court characterized Apple as "a sophisticated negotiator" that was "fully aware" that its contracts would induce collective action and raise e-book prices.[210] The court noted a handful of evidence that implicated Apple's awareness, or at the very least its confidence, that prices in the e-book market would rise, including Cue's testimony that the MFN clauses

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Foundation as Amicus Curiae in Support of Petitioner, Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (No. 14-857), 2015 WL 4512206; Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner, Omnicare, Inc. v. Laborers' Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015) (No. 13-435), 2014 WL 2734948.

206. Brief of Washington Legal Foundation, *supra* note 205, at 17–18.

207. *Id.* at 18–19. WLF also argued, formalistically, that the switch between models was "price indifferent" because the models themselves did not force retailers to raise prices. *Id.*

208. *Id.* at 20–23. WLF furthered its argument by noting that the district court's failure to consider such factors violated the Court's holding in *GTE Sylvania, see supra* notes 73–77 and accompanying text, by failing to "careful[ly] 'weigh all the circumstances.'" Brief of Washington Legal Foundation, *supra* note 205, at 20–21 (alteration omitted).

209. *Apple II*, 791 F.3d 290, 316 (2d Cir. 2015).

210. *Id.* at 317.

"forced" the publisher's shift to the agency model, Apple's CEO's confidence in predicting the iBookstore's successful launch, and Apple's collective knowledge that the Big Six detested Amazon's $9.99 price point.[211] To the Second Circuit, this evidence was more than sufficient to prove "more likely than not" that Apple had effectuated a conspiracy to raise e-book prices.[212]

Responding to Apple's myriad of counterarguments, the court found none of the arguments persuasive. To Apple's contention that its bargaining tactics were shrewd "aikido move[s]," the court responded that Apple acted with a "conscious commitment to the goal of raising e-book prices."[213] Furthermore, even if Apple acted within its own independent interests, "'independent reasons' can also be 'interdependent,' and the fact that Apple's conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices."[214] The court likewise dismissed the possibility of conscious parallelism, finding that a factfinder could easily infer that Apple and the publisher defendants acted in concert, noting the "near-simultaneous signing of Apple's Contracts with multiple publishers" and the "constant communication regarding the[] negotiations with both Apple and Amazon."[215]

The court further recast Apple's evidentiary argument as "explaining how each piece of evidence standing alone is 'ambiguous'

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211. *Id.*

212. *Id.* at 315–16 (quoting *In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012)).

213. *Id.* at 317. Indeed, evidence of "a common scheme to achieve an unlawful objective" is one of the plus factors giving rise to an inference of horizontal conspiracy. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

214. *Apple II*, 791 F.3d at 317–18 (citing AREEDA & HOVENKAMP, *supra* note 156, § 14.03(b), at 14–25).

215. *Id.* at 318. Conscious parallelism is where "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007) (alterations in original) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)). As Apple's argument suggests, conscious parallelism is not illegal. *See id.*; HOLMES & MANGIARACINA, *supra* note 62, § 2:6 & nn.6–7.

Courts have struggled to define the borderline between lawful parallelism and unlawful conspiracy. *See, e.g.*, White v. R.M. Packer Co., 635 F.3d 571, 578–80 (1st Cir. 2011) (finding that four gas stations on Martha's Vineyard did not collude to raise retail gasoline prices by "an average of fifty-six cents per gallon" despite evidence of joint lobbying to keep new gas stations out of Martha's Vineyard, joint discussions on price, and loans between the gas stations); *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 627–28 (7th Cir. 2010) (discussing activities that are both sufficient and insufficient for proof of parallel behavior). *See generally* Julia Shamir & Noam Shamir, *Colluding Under the Radar: Achieving Collusion Through Vertical Exchange of Information*, 63 CLEV. STATE L. REV. 621 (2015).

and therefore insufficient to support an inference of conspiracy."[216] The court dismissed this piecemeal approach because it was legally bound to view the record as a whole in antitrust cases.[217] Given that restraint, the court surmised:

> Combined with the unmistakable purpose of the Contracts that Apple proposed to the publishers, and with the collective move against Amazon that inevitably followed the signing of those Contracts, the emails and phone records demonstrate that Apple *agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition.[218]

Moreover, the Second Circuit found the policy arguments articulated by the several amici unpersuasive. While the court admitted that MFN clauses were not per se illegal, it found that the presence of MFN clauses, in light of the larger scheme to conspire, buttressed its holding that Apple orchestrated a horizontal price-fixing conspiracy.[219] The court further signaled its disapproval of MFN clauses, noting that "under the right circumstances, an MFN can facilitate anticompetitive horizontal coordination by reducing a company's incentive to deviate from a coordinated horizontal arrangement."[220] Thus, to the court was unconcerned with the potential pro-competitive effects of Apple's entry into the e-book market—rather the means Apple employed demonstrated a commitment to the anti-competitive end of raising "consumer facing e-book prices."[221]

Despite a finding of conspiracy, a conspirer does not violate the Sherman Act unless the conspiracy effectuated an "unreasonable restraint on trade."[222] As Part II discussed and the Second Circuit echoed, courts employ two tests to determine unreasonable restraints

216. *Apple II*, 791 F.3d at 319.

217. *Id.* (citing Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)).

218. *Id.*

219. *Id.* at 319–20 ("[I]t is well established that vertical agreements, lawful in the abstract, can in context 'be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel . . . .'" (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007))).

220. *Id.* at 320 (internal quotation marks and alterations omitted) (quoting Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses,* 64 ANTITRUST L.J. 517, 520–21 (1996)).

221. *Id.*

222. 15 U.S.C. § 1 (2012).

on trade: the per se rule and the rule of reason.[223] Noting that most restraints utilize rule-of-reason analysis, the court deftly found that "some restraints 'have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*.'"[224] Building from this point, the court noted that horizontal price-fixing conspiracies are the "archetypal example" of per se unlawfulness.[225] Thus, the Second Circuit laid the groundwork for classifying Apple as a horizontally aligned hub with its Big Six spokes.[226]

In classifying Apple as a hub, the Second Circuit relied on two critical analytical distinctions. First it steadfastly refused to focus on the formalistic positioning of firms in the marketplace for antitrust analysis.[227] To the court, Apple's vertical position vis-à-vis the publisher defendants was irrelevant—rather it was the functional effect of the overall restraint placed on the marketplace.[228] Thus, because the restraint was the focal point of the analysis, the court treated all defendants, regardless of market positioning, similarly in the presence of an anticompetitive and horizontally manufactured restraint on trade. Or as the court put it, "[t]he competitive effects of th[e] *same restraint* are no different merely because a different conspirator is the defendant."[229] Second, the court bifurcated Apple's means of achieving its conspiracy from its ultimate objective of raising e-book prices, finding only the latter significant in antitrust analysis.[230] As the court stated, "the relevant agreement in restraint of trade in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher

223. *See supra* Part II.

