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## State Regulation of Resale Price Maintenance on the Internet: The Constitutional Problems with the 2009 Amendment to the Maryland Antitrust Act

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# State Regulation of Resale Price Maintenance on the Internet: The Constitutional Problems with the 2009 Amendment to the Maryland Antitrust Act

Katherine M. Brockmeyer\*

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### *I. Introduction*

For nearly a century, minimum resale price maintenance (RPM) was considered per se illegal<sup>1</sup> under § 1 of the Sherman Act.<sup>2</sup> Minimum RPM results from an agreement between a manufacturer and a dealer to set a price below which the dealer cannot resell the manufacturer's product.<sup>3</sup> In 2007, the United States Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>4</sup> decided that the per se rule would no longer apply, and that RPM would be subject to the rule of reason.<sup>5</sup> In contrast to the per se rule, the rule of reason requires the fact finder to weigh all aspects of the challenged practice to determine if it is "an unreasonable restraint on competition."<sup>6</sup> In response to *Leegin*, the Maryland General Assembly amended the Maryland Antitrust Act<sup>7</sup> in 2009, hereinafter referred to as the "Maryland RPM prohibition," to prohibit per se the use of

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

2. See 15 U.S.C. § 1 (2006) (prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations").

3. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (defining minimum RPM as "a vertical agreement between a manufacturer and its distributor to set minimum resale prices").

4. See *id.* at 882 (finding that the rule of reason is the appropriate standard of review for vertical price restraints).

5. See *id.* (applying the rule of reason to vertical price restraints such as RPM).

6. *Id.* at 885 (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

7. See MD. CODE ANN., COM. LAW § 11-201 (West 2010) (setting forth the provisions of the Maryland Antitrust Act).

RPM.<sup>8</sup> The Maryland RPM prohibition is the first and so far only state legislation "expressly rejecting the application of *Leegin* to state law."<sup>9</sup>

Circumstances will likely arise where RPM would be found lawful in every state—except Maryland. Because virtually all courts consult federal antitrust precedent when interpreting state antitrust laws,<sup>10</sup> courts will interpret state antitrust laws in accordance with *Leegin* and adopt the rule of reason as the standard applicable to RPM. Because the burden of proof under the rule of reason for an antitrust plaintiff is very high, uses of RPM analyzed under the rule of reason post-*Leegin* will likely be upheld in all or almost all cases.<sup>11</sup>

This Note demonstrates that although federal law does not preempt the Maryland RPM prohibition, the Maryland statute regulates commerce occurring wholly outside the state in violation of the dormant Commerce Clause. It begins by examining a hypothetical but nonetheless probable situation in which an internet dealer located outside Maryland sells a product subject to manufacturer-imposed RPM to a Maryland consumer over the Internet. The Maryland Attorney General or a private plaintiff subsequently brings suit against the manufacturer for violating the Maryland RPM prohibition. In response, the manufacturer argues that the Maryland statute is unconstitutional because it both is preempted by *Leegin*'s interpretation of § 1 of the Sherman Act and contravenes the dormant Commerce Clause.

In light of the Court's decision in *Exxon Corp. v. Governor of Maryland*,<sup>12</sup> *Leegin*'s interpretation of § 1 of the Sherman Act does not preempt the Maryland RPM prohibition because it does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting the Sherman Act]."<sup>13</sup> The Maryland

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8. See MD. CODE ANN., COM. LAW § 11-204(b) (LexisNexis 2009) ("[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.").

9. Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, at 2.

10. See Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 173, 173-74 (2008) (discussing the nature of state antitrust laws).

11. See *infra* Part III (discussing why RPM uses analyzed under the rule of reason will likely be upheld in all or almost all cases).

12. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133-34 (1978) (finding that a Maryland law requiring price reductions to be extended uniformly was not preempted by § 2(b) of the Robinson-Patman Act).

13. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

RPM prohibition as applied to the Internet, however, violates the dormant Commerce Clause because it forces manufacturers to take into account the Maryland law when deciding whether or not to use RPM in states where the practice might be found lawful.<sup>14</sup> The Maryland RPM prohibition also disrupts the national economy by creating a compliance nightmare for manufacturers selling their products at the national level.<sup>15</sup>

Part II provides background information regarding RPM and its treatment under the law. Part III explains the assumption that RPM will be found permissible under the rule of reason articulated in *Leegin* in all or almost all cases. Part IV evaluates the hypothetical manufacturer's preemption claim. Part V evaluates the hypothetical manufacturer's dormant Commerce Clause argument. Part VI discusses more generally, whether it is appropriate for state antitrust laws to differ substantively from federal antitrust laws. Part VII concludes that the Maryland RPM prohibition, while not preempted by *Leegin's* interpretation of the Sherman Act, violates the dormant Commerce Clause and disrupts the national economy by forcing manufacturers to adapt their business models to inconsistent state and federal antitrust laws.