224. *Apple II*, 791 F.3d at 321 (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

225. *Id.* (quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980)).

226. Indeed, the court was careful to note the distinction between vertical price restraints and hub-and-spokes conspiracies, noting that the Supreme Court had often crafted an exception to the rule of reason in the presence of a hub-and-spokes conspiracy. *Id.*

227. *See id.* at 323 ("[T]he reasonableness of a restraint turns on its anticompetitive effects, and *not the identity of each actor who participates in imposing it* . . . ." (emphasis added)).

228. *Id.* at 322 ("It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating 'whether [a] *restraint* is unreasonable,' not the reasonableness of a particular defendant's role in the scheme." (alteration in original) (quoting Atl. Richfield Co. v. U.S. Petroleum Co., 495 U.S. 328, 342 (1990))).

229. *Id.* at 323.

230. *Id.*

Defendants to raise ebook prices."[231] In so finding, the court harmonized decades of Supreme Court decisions—so long as a vertical player had the ultimate objective of effectuating an anti-competitive end through the use of a horizontal cartel, a court could safely classify that vertical player as a hub directing its spokes.[232] In bifurcating Apple's means from its ends, the court largely avoided the lawfulness of MFN clauses, as these were merely means in an otherwise unlawful conspiracy.[233]

Given those analytical distinctions, the Second Circuit determined that the district court was quite right in condemning Apple's conspiracy as per se unlawful.[234] Still, the court also engaged in a "quick look" rule-of-reason analysis, likewise finding Apple liable under that analysis as well.[235] In accordance with the approach, which the court described as "shift[ing] the rule-of-reason analysis directly to Apple's procompetitive justifications for organizing the conspiracy," namely dislodging a monopolistic loss leader and eventual competitiveness in the e-book

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231. *Id.* (internal quotation marks omitted).

232. *Id.* at 323–25. The court found that the Supreme Court has "explicitly distinguished situations in which a vertical player organizes a horizontal cartel" and cited a long line of cases, including *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988), which found vertical *non-price* restraints evaluable under the rule of reason, and *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 130 (1998), which distinguished, in dicta, between vertical suppliers that make agreements with horizontal retailers and vertical suppliers that organize a horizontal cartel. *Apple II*, 791 F.3d at 323–24. Perhaps most critically, the Second Circuit also harmonized its analysis with *Leegin*, noting that the Supreme Court's analysis was

> careful to distinguish between vertical restraints and horizontal ones. Vertical price restraints are unfit for the *per se* rule because they can be used to encourage retailers to invest in promoting a product by ensuring that other retailers will not undercut their prices for that good. However, vertical price restraints can also be used to organize horizontal cartels to increase prices, which are, "and ought to be, *per se* unlawful."

Id. at 324 (internal citations omitted) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887, 890–93 (2007)).

233. *See id.* at 325 ("How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant.").

234. Such came over vociferous objection from Apple that its conspiracy did not actually lead to long-term price increases or decreased quantity output. *Id.* at 328. The court responded that courts were not required to conduct market analyses, nor was Apple any less liable for antitrust violations if its intentions to raise e-book prices were not fully realized. *Id.* Furthermore, the court noted that Apple's evidence was not inconsistent with an alternative explanation: "[t]he popularization of ebooks fundamentally altered the publishing industry by eliminating many of the marginal costs associated with selling books." *Id.*

235. *Id.* at 329–30 (additionally noting that the quick look inquiry shifts the burden to a defendant to prove pro-competitive effects). The concurrence did not join in the court's quick look analysis, finding per se condemnation sufficient to find Apple liable. *Id.* at 340–41 (Lohier, J., concurring).

market.[236] Beginning with the former pro-competitive justification, the court dismissed the notion that price increases inexorably lead to new market entry.[237] Convincingly citing *Catalano, Inc. v. Target Sales, Inc.*, the court argued that if Apple's argument was taken to its logical conclusion, "it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack."[238] That Amazon was charging supra-competitive prices was of no moment to the Second Circuit—Apple was not entitled to enter the e-book market on profitable terms[239] nor was it solely responsible for wrestling concentrated market power away from Amazon.[240] Even so, recognizing that there are situations where supra-competitive prices can prevent competition, the court implied that Amazon's situation was not one of these situations because there was no demonstrated "dangerous probability" that Amazon would "later recoup its losses by raising prices to monopoly levels after driving its rivals out of the market."[241] Furthermore, the pro-competitive effects of Apple's iPad coming fully equipped with a functional iBookstore was superfluous to the Second Circuit's analysis.[242] As the court found:

> The technological innovations embedded in the iPad are similarly unrelated to Apple's agreement with the Publisher Defendants. The iPad's backlit touchscreen, audio and video capabilities, and ability to offer consumers a number of services

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236. *Id.* at 330, 334 (majority opinion).

237. *Id.* at 330–31.

238. *Id.* (quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649 (1980)).

239. *Id.* at 331–32. The court noted that "Apple had no entitlement to enter the market on its preferred terms." *Id.* at 331. Rather, Apple, like any putative market entrant, needed to face the dilemma of supra-competitive prices:

> The posited dilemma is the whole point of competition: if Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay *more* than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market.

Id. at 331.

240. Indeed, the court noted that if Apple felt that Amazon was charging supra-competitive prices, its proper recourse was with the Antitrust Division of the Department of Justice, which may have taken up the case under Section 2 of the Sherman Act. *Id.* at 332; *see also id.* at 340–41 (Lohier, J., concurring) ("I am persuaded that permitting marketplace vigilantism, would do far more harm to competition than good, would be disastrous as a policy matter, and is in any event not sanctioned by the Sherman Act." (internal quotation marks omitted)).

241. *Id.* (majority opinion). The court further argued that supra-competitive prices can be justifiable because of the risk to the loss leader that it may not be able to recoup those losses. *Id.*

242. *Id.* at 334–35.

> on a single device revolutionized tablet computing. But, as Apple's witnesses testified, the company had every intention of bringing the iPad to market with or without the iBookstore.[243]

Thus, the majority concluded that none of Apple's pro-competitive rationales justified its horizontal collusion with the publisher defendants. That holding meant that not only had Apple flunked the per se rule, but also failed to adequately show any pro-competitive effects to its market entry. Accordingly, the Second Circuit affirmed the district court's decision.

The dissent sharply disagreed with the majority's analysis, honing in principally on the majority's application of the per se rule.[244] Staging the backdrop of Apple's market entry as a landscape in which a predatory loss leader dominated ninety percent of the market,[245] the dissent found that Apple deserved the heightened scrutiny of the rule of reason, which would have shifted the burden to the Government to show that Apple's conspiracy was anti-competitive.[246] The dissent characterized the majority's argument as outdated and relying principally on pre-*Leegin* case law;[247] *Leegin*, to the dissent, signaled a clear preference for rule-of-reason analyses in the presence of vertical price restraints.[248] The dissent pointed to *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, a Third Circuit decision with a similarly situated vertical player, which applied the rule-of-reason analysis without much debate.[249] Thus, "[t]he majority's holding in this case therefore creates a circuit split, and puts [the Second Circuit] on the wrong side of it."[250]

Applying the rule-of-reason analysis, the dissent focused on viable alternatives for Apple, or any competitor, trying to enter the e-book

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243. *Id.* at 335.

244. *Id.* at 345 (Jacobs, J., dissenting) ("The district court's principal legal error, from which other errors flow, is its conclusion that Apple violated § 1 under the *per se* rule.").

245. *See id.* at 342–45.

246. *Id.* at 345 (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

247. *Id.* at 347 & n.3 ("[T]he majority cites seven cases that pre-date *Leegin*" and proceeding to list those cases).

248. Indeed, the dissent drew a sharp contrast with the majority's function-over-form approach, noting that *Leegin* showed that "the vertical nature of the agreement is its salient feature" and further noting that "the influence of a vertical arrangement on a horizontal cartel (on another plane of competition) does not render the vertical arrangement *per se* unlawful." *Id.* at 346.

249. *Id.* at 346–47 (citing Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008)).

250. *Id.* at 347.

market. To the dissent, "[T]he rule of reason must take account primarily of the deconcentrating of the e-book retail market,"[251] and the Government must show that less restrictive means existed for Apple to "achieve[] the same competitive benefits."[252] The dissent deciphered three methods in which Apple could have entered the e-book market, none of which were viable in fact or in policy.[253] Under the first theory, Apple could have entered the e-book market at the same supra-competitive prices charged by Amazon, which would have had the functional effect of creating a market duopoly.[254] Under the second theory, Apple could have entered the market charging prices higher than those offered by Amazon, which would have led to lost profits and negative branding.[255] Under the third theory, Apple could have asked the Department of Justice to investigate Amazon for monopolistic pricing, but the Department likely already considered this alternative given that Amazon's loss leading was publicly known and presumptively "good for consumers."[256] Thus, Apple had no viable alternatives to enter the market, signaling that the Government could not construe its activities as fundamentally anti-competitive.

Both the district and circuit court covered much ground in analyzing Apple's putative liability under the Sherman Act. The district

251. *Id.* at 350 (citing Eleanor M. Fox, *Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices*, *in* INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM 137, 149 (Eleanor M. Fox & James T. Halverson eds., 1979)).

252. *Id.* (citing Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.,386 F.3d 485, 507 (2d Cir. 2004)).

253. *Id.* at 351–52 ("The absence of alternative means bespeaks the reasonableness of the measures Apple took.").

254. *Id.* at 351 ("Antitrust law disfavors a durable duopoly nearly as much as monopoly itself." (citation omitted)). A duopoly is simply "an industry with two firms." BLAIR & KASERMAN, *supra* note 128, at 229 n.4. Duopolies can produce the same effects as single monopolies because each firm in a duopoly has an incentive, in the long-run, to accommodate rather than compete. *See id.* at 233–34. Note, however, that such is not the case in short-run analyses--firms in a duopoly face an incentive to cheat because the short-term profits from cheating are higher than those from colluding. *Id.* at 233. Because, however, "[f]irms do not have a natural life and, therefore, have at least an indefinite life," Judge Jacobs is quite right that corporate duopolies pose just as grave a risk as monopolies. *Id. But see, e.g.*, Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 88-89 (2015) (noting that a market duopoly is "often better than a monopoly" in telecommunication markets (citing Joseph Farrell, *Open Access Arguments: Why Confidence Is Misplaced*, *in* NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED? 195, 199–201 (Thomas M. Lenard & Randolph J. May eds., 2006)).

255. *Apple II*, 791 F.3d at 351–52 (further noting that this solution could have opened Apple up to other forms of antitrust liability if it used its iPad as an exclusive platform for Apple's e-books).

256. *Id.* at 352 ("[F]undamentally, litigation is not a *market* alternative.").

court found that Apple's liability hinged on the per se rule because Apple was a vertical player that facilitated a horizontal cartel in the context of an impliedly larger hub-and-spokes conspiracy. Even stronger, the Second Circuit found that Apple was liable under both the per se rule and rule of reason because Apple was the central hub that orchestrated the spokes to Act. Even stronger still, the concurrence found that only per se condemnation was necessary to find Apple liable. In contrast to other views, the dissent would have acquitted Apple entirely because Apple enacted vertical price restraints to break a formidable barrier to entry erected by Amazon. With such a diversity of opinion, this Note now turns to a proper evaluation of the Second Circuit's opinion.

IV. EVALUATION

Thus far, this Note has taken a largely objective approach in presenting the background and underlying facts and legal reasoning of the *Apple* opinions. Now, however, this Note turns to a critical evaluation of the Second Circuit's reasoning in light of antitrust precedent and economic analysis. Under both historic and economic scrutiny, the Second Circuit's decision to classify Apple's arrangement with the Big Six is questionable, if not incorrect. The global ramifications of the Second Circuit's decision remain to be seen, but the effect could be chilling on commonly used vertical contract terms.

Part IV proceeds in two parts. First, it tackles the persuasive force of the Second Circuit's arguments in light of the storied background of antitrust case law. The legal analysis answers two questions that were fundamental to the Second Circuit's reasoning: Was Apple a horizontal conspirator in a common scheme to fix prices or a vertically aligned firm engaged in long-term contracting? And, was the per se rule the proper analytical framework for this litigation? Part IV then turns to the economic force of the Second Circuit's arguments by tackling three distinct topics: (1) Amazon's monopoly, (2) Amazon's predatory pricing, and (3) Apple's vertical integration and RPM. Ultimately, Part IV concludes that the Second Circuit erred by failing to adopt a rule-of-reason analysis for Apple's conduct.

A. *Legal Analysis*

1. Horizontal or Vertical Price-Fixing

Both the district court and Second Circuit classified Apple as a

conspirator in a larger horizontal scheme to raise retail prices.[257] On its face, this classification seems incorrect. "Horizontal price-fixing occurs when firms *competing at the same market level* (e.g., a group of manufacturers or a group of distributors) agree to fix or otherwise stabilize the prices that they will charge for their products or services."[258] Apple and the Big Six were not competing at the same market level—the Big Six were distributors of books, whereas Apple hoped to retail those e-books.[259] This distinction is perhaps best shown through illustration. When a consumer logs onto, or "enters," the iBookstore on an iPad, that consumer can peruse the available e-books available for purchase. The e-books available are those provided by the Big Six to Apple—digitized versions of the Big Six's hard-cover books. Thus, the iBookstore is no different than a supermarket whereby consumers can peruse the aisles for available products provided by various manufacturers and distributors. The Big Six simply provided the products available for purchase on Apple's iBookstore.