## II. Background

### A. Resale Price Maintenance Generally

#### 1. Resale Price Maintenance Defined

Minimum RPM is a vertical price restraint imposed by a manufacturer on its dealers that establishes a minimum price at which the dealers may resell the product.<sup>16</sup> Dealers are guaranteed a markup, or profit margin, on each sale of the manufacturer's product as a result.<sup>17</sup> The immediate effect is to eliminate intrabrand price competition—price competition among the

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14. See *infra* Part V (discussing why the Maryland RPM prohibition violates the Commerce Clause).

15. See *infra* Part VI (discussing why the Maryland RPM prohibition disrupts the national economy).

16. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 131–32 (6th ed. 2007) (describing the nature of RPM agreements). For the remainder of the Note, unless otherwise distinguished, RPM refers to minimum RPM.

17. See JOSEPH P. BAUER & WILLIAM H. PAGE, 2 FEDERAL ANTITRUST LAW § 12.2 (2002) ("The assured mark-up . . . at the retailer level, which results from the resale price maintenance program, helps to preserve the . . . mark-up at the seller level.").

manufacturer's dealers selling the same brand.<sup>18</sup> Conversely, interbrand price competition—price competition among manufacturers of different brands selling the same category of product—is heightened.<sup>19</sup>

## 2. *The Incentive to Use Resale Price Maintenance*

Manufacturers want to use RPM for three reasons: (1) it encourages dealers to offer product-specific services, such as product demonstrations; (2) it eliminates the potential for "free-riding" in the market; and (3) it facilitates market entry. The dealers' guaranteed profit margin induces dealers to provide product-specific services to compete with rival dealers.<sup>20</sup> These services can increase demand for the manufacturer's product and overall sales,<sup>21</sup> improving the manufacturer's position vis-à-vis rival manufacturers.<sup>22</sup>

Absent RPM, discount dealers may "free-ride" on "full service" dealers who provide product-specific services<sup>23</sup> and thereby, "capture some of the increased demand those services generate."<sup>24</sup> Consumers can learn about a manufacturer's product by visiting a "full service" dealer that offers product-specific services<sup>25</sup> or by taking note when a dealer with a reputation for selling high-quality goods carries the product.<sup>26</sup> If the consumer can

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18. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) ("A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; . . .").

19. See *id.* (discussing how RPM can increase interbrand competition).

20. Roger D. Blair, Jill Boylston Herndon, & John E. Lopatka, *Resale Price Maintenance and the Private Antitrust Plaintiff*, 83 WASH. U. L.Q. 657, 698 (2005) (noting that product-specific services "include product-specific information from knowledgeable salespeople (often tailored to a consumer's individual needs), product demonstrations, consumer trial (e.g., test drives of automobiles), and the like").

21. See ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* 376–77 (2d ed. 2009) (discussing how RPM agreements can be used to achieve the desired level of product-specific services).

22. See *Leegin*, 551 U.S. at 890 ("[T]his in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers.").

23. See Benjamin Klein, *Distribution Restrictions Operate by Creating Dealer Profits: Explaining the Use of Maximum Resale Price Maintenance in State Oil v. Khan*, 7 SUP. CT. ECON. REV. 1, 6 (1999) (discussing the nature of "classic dealer free-riding").

24. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

25. See Klein, *supra* note 23, at 6 (providing an example of classic "free-riding").

26. See Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 347–49 (1984) (discussing how consumers'

purchase the same product at a lower price from a discount dealer that has neither invested in product-specific services nor developed a reputation for selling quality goods, the "full service" dealer will lose sales to the discount dealer, reducing its incentive to provide product-specific services.<sup>27</sup> Because RPM standardizes the price of the manufacturer's product at the dealer level, it prevents "free-riding" by prohibiting the discount dealer from "undercutting the service provider."<sup>28</sup>

Finally, if a manufacturer wants to introduce its product in a new market, it can use RPM to facilitate market entry. The manufacturer can use the restraint "to induce competent and aggressive [dealers] to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer."<sup>29</sup>

## *B. Resale Price Maintenance Under the Law*

### *1. The Per Se Rule Versus the Rule of Reason*

Although § 1 of the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy . . . in restraint of trade or commerce,"<sup>30</sup> the Court has interpreted § 1 to proscribe only *unreasonable* restraints.<sup>31</sup> To determine whether a restraint unreasonably restrains trade, a court traditionally applies either the per se rule or the rule of reason.<sup>32</sup> RPM was subject to the per se rule until 2007<sup>33</sup> when the Court rejected application of the per se rule and applied the rule of reason.<sup>34</sup>

perception of quality can lead to free-riding).