Indeed, if Apple hoped to compete with the Big Six in *distributing* e-books, the record in the litigation does not bear it out.[260] Rather, Apple approached the Big Six hoping to enter a long-term engagement to retail e-books.[261] That both the Big Six and Apple shared the same goal of increased retail prices, as both the district court and the Second Circuit found,[262] does not render the pair horizontally aligned. Retailers

257. *See supra* Section III.D.

258. HOLMES & MANGIARACINA, *supra* note 62, § 2:11 (emphasis added); *see also* Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CAL. L. REV. 683, 690–95 (2011) (providing illustrations of common horizontal-cartel behavior and decision-making); Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 825–41 (2011) (discussing different types of cartel decision-making and the way in which those decisions are made).

259. *See supra* Part III; *see also* Auletta, *supra* note 96 (noting that the Big Six never meaningfully engaged in direct sales to consumers, unlike Amazon, but rather sold exclusively to bookstores). Needless to say, the record is replete with references to Apple's positioning in the e-book *retail* market. *See, e.g.*, *Apple I*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013) ("Apple did not want to compete with Amazon (or any other e-book retailer) on price . . . .").

260. Carrying out the same illustration in the previous paragraph, suppose a supermarket decided to manufacture its own generic brand of foodstuffs and then attempted to distribute those products to other supermarkets. Those foodstuffs would now be competing directly with the supermarket-turned-manufacturer's non-exclusive suppliers. Indeed, the record contains no evidence of Apple entering the e-book manufacturing or distribution market.

261. *See supra* Section III.A.

262. *Apple I*, 952 F. Supp. 2d at 647 ("Apple and the Publisher Defendants shared one overarching interest—that there be no price competition at the retail level."); *Apple II*, 791 F.3d 290, 327 (2d Cir. 2015) ("This control over pricing facilitated their ultimate goal of raising ebook prices . . . .").

and manufacturers often share the same goals, and vertical contracts help achieve those goals.[263] At least facially, these facts render the relationship between Apple and the Big Six a vertical one.[264]

Formalistic distinctions, however, do not end the analysis for purposes of the Sherman Act.[265] It is plausible that Apple, although vertically aligned vis-à-vis the Big Six, was the hub of a publishing cartel. Indeed, the Second Circuit used that theory to overlook Apple's market positioning, allowing it to rely on *Interstate Circuit* and its progeny.[266] Antitrust law has long struggled with the distinction between a horizontal price-fixing scheme induced by a horizontal competitor and one induced by a vertical competitor, often subjecting both to per se condemnation.[267] For example, in *Interstate Circuit,* which the dissent conceded supported the Second Circuit majority's decision, a group of movie distributors imposed a minimum price of forty cents on several movie theaters.[268] Prevailing prices at the time of

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263. Indeed, the Court in *Monsanto Co. v. Spray-Rite Service Corp.* noted that "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions." 465 U.S. 752, 762 (1984). Such could be because "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." *Id.*

264. *See* HOLMES & MANGIARACINA, *supra* note 62, § 2:11 ("'[H]orizontal' agreements are to be distinguished from the vertical forms of price fixing between firms at different levels of the market (e.g., manufacturer with distributor) . . . .").

265. Indeed, the Court has often found "facilitation of cartelization" to be a sufficient reason to find a vertical contract unlawful. *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726 (1988). The *Leegin* Court suggested that vertical contracts that facilitated cartelization could be unlawful under both a rule-of-reason analysis and a per se analysis:

> To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).

266. *See supra* Section III.D.

267. *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984) (noting that vertical contracts that had the effect of price-fixing would be per se illegal); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 215 (1939) (dealing with per se treatment of vertically aligned firms facilitating a horizontal cartel); Toys "R" Us v. Fed. Trade Comm'n, 221 F.3d 928, 934–35 (7th Cir. 2000) (dealing with vertically aligned firms creating both vertical and horizontal restraints on trade and using a mix of per se and rule-of-reason analysis).

268. 306 U.S. at 215; *see also Apple II*, 791 F.3d 290, 345 (2d Cir. 2015) (Jacobs, J., dissenting) ("In another age, the Supreme Court treated such a hub-and-spokes conspiracy as a *per se* violation." (quoting *Interstate Circuit*, 306 U.S. at 226–27)).

the vertical agreement for movies was under twenty-five cents.[269] The Court had little trouble concluding that the movie distributors, notwithstanding their vertical positioning, facilitated a horizontal restraint on trade among retail prices.[270]

Likewise, the Seventh Circuit's decision in *Toys "R" Us, Inc. v. FTC* is instructive on the confusion courts have in applying the per se rule.[271] Toys "R" Us (TRU), threatened by low-cost competitors, vertically contracted with its toy manufacturers to reduce output to those competitors.[272] Such had the net effect of creating manufacturing cartel because the vertical contracts were against the individual manufacturer's self-interest—it would have made more sense for one of the manufacturer's to breach its contract with TRU and reap the benefits of the sales to the low-cost competitors.[273] Realizing such, TRU reinforced the cartel by orchestrating a group boycott among the toy manufacturers.[274] Given such evidence, the Seventh Circuit concluded that ample evidence existed to show that TRU had created a horizontal restraint on trade for *both* the vertical agreements and the group boycott.[275]

So too here, the Second Circuit indiscriminately applied the per se rule while overlooking critical distinctions between *Interstate Circuit*'s progeny and the present litigation. For one, the movie distributors in *Interstate Circuit* occupied a monopolistic position in the movie distribution chain at the time of its vertical agreement.[276] Such was not true of Apple, which, to the contrary, was attempting to dislodge a pre-existing monopolist from the e-book market through its vertical agreements.[277] Second, the movie distributors created the resulting conspiracy in *Interstate Circuit*, whereas Apple entered into a market with a pre-existing cartel in the Big Six.[278] Third, Apple never created a

269. *Interstate Circuit*, 305 U.S. at 217–18.

270. *Id.* at 226–27; *see also supra* Section II.C.

271. 221 F.3d 928 (7th Cir. 2000).

272. *Id.* at 931–32.

273. *Id.* at 932 ("The manufacturers were also concerned that any of their rivals who broke ranks and sold to the [low-cost competitors] might gain sales at their expense, given the widespread and increasing popularity of the [those competitors'] format.").

274. *Id.* at 932–33.

275. *Id.* at 940.

276. *Compare Interstate Circuit*, 306 U.S. at 215 ("[Interstate Circuit] has a complete monopoly of first-run theatres in these cities, except for one in Houston operated by one distributor's Texas agent."), *with Apple II*, 791 F.3d 290, 301 (2d Cir. 2015) ("Apple lacked a dedicated marketplace for ebooks or a hardware device that could offer an outstanding reading experience.").

277. *See supra* Section III.A.

278. *Compare Interstate Circuit*, 306 U.S. at 219 ("The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action

horizontal agreement between the publishers and itself, unlike the group boycott agreement in TRU.[279] Although Apple played a predominant role in the negotiations with the publishers, each publisher signed the agreement independently, similar to the initial vertical contracts in *Toys "R" Us*.[280] The fact that Random House chose not to vertically contract with Apple is instructive of the fact that the economic inducement to act collectively was far from certain.[281]

The Second Circuit also overlooked pre-*Leegin* decisions that may have shed a significant light on its treatment of Apple's relationship with the Big Six. Most significant is the Court's decision in *Business Electronics*, where the Court drew a sharp distinction between horizontal and vertical agreements.[282] "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."[283] Furthermore, the Court paid little attention to the *effects* of the agreement, but rather the agreement itself—"a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."[284] Although *Business Electronics* did not deal directly with a horizontal agreement, the Court's focus on the agreement has two implications: first, the starting point of any analysis should be the agreement, and second, there is a high burden to prove a horizontal agreement in the absence of an agreement.[285] These formalistic notions suggest that the Court intended to limit its decision in *Interstate Circuit* and its progeny, where the functional outcomes of putatively anticompetitive behavior dominated the analysis.

Had the Second Circuit justified its decision through *Business Electronics* and similar cases, it likely would have concluded that Apple was a vertical contractor and may have presumed a rule-of-reason analysis. However, absent a Supreme Court decision that shielded

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upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate" (emphasis added)), *with Apple II*, 791 F.3d at 298 (finding that "for decades" all of the Big Six collectively "operated under a fairly consistent business model.").

279. 221 F.3d at 931–32.

280. *Id.* at 932 ("The agreements between TRU and the various manufacturers were, of course, vertical agreements, because they ran individually from the supplier/manufacturer to the purchaser/retailer."); *see also supra* Section III.D.

281. *See supra* Section III.A.

282. *Business Electronics*, 485 U.S. at 729–30; *see also supra* Section I.E.

283. *Id.* at 730.

284. *Id.* at 730 n.4.

285. *See id.* at 727–28.

minimum RPM from per se illegality, the Second Circuit was not wrong to rely on *Interstate Circuit*. The legal error stems not from the Second Circuit's analysis but rather from its ignorance of the *Leegin* decision, which fundamentally altered the relationship between the per se rule and the rule of reason.

2. *Leegin* Decision

The *Leegin* decision synthesized decades of Chicago School era case law into a wholehearted defense of the rule of reason's place in antitrust law.[286] Like earlier courts, the *Leegin* Court limited the applicability of the per se rule to situations where the conduct was "manifestly anticompetitive" and "lack[ing] any redeeming virtue."[287] Thus, the per se rule was appropriate "only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[288] Furthermore, the Court reiterated its "reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."[289] Needless to say, the Court was not shy in implementing a very high burden for future courts' justifications of per se illegality.[290]

The *Leegin* Court further defended the use of minimum RPM through several familiar, economic justifications.[291] In so doing, it linked minimum RPM to its maximum RPM jurisprudence, finding the underlying economic rationales the same.[292] More significantly, the

286. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885–87 (2007); *see also* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 3 & n.11 (2015) (noting that *Leegin* falls in line with "a series of Chicago School-influenced antitrust landmarks"); Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261, 266 (2008) ("Split decisions of five-to-four justices shaped the pillar landmarks, Dr. Miles and Leegin, demonstrating the persistence of the controversy at least among lawyers and judges.").

287. *Leegin*, 551 U.S. at 886 (first quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)) (second quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 289 (1985)).

288. *Id.* at 886–87 (citing Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 344 (1982)).

289. *Id.* at 887 (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

290. *See supra* notes 263–265.

291. *Leegin*, 551 U.S. at 889–92.

292. *Id.* at 890 (citing *GTE Sylvania*, 433 U.S. at 54–57) ("The justifications for vertical price restraints are similar to those for other vertical restraints."). Those rationales included promoting inter-band competition by reducing intra-brand competition, reducing free-riding retailers, and incentivizing market entry. *Id.* at 890–92; *see also* Coase, *supra* note 88, at 390–91 (justifying vertical contracting as essential to a firm's profit motive

Leegin Court also outlined several anticompetitive rationales for minimum RPM, drawing on past case law.[293] As the Court provided:

> A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. . . .
>
> Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network.[294]

Curiously, the Court stopped short of expanding the coverage of the per se rule to all cartels—rather only horizontal cartels that decreased output or increased prices were per se unlawful.[295] By contrast, vertical firms that facilitated a cartel deserved a rule-of-reason analysis.[296] The robustness of the rule of reason stemming from *Leegin* cannot be overstated. Indeed, the Court believed that because "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output,'" the rule-of-reason analysis should be an option of first resort. [297]

In crafting an appropriate rule-of-reason analysis, the Court pointed to certain factors that could shed light on the

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because it increases the discovery of relevant prices and reduces long-term negotiation costs). For a full explanation on intra-brand restraints and a defense for their per se legality, see Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 6, 78–86 (2004). Likewise, for an explanation of the free-riding problem, and why there may be less restrictive alternatives than minimum RPM for online retailers, see Marina Lao, *Internet Retailing and "Free-Riding;" A Post-*Leegin *Antitrust Analysis*, 14 J. INTERNET L., no. 9, Mar. 2011, at 15–16, 18–20.

293. *Leegin*, 551 U.S. at 893–94.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 894 (alteration in original) (quoting Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988)).

competitiveness.[298] First was consideration of the number of integrated firms in the relevant market and those firms' market share.[299] To the Court, a small number of integrated firms with relatively little market share posed "little likelihood [to] facilitate[e] a . . . cartel, for a cartel then can be undercut by rival[s]."[300] By contrast, a large number of integrated firms, taking up a large portion of the overall market share, "should be subject to more careful scrutiny."[301] Second, courts should consider the source of the contract.[302] To the Court, if the retailer was the source of the vertical contract "there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct."[303] Finally, the *Leegin* Court directed courts to look to the market power of potentially dominant firms in the market.[304]

Given the *Leegin* Court's exceptionally high bar for the per se rule, along with Apple's ambiguous relationship with the Big Six, the Second

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298. *Id.* at 897–99.

299. *Id.* at 897.

300. *Id.*

301. *Id.* The Court relied on several academic pieces in reaching this conclusion. Of note are a Bureau of Economics report to the Federal Trade Commission (FTC) and an article by then-Professor Easterbrook. In the former, Thomas Overstreet found that "[a] complete analysis of suspected RPM-facilitated manufacturer collusion must . . . why potential entry . . . will not effectively undermine the cartel." THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 23 (1983), https://www.ftc.gov/sites/default/files/documents/reports/resale-price-maintenance-economic-theories-and-empirical-evidence/233105.pdf. For Overstreet, colluding, vertically aligned firms were unlikely to occur where prospective entrants could profitably enter at either the distribution or retail end of the market. *See id.* at 22–23. Accordingly, markets that had few firms, accounting for a large market share, could effectively deny market access to entrants through vertical collusion. *Id.* ("[C]olluding [manufacturers] would have to account for a significant fraction of the relevant market; otherwise, noncollusive manufacturers would be able to expand their sales and market shares because they could induce consumer substitution with relatively lower prices.").