27. See *Leegin*, 551 U.S. at 891 ("[T]he high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer.").

28. *Id.*

29. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977).

30. 15 U.S.C. § 1 (2006).

31. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60–68 (1911) (interpreting the Sherman Act to proscribe only unreasonable restraints on trade).

32. See ABA SECTION OF ANTITRUST LAW, *supra* note 16, at 47 ("To determine whether an agreement unreasonably restrains competition, courts traditionally have applied one of two methods of analysis, depending on the nature of the agreement at issue.").

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

34. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007)

The per se rule applies to a practice that "facially appears to be one that would always or almost always tend to restrict competition and decrease output" rather than "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"<sup>35</sup> A practice subject to the per se rule is irrebuttably presumed unreasonable "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use."<sup>36</sup> The per se rule is reserved for practices "that . . . would be invalidated in all or almost all instances under the rule of reason."<sup>37</sup>

The rule of reason is the predominant standard applied in cases brought under § 1 of the Sherman Act.<sup>38</sup> Under the rule of reason, the plaintiff bears the initial burden of showing that a restraint has a significant anticompetitive effect.<sup>39</sup> If the plaintiff meets its initial burden, the burden shifts to the defendant to produce procompetitive justifications for the restraint.<sup>40</sup> If the defendant can produce such evidence, the plaintiff must show that the procompetitive effects could be achieved by less restrictive means.<sup>41</sup> Ultimately, the purpose of the rule of reason is to determine whether the challenged practice's anticompetitive effects outweigh its procompetitive justifications.<sup>42</sup> In the context of vertical nonprice restraints, unless the antitrust defendant has market power, it is very difficult for the plaintiff to meet the initial burden of proof.<sup>43</sup> As a result,

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(finding that the rule of reason is the appropriate standard of review for vertical price restraints).

35. *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

36. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

37. *Leegin*, 551 U.S. at 886–87.

38. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("[T]here is a presumption in favor of a rule-of-reason standard . . .").

39. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (noting that the rule of reason requires the plaintiff to prove anticompetitive effect).

40. *See id.* ("Once [the plaintiff's] initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint.").

41. *See id.* (requiring the plaintiff to "prove either that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition").

42. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977) (requiring courts applying the rule of reason to balance the restraint's procompetitive and anticompetitive effects).

43. *See Peter Nealis, Per Se Legality: A New Standard in Antitrust Adjudication Under the Rule of Reason*, 61 OHIO ST. L.J. 347, 370 (2000) (discussing the plaintiff's high burden of proof associated with the rule of reason).



vertical nonprice restraints subject to the rule of reason under § 1 of the Sherman Act are routinely upheld.<sup>44</sup>

## 2. Resale Price Maintenance from *Dr. Miles* to Leegin

The per se rule applicable to RPM for nearly a century had its origins in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>45</sup> There, the Supreme Court held a manufacturer's agreement with its dealer on the minimum price below which the dealer could not resell the manufacturer's product to be per se illegal.<sup>46</sup> *Dr. Miles*, a manufacturer of proprietary medicines, sued Park, a wholesale drug company, for tortious interference with contract.<sup>47</sup> Park defended by arguing, among other things, that the restrictions in *Dr. Miles*'s contracts setting the minimum resale price for *Dr. Miles*'s product were void as against public policy.<sup>48</sup> The Court agreed with Park, characterizing *Dr. Miles*'s resale price restrictions as a restraint on alienation<sup>49</sup> that was contrary to public policy and void.<sup>50</sup>

In 1937, however, at the height of the Depression, Congress passed the first of two Fair Trade Amendments to amend the Sherman Act to allow states to make an independent determination whether to allow RPM.<sup>51</sup> The

44. See *infra* Part III (discussing how the rule of reason has been applied to vertical nonprice restraints).

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

46. See *id.* (declaring all vertical price restraints illegal per se).

47. See *id.* at 394 (discussing the nature of *Dr. Miles*'s complaint). Although *Dr. Miles* did not bring suit under the antitrust laws, the per se rule applied to *Dr. Miles*'s price restrictions became the predominant standard used to determine whether a vertical restraint violated § 1 of the Sherman Act. See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (interpreting *Dr. Miles* as prohibiting per se vertical price restrictions).