Easterbrook posited the same conclusion:

> If a monopoly manufacturer has long-term exclusive dealing contracts with its distributors, its distribution network is 'foreclosed' to a would-be entrant. The prospective manufacturer must come in on two levels (making plus distribution) or arrange for coordinated entry. But if there are four manufacturers in the industry, and only one or two use exclusive distribution, the would-be entrant will find a group of distributors anxious to be its agents if it offers a better deal, which it will.

Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 162 (1984).

302. *Id.* at 897–98.

303. *Id.* at 898 (citations omitted).

304. *Id.* at 898–99. This consideration seems to be a derivative of the first. *See* sources cited *supra* note 301.

Circuit should have been predisposed to a rule-of-reason analysis. *Leegin* valued the persistent use of the rule of reason, as opposed to the antiquated per se rule because "courts gain experience considering the effects of these restraints," which, "over the course of decisions, . . . can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[305] By failing to entertain the rule of reason as an option of first resort, the Second Circuit contravened the Court's direction in *Leegin*, harkening back to judicial hostility to economic analysis in the Warren Court.[306] As to the only judicial carve out afforded by the *Leegin* Court for use of the per se rule—horizontal cartels among competitors; that carve out is inapposite.[307] Apple was not a competitor with the Big Six, as it never intended to distribute e-books.[308] Furthermore, even if the Second Circuit had latched onto this carve out by focusing on the effect of price increases, *Leegin* required "manifestly anticompetitive" effects for application of the per se rule.[309] Apple's prices—between $12.99 and $19.99—were arguably pro-competitive because of Amazon's at or below cost pricing.[310] The Second Circuit simply finds no recourse in resuscitating *Dr. Miles* in the post-*Leegin* era.

Also pertinent to this analysis is that other circuit courts to consider similar vertical price restraints have unequivocally adopted the rule of reason. In *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, Mack Trucks, a truck manufacturer with considerable market share, operated a string of truck dealers, which were free to purchase from any manufacturer.[311] Mack Trucks, however, executed several vertical price agreements with many of its dealers, as well as orchestrated a horizontal conspiracy among those dealers to not compete on price.[312] Under the Second Circuit's analysis, *Mack Trucks* should have been analyzed as a modern-day *Interstate Circuit*, whose facts are almost indistinguishable. Instead, the Third Circuit, citing *Leegin*, applied the rule of reason and swiftly found Mack Trucks liable.[313] As the Third

305. *Id.* at 898.
306. *See supra* Section II.D.
307. *Leegin*, 551 U.S. at 893.
308. *See supra* Section IV.A.1.
309. *Leegin*, 551 U.S. at 886 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)).
310. *See infra* Section IV.B.2.
311. 530 F.3d 204, 209–10 (3d Cir. 2008).
312. *Id.*
313. *Id.* at 224–25.

Circuit stated, "The rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers."[314] Recently, the First Circuit used the same logic in applying the rule of reason to a similar set of facts.[315]

To be fair, the Second Circuit's outcome may very well have been the same under a rule-of-reason analysis. Under the *Leegin* factors, almost the entire publishing industry was integrated on Apple's terms.[316] But, that the outcome may have been the same largely misses the point. The Second Circuit's reliance on the per se rule contravenes the Court's call for increased economic experience in antitrust proceedings. Applying such an economic analysis, the Second Circuit would have had the opportunity to confront a largely novel issue—whether vertical contracting with a horizontal cartel passes muster in the face of a market with an entrenched monopolist and significant

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314. *Id.* at 225.

315. *See* Am. Steel Erectors, Inc. v. Local Union No. 7, 815 F.3d 43 (1st Cir. 2016). In *American Steel*, steel erector companies would submit bids to steel fabricator companies. *Id.* at 49. Because the cost of labor was included in the bid price, non-unionized steel erector companies could systematically outbid unionized erector companies, allowing the non-unionized erector companies to increase their market share. *Id.* In response, the unions, led by Local Union No. 7, adopted a "Market Recovery Program," whereby

> signatory erectors withheld a fraction of each union laborer's paycheck, which was then paid into a target fund . . . operated by Local 7. Local 7 could then identify construction projects likely to draw competition from nonunion erectors and, on a case-by-case basis, send "blast faxes" or "project alerts" to its signatory union erectors with an offer to subsidize their bids and make them more competitive with nonunion bids.

Id. at 49–50. American Steel Erectors, a non-unionized erector company, sued Local Union No. 7 for antitrust violations, alleging a per se unlawful conspiracy between the laborers and erectors. *Id.* at 50 (additionally alleging violations to the Labor Management Relations Act).

The First Circuit refused to classify the relationship as a horizontal one. *Id.* at 62 ("[T]he vertical chain in this case runs from the laborers to the erectors, from the erectors to the fabricators, and from the fabricators to the general contractors."). As such, the court found per se liability to be inapposite. *See id.* at 64. Rather, to trigger the per se rule, the First Circuit noted, with a *cf.* citation to the Second Circuit's decision in *United States v. Apple*, that the "vertical relationships would *at least* need to intersect with or give rise to an unlawful horizontal relationship." *Id.* (emphasis added).

316. *See infra* Section IV.B.3. Indeed, Cha argues, with some force, that under the *Leegin* factors, the Second Circuit would have "easily recognize[d] Apple's conduct as nearly-certain anticompetitive behavior." Cha, *supra* note 96, at 1588. Accordingly, Cha concludes that the decisions in *Toledo* and *Apple* are reconcilable because Mack Trucks only exhibited two of the four *Leegin* factors, whereas Apple exhibited all four. *Id.* at 1579–88. Thus, "these differences could simultaneously justify the *per se* application in *Apple* and the *rule of reason* in *Toledo*." *Id.* at 1579.

barriers to entry. Instead, the Second Circuit's decision proliferates the judicial confusion between horizontal and vertical contracting, potentially chilling pro-competitive activity and efficiency gains between suppliers and retailers.

B. *Economic Analysis*

1. Monopoly and Entry Barriers

By most counts, Amazon attained monopoly status among e-book retailers.[317] As indicated through its complete control over the e-book retail prices, a monopoly is dangerous and inherently anticompetitive because of its leverage over price.[318] That leverage serves two main functions. First, in the absence of competition, a monopolist can raise prices to supra-competitive levels such that the monopolist achieves profits well above what a competitive market would yield.[319] Monopoly

317. *See supra* Section III.A. Many commentators have weighed in on Amazon's monopoly status. *See, e.g.*, Cha, *supra* note 96, at 1548 ("Amazon was basically an e-book monopoly . . . ."); Zachary Flood, Note, *Antitrust Enforcement in the Developing E-Book Market: Apple, Amazon, and the Future of the Publishing Industry*, 31 BERKELEY TECH. L.J. 879, 895–96 (2016) ("Even where market entry might disrupt an illicit monopoly, creating an exception to per se treatment on this basis would essentially endorse competitive vigilantism."); Jessica Harrill, Note, *Two Years is Two Long: The Two-Year Ban on the Agency Model Can Save the E-Book Industry but Ruin Bookstores*, 34 N. ILL. U. L. 189, 196–98 (2014) (noting that a ban on the agency model would "offer[] Amazon a chance to regain the monopoly it had previously").

Despite this wealth of information, the Southern District of New York has never squarely answered the question of Amazon's monopoly status. In *In re Electronic Books Antitrust Litigation*, the court denied Apple and the publisher defendants' motion to dismiss, finding that the plaintiff-purchasers had stated a putative claim under the Sherman Act for a horizontal conspiracy. 859 F. Supp. 2d 671, 673 (S.D.N.Y. 2012). While Apple argued that Amazon was a monopolist that engaged in monopoly pricing, the court refused to directly address those arguments at the pleadings stage. *See id.* at 688, 692.

Moreover, in *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, plaintiff-retailers alleged, *inter alia*, that Amazon violated section 2 of the Sherman Act through monopolization and attempted monopolization. 985 F. Supp. 2d 612, 622–24 (S.D.N.Y. 2013). As to the plaintiff's monopolization claim, the court found that while "Amazon possesse[d] . . . market share [of] 60%," there was "no additional evidence suggesting monopoly power." *Id.* at 622 (citing Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998)). Likewise, the court dismissed the attempted monopolization claim as threadbare and conclusory at the motion-to-dismiss stage. *Id.* at 623.

318. BLAIR & KASERMAN, *supra* note 128, at 28–37.

319. *Id.* at 36–37; *see also In re* Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 664–65 (D. Conn. 2016) ("The exclusion of rivals will typically go hand-in-hand with market power, but it is the ability to charge supracompetitive prices that is the *sine qua non* of market power."); Le v. Zuffa, L.L.C., No. 2:15cv-010145-RFP-PAL, 2016 WL 6134520, at *2 (D. Nev. Oct. 19, 2016) ("If the plaintiff puts forth evidence of restricted output and

profits always lead to social welfare loss (often called deadweight loss) because not only is the monopolist charging higher prices, it is also producing much less goods.[320] The second drawback of monopolies is that monopolies, theoretically, can retain its market position indefinitely because of its control over price.[321] If a monopolist sees a potential new market entrant, that monopolist can lower prices to competitive levels to snuff out the threat.[322] These reasons often justify government intervention in monopolistic markets.[323]

The Chicago School, however, disputes the need for government intervention, and views monopolies as self-correcting.[324] To the Chicago adherents, the high profits attained by a monopolist will always attract new entrants and quickly make the monopolist's market competitive.[325] Thus, in a structurally competitive market with a monopolist, market forces dictate that long-run monopolization cannot exist. As Frank Easterbrook notes, because "[m]onopoly is self-destructive" and "eventually attract[s] entry," "[t]he central purpose of antitrust is to speed up the arrival of the long run."[326] This view is important not only because of the Chicago School's influence on the courts, but also because courts should consider the viability of long-run monopolization in a proper rule-of-reason analysis.[327]

Indeed, the Second Circuit overlooked Amazon's monopoly status in reaching its decision. That is not to say that a finding of an existing, illicit monopoly would have absolved Apple of its conduct. Rather, the Second Circuit—even a legally existing monopoly[328]—would have been relevant to a rule-of-reason analysis. The Second Circuit could have

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supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power." (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995))).

320. BLAIR & KASERMAN, *supra* note 128, at 36–37.

321. *Id.*

322. *See id.* at 34–35 (outlining five types of entry barriers that monopolists can use to keep out potential entrants, including patent protection and controlling essential raw materials).

323. *See id.* at 62–66.

324. *See* HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 62.

325. *Id.*

326. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

327. *See supra* Section I.E.

328. Indeed, illegal monopolies require proof of "monopoly power" and also "the willful acquisition or maintenance of that power." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)). As the Court stated, "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Id.* Thus, the Second Circuit could have considered the effect of Amazon's monopoly power on the e-book market even if Apple was not an illegal monopoly.

considered Amazon's pre-existing market share, how long Amazon had held monopoly status, and the cost of entry into the e-book market. In this way, the Second Circuit could have distinguished itself from previous cases in the Southern District of New York, which neglected to consider Amazon's monopoly status at the motion-to-dismiss stage.[329] This analysis also would have fit comfortably with the *Leegin* analysis, which directed courts to consider the market share of dominant firms.[330] While *Leegin* was focused on the market share of the firm imposing the restraint, a key goal of antitrust law is overall competition.[331] Thus, an appropriate rule-of-reason analysis should have considered the effect of Amazon's monopoly status on Apple's decision-making.

2. Predatory Pricing

Predatory pricing is a tool often employed by potential or entrenched monopolists.[332] While the policy is illegal, defining predatory pricing continues to be a pernicious problem in antitrust law.[333] The basic definitional problem boils down to when a firm's price becomes predatory. Economically, a price is predatory when a firm is incurring a loss on the product—that is, when a firm prices its goods below the marginal cost for that good.[334] Marginal cost is the firm's cost for producing one additional unit.[335] In theory, competitive markets drive all firms in the market to produce at marginal cost (i.e., to the point where it becomes irrational to produce one additional unit).[336]

The definitional problem arises, however, because marginal cost is really a theoretical construct for economists, meaning both firms and courts struggle to determine when a price is predatory.[337] In 1975, in a highly influential article, Professors Areeda and Turner proposed a solution.[338] Instead of relying on marginal cost, the professors proposed

329. *See* cases cited *supra* note 317.
330. *See* Cha, *supra* note 96, at 1587–88; *supra* Section IV.A.2.
331. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 509 (1974).
332. *See* HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 339–40.
333. *Id.* at 340–41.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.* at 342–43; Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975).

a proxy variable: average variable cost (AVC).[339] Variable costs are costs associated with the volume of production—that is, costs that increase in direct proportion to the number of units produced.[340] They are not to be confused with fixed costs, which are the constant business expenses associated with production, such as labor costs and rents for a production facility.[341] Areeda and Turner believed that AVC was an appropriate proxy for marginal cost because both costs increase in proportion to the units produced.[342]

Because AVC is easy for most firms—and courts—to measure, many courts adopted the Areeda-Turner test for predatory pricing.[343] Prices below a firm's AVC for the relevant good were considered predatory, whereas those above were not. Predictably, as with many bright-line approaches, problems quickly arose. Because AVC was easily calculable, firms could simply price their goods just above their AVC without triggering any liability.[344] As Hovenkamp puts it, "[T]he Areeda-Turner test can give the predator considerable room for maneuvering. In fact, under the Areeda-Turner rule a firm could compute its AVC and legally sell at a price one cent higher, all the while still imposing significant losses on its victim."[345] That result is particularly acute at inefficiently high levels of production—where marginal cost is quite high and thus pronouncedly divergent from AVC.[346] Successful predators, often monopolists already, thus are able to evade predation litigation by ramping up production and charging just above variable costs.[347]