48. See *Dr. Miles*, 220 U.S. at 394 (discussing the nature of Park's defense).

49. See *id.* at 404 (characterizing *Dr. Miles*'s practice of setting the resale prices of its goods as a restraint on alienation).

50. See *id.* at 408 ("[A]greements 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.").

51. See 6 EARL W. KINTNER & WILLIAM P. KRATZKE, FEDERAL ANTITRUST LAW § 43.19 (1986) (discussing the Fair Trade Amendments). Congress wanted to protect small business from the use of "loss-leaders." *Id.* "Loss-leaders" are "good[s] that [are] priced aggressively in order to induce customers to come in the door, where it is then anticipated that they will purchase other goods as well." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 742(f), at 248–50 (3d ed. 2008).

Miller-Tydings Act<sup>52</sup> provided that RPM agreements between manufacturers and their dealers would not violate the Sherman Act if permitted by state law.<sup>53</sup> In 1951, the Supreme Court held, in *Schwegmann Bros. v. Calvert Distillers Corp.*,<sup>54</sup> that a manufacturer could not enforce RPM agreements against nonsignors—dealers who choose not to sign the RPM agreement.<sup>55</sup> The next year, Congress passed the McGuire Act,<sup>56</sup> which, among other things, permitted states to create a right of action for manufacturers against nonsignors.<sup>57</sup>

But in 1975, in response to the recession of the mid-1970s, Congress passed the Consumer Goods Pricing Act of 1975,<sup>58</sup> repealing the Fair Trade Amendments.<sup>59</sup> In effect, the Act eliminated the antitrust immunity enjoyed by RPM in states with laws that permitted RPM—otherwise referred to as "fair trade" laws—and RPM returned to its per se illegal status in those states.<sup>60</sup> The Senate Report concluded that state "fair trade" laws resulted in an 18–27% increase in the price of goods subject to RPM.<sup>61</sup> Repealing the Fair Trade Amendments would thus result in \$2.1 billion in consumer savings.<sup>62</sup>

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52. See Miller-Tydings Fair Trade Act, ch. 690, 50 Stat. 693 (1937) (repealed 1975) (providing an exception to the Sherman Act for RPM agreements that would be permitted under state law).

53. See KINTNER & KRATZKE, *supra* note 51, § 43.19 ("The Miller-Tydings Act provided that minimum resale prices agreed upon by producers or distributors and resellers would not violate the Sherman Act if such agreements were permitted under state law as applied to intrastate transactions.").

54. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (finding an RPM agreement unenforceable against a retailer who refused to agree to sell at the fixed price).

55. See *id.* ("[S]ince Congress was writing a law to meet the specifications of state law, it would seem that if the nonsigner provision as well as the 'contract' provision of state law were to be written into federal law, the pattern of the legislation would have been different.").

56. See McGuire Act, ch. 745, 66 Stat. 631 (1952) (repealed 1975) (overruling the Court's decision in *Schwegmann Bros.*).

57. See KINTNER & KRATZKE, *supra* note 51, at § 43.19 (describing the various components of the McGuire Act).

58. See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (repealing the Fair Trade Amendments to the Sherman Act).

59. See KINTNER & KRATZKE, *supra* note 51, at § 43.29 (describing the Consumer Goods Pricing Act of 1975).

60. See *id.* (noting that the Consumer Goods Pricing Act of 1975 abolished the "antitrust immunity or immunity from the Federal Trade Commission Act for agreements which impose vertical restrictions on pricing").

61. See *id.* (describing the contents of the Senate Report).

62. See *id.* (discussing the consumer savings that would result from the repeal of the

While Congress articulated its belief that RPM agreements adversely affected competition by repealing the Fair Trade Amendments,<sup>63</sup> the Court, beginning with *Monsanto Co. v. Spray-Rite Service Corp.*,<sup>64</sup> started the process of undercutting the per se rule that led to its decision in *Leegin*. In *Monsanto*, the Court made it more difficult to prove a vertical price agreement by requiring the plaintiff to show something more than price effects.<sup>65</sup> The antitrust plaintiff must offer "evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective."<sup>66</sup> In *Business Electronics Corp. v. Sharp Electronics Corp.*,<sup>67</sup> the Court limited application of the per se rule to vertical price restraints that required adherence by the dealer to a specific price or price level.<sup>68</sup> In *State Oil v. Khan*,<sup>69</sup> the Court rejected application of the per se rule to vertical agreements that set a *maximum* resale price and held that such restraints must be evaluated under the rule of reason.<sup>70</sup> The Court's gradual movement away from strict application of the per se rule to all types of vertical price restraints foreshadowed the *Leegin* decision.

In 2007, the Court overruled *Dr. Miles* in *Leegin* and extended the rule of reason to all RPM-based claims.<sup>71</sup> The defendant, Leegin, manufactured specialty leather goods under the brand name Brighton and instituted a policy under which it refused to sell to dealers that discounted its products

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Fair Trade Amendments).

63. *See id.* (discussing Congress's motivation for repealing the Fair Trade Amendments).

64. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (requiring plaintiffs alleging a price-fixing conspiracy to discredit the possibility that a manufacturer and its purchasers acted independently).

65. *See id.* at 764 ("[S]omething more than evidence of [price] complaints is needed.").

66. *Id.* at 768.

67. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735–36 (1988) ("[A] vertical restraint is not illegal per se unless it includes some agreement on price or price levels.").

68. *Id.*

69. *See State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (adopting the rule of reason for maximum vertical price fixing agreements).

70. *See id.* (concluding that maximum vertical price fixing agreements are not per se illegal under the Sherman Act).

71. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) ("We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.").

below suggested prices.<sup>72</sup> In 2002, Leegin discovered that the plaintiff, PSKS, operating as Kay's Closet, was discounting Brighton goods and asked PSKS to stop doing so.<sup>73</sup> PSKS refused, and Leegin terminated its sales to PSKS.<sup>74</sup>

PSKS sued Leegin in federal court, alleging that Leegin violated § 1 of the Sherman Act by agreeing with dealers to set a minimum resale price for Brighton goods.<sup>75</sup> Relying on the per se standard articulated in *Dr. Miles*, the district court excluded Leegin's proposed expert testimony regarding the procompetitive justifications for its retail policy, and the jury found for PSKS.<sup>76</sup> The Fifth Circuit rejected Leegin's argument that the rule of reason should apply to vertical price restraints and affirmed the district court judgment.<sup>77</sup> The Supreme Court reversed and remanded.<sup>78</sup>

*Leegin* observed that "[t]he promotion of interbrand competition . . . is 'the primary purpose of the antitrust laws.'"<sup>79</sup> RPM can be procompetitive because it may stimulate interbrand competition by: (1) reducing intrabrand price competition and thereby increasing intrabrand nonprice competition,<sup>80</sup> (2) encouraging dealers to offer more product-specific services to support a brand,<sup>81</sup> (3) discouraging discount retailers from "free-

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72. *See id.* at 882–83 (describing the nature of Leegin's business). Because Leegin dealt primarily with boutique retailers, the stated purpose of the policy was to provide retailers with a sufficient profit margin, so they would provide consumers with the desired level of product-specific services. *See id.* at 883 ("Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy.").

73. *See id.* at 884 ("In December 2002, Leegin discovered [PSKS] had been marking down Brighton's entire line by 20 percent.").

74. *See id.* ("Its request refused, Leegin stopped selling to the store.").

75. *See id.* ("[PSKS,] alleged, among other claims, that Leegin had violated the antitrust laws by 'enter[ing] into agreements with retailers to charge only those prices fixed by Leegin.'").

76. *See id.* at 884 (discussing the trial court's decision to exclude certain testimony related to the competitive effects of RPM agreements).

77. *See id.* at 885 ("We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as per se unlawful.").

78. *See id.* at 907–908 (overruling *Dr. Miles* and remanding the case for consideration under the rule of reason).

79. *Id.* at 890 (quoting *State Oil v. Khan*, 522 U.S. 3, 15 (1997)).

80. *See id.* ("The promotion of interbrand competition is important because the 'primary purpose of the antitrust laws is to protect [this type of] competition.'" (citing *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997))).