While much of this analysis may seem like economic jargon, it is significant because it showcases just how difficult a successful predatory pricing suit is. Legal developments in this area have brought little help to the plaintiffs' bar.[348] In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court not only required a showing of prices "below an appropriate measure of its rival's costs" but also required a showing, by a reasonable probability, that the competitor

339. HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 342–43.
340. *Id.*
341. *Id.*
342. *Id.*
343. *See id.* at 342 n.1 (listing cases).
344. *Id.* at 342–43; *see also id.* at 357–64 (discussing judicial interpretations and adaptations of the Areeda-Turner test).
345. *Id.* at 343.
346. *Id.* at 343 n.6 ("Since predatory pricing is a short-run phenomenon, the predator would ordinally wish to do it without constructing an additional plant, even though during the predatory period output must be very high.").
347. *See id.* at 343–44.
348. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

would recoup its losses.[349] The Court then went on to signal the traditional hostility toward predatory pricing litigation: "Without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers."[350] Accordingly, a successful plaintiff would need to undertake one of two scenarios: (1) refuse to enter a market controlled by a predator and wait for the subsequent price increases (although this may raise issues of standing), or (2) enter a predator-controlled market, then leave the market because of that predation, and wait to file suit once the predator has increased its prices. Needless to say, both courses of action are preposterous for rational businesses.

This economic and legal uncertainty should factor heavily into any rule-of-reason analysis. Regardless of Amazon's status as a legal predator, Apple and the Big Six believed Amazon was engaging in loss leading.[351] But neither party had any cognizable legal claim until Amazon raised its prices.[352] Nor would the Department of Justice likely investigate Amazon—low prices are facially beneficial to consumers, as the *Brooke* Court noted.[353] Left with no judicial recourse, it is quite plausible that Apple felt that vertical contracts were the only effective method of entering the market. The Second Circuit shunned such analysis, stating that Apple had no right to enter a market profitably.[354] Fair enough—but under what terms could *any* firm enter the market given Amazon's dominance? A proper rule-of-reason analysis may have shed some light on this question.

3. Vertical Integration and RPM

The final stone to turn in this analysis deals not with Amazon's entry barriers but rather with Apple's incentive to integrate vertically

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349. *Id.* at 223–24.

350. *Id.* at 224.

351. *See supra* Section III.A.

352. *See Brooke Grp.*, 509 U.S. at 223; HOVENKAMP, ANTITRUST POLICY, *supra* note 7, at 350 (noting that the raised prices must be bigger than the predatory prices for the pricing to be profitable).

353. *Brooke Grp.*, 509 U.S. at 223 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved." (quoting Atl. Richfield Co. v. U.S. Petrol. Co., 495 U.S. 328, 340 (1990))).

354. *See supra* Section III.D.

in the first place. Apple faced incredible incentives to integrate vertically. With the launch of its iPad, Apple saw an opportunity for profitability by fusing its extant technology with an e-reader capability.[355] To do so, Apple had one of two options: (1) Enter the e-book distribution market and compete directly with the Big Six, or (2) become an e-book retailer and compete directly with Amazon. The first option would largely blunt its technological advantages, as Apple would face prohibitive costs in entering a well-established market with little experience, and a dominant retailer to boot.[356] Said another way, clamping down on intra-brand competition was cheaper than competing directly on an inter-brand level.[357]

Indeed, Apple's decision to vertically integrate is far from irrational—in many respects it is exactly why courts have done away with legal restraints on RPM.[358] Integration between Apple and the Big Six internalized costs, such that the two shared the same goal—maximizing Apple's retail sales.[359] The assuaged adversarial relationship is efficiency-gaining because "neither party will now find it necessary to expend resources designing and negotiating contracts to protect itself from the anticipated opportunism of the other."[360] Likewise, Apple's integration with the Big Six was also efficiency-gaining because of the reduced informational costs, especially when contrasted with inter-brand competition.[361] As Blair and Kaserman analogize: "It is far easier for the manager of a firm to discover and, as necessary, reward or penalize the behavior of employees than it is to exercise similar controls over the behavior of another firm."[362] Likewise, Apple expended considerably less in informational costs in dealing with its distributors when compared to the information asymmetries between Apple and Amazon.[363]

V. CONCLUSION

In 1911, the Court decided *Dr. Miles*, which outlawed minimum RPM. While almost a century of case law adhered faithfully to *Dr. Miles*, the Court changed course by expressly overruling *Dr. Miles* in

355. *See supra* Section III.A.
356. *See supra* Section III.A.
357. BLAIR & KASERMAN, *supra* note 128, at 316–20; *see also supra* note 77 and accompanying text.
358. *See supra* Section II.E and Section II.F.
359. *See* BLAIR & KASERMAN, *supra* note 128, at 316–20; *supra* Section III.A.
360. BLAIR & KASERMAN, *supra* note 128, at 317.
361. *See id.*; *see also* Coase, *supra* note 88, at 390–91.
362. BLAIR & KASERMAN, *supra* note 128, at 318.
363. *See id.* at 317–18.

Leegin. Yet, the ghost of *Dr. Miles* still persists. The Second Circuit, finding a horizontal relationship in a vertical setting, found an end run around the *Leegin* decision. Based on questionable legal and economic grounds, the Second Circuit's decision is potentially troublesome because of its potential to chill otherwise legal vertical contracting. Such reasoning makes for a fascinating dichotomy,[364] which will no doubt play out over the following decades—only adding to the storied history of antitrust law.

While the Supreme Court denied certiorari to the *Apple* decision,[365] courts are highly unlikely to easily forget *Dr. Miles*. While the facts of the Apple case may not have been the most sympathetic for the Court to grant certiorari, the Court will no doubt be faced with a similar case in the near future. When the Court is asked to clarify its *Leegin* holding, it should hold, as this Note has argued, that the rule of reason encompasses not only legal but also economic analysis. Factors such as market monopolization, the potential for predatory pricing, and the pro-competitive justifications for vertical integration and RPM should all factor into antitrust analyses. Without due consideration of those factors, courts risk ending pro-competitive behavior—and encouraging anti-competitive conduct.

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364. Indeed, the circuits appear to be already split on this issue. *Compare* Am. Steel Erectors, Inc. v. Local Union No. 7, 815 F.3d 43 (1st Cir. 2016), *and* Toledo Mack Sales & Serv., Inc v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008), *with* MM Steel, L.P. v. JSW Steel (U.S.) Inc., 806 F.3d 325 (5th Cir. 2015), *and Apple II*, 791 F.3d 290 (2d Cir. 2015).

365. Apple, Inc. v. United States, 136 S. Ct. 1376 (2016).

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