81. *See id.* at 890 (discussing the procompetitive effects of offering product-specific services).

riding" on "full service" dealers,<sup>82</sup> and (4) facilitating market entry for new brands.<sup>83</sup> RPM can be anticompetitive if it: (1) facilitates a cartel at the manufacturer or dealer level,<sup>84</sup> (2) is used to "forestall innovation in distribution that decreases costs," or (3) "give[s] retailers incentive not to sell the product of smaller rivals or new entrants."<sup>85</sup> PSKS further argued that RPM leads to higher prices for consumers.<sup>86</sup> The Court concluded that because RPM can be procompetitive, "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.'"<sup>87</sup> The rule of reason, and not the *per se* rule, should apply to vertical price restraints.<sup>88</sup>

*Leegin* identified three factors to guide a rule of reason analysis of RPM: (1) the percentage of manufacturers in a relevant market using RPM; (2) whether dealers or manufacturers instigate the restraint; and (3) whether the party imposing the restraint possesses market power.<sup>89</sup> When a large percentage of manufacturers in a relevant market use RPM, lower courts should make sure there is no cartel to raise prices at the manufacturer level.<sup>90</sup> If a dealer rather than the manufacturer is the impetus behind the restraint, there is a "greater likelihood that the restraint facilitates a retailer

82. *Id.* at 890–91 (discussing how RPM can eliminate the use of free-riding in the market).

83. *See id.* at 891 (explaining how RPM can facilitate entry into a market).

84. *See id.* at 892–93 (discussing how RPM can be used to facilitate cartels). The Court pointed out, however, that such conduct would still be unlawful under a rule of reason analysis. *See id.* at 893 ("To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate [a] cartel, it, too, would need to be held unlawful under the rule of reason.").

85. *Id.* at 893–94.

86. *See id.* at 895 ("Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods."). On remand from the Supreme Court, PSKS once again argued that *Leegin*'s resale price maintenance policy artificially increased prices. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 09-40506, 2010 WL 3220384, at \*6 (5th Cir. Aug. 17, 2010) (describing PSKS's amended complaint). The Fifth Circuit rejected PSKS's argument, applying the market-powerscreen. *See id.* (finding that absent market power, higher prices can only cause *Leegin* to lose business to competitors and cannot cause harm to consumers).

87. *Id.* at 894 (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

88. *Id.* ("[RPM] agreements appear ill suited for *per se* condemnation.").

89. *See id.* at 897–98 (discussing three factors that could help a lower court apply the rule of reason to vertical price restraints).

90. *See id.* at 897 (discussing the possible ramifications of having a large percentage of manufacturers in a relevant market use RPM).

cartel or supports a dominant, inefficient retailer."<sup>91</sup> Finally, it is less likely that there will be adverse effects on competition if the party imposing RPM lacks market power, that is, where interbrand competition is strong.<sup>92</sup>

### 3. *The State Response to Leegin*

Many state attorneys general oppose the switch from the per se rule to the rule of reason articulated in *Leegin* and believe that RPM remains per se illegal under their state antitrust laws.<sup>93</sup> Virtually all courts, however, consult federal antitrust precedent when interpreting state antitrust laws.<sup>94</sup> It is possible, therefore, that lower courts will interpret state law in accordance with *Leegin* and apply the rule of reason to RPM.<sup>95</sup>

Fearing that Maryland courts might apply the rule of reason post-*Leegin* to RPM, the Maryland General Assembly amended the Maryland Antitrust Act to prohibit per se the use of RPM.<sup>96</sup> The General Assembly made a judgment that RPM universally results in an unreasonable restraint on competition, and thus, antitrust plaintiffs should not have to sustain the higher burden of proof required under the rule of reason.<sup>97</sup> The Maryland RPM prohibition is the first and so far only state legislation expressly prohibiting RPM.<sup>98</sup> While other states might pass legislation in the near

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91. *Id.* at 898.

92. *See id.* ("And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.")

93. *See* Joel M. Mitnick et al., *A Commentary on Current State Enforcement Policy for RPM: On Life Support from Leegin's Disease: Can the States Resuscitate Dr. Miles?*, 22 ANTITRUST 63, 63 (2008) ("More dramatically, enforcement officials of several states have asserted that RPM remains per se unlawful under various state antitrust laws despite *Leegin*.").

94. *See* Duncan & Guernsey, *supra* note 10, at 173–74 (discussing the nature of state antitrust laws).

95. *See, e.g.,* Spahr v. Leegin Creative Leather Prods., No. 2:07-CV-187, 2008 WL 3914461, at \*7 (E.D. Tenn. Aug. 20, 2008) (applying the rule of reason to RPM uses after finding no reason why the state supreme court would not follow *Leegin*).

96. *See* MD. CODE ANN., COM. LAW § 11-204(b) (LexisNexis 2009) ("[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.")

97. *See* DEP'T OF LEGISLATIVE SERVS. OF MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE: H.B. 657, H. 426, 2009 Sess. (2009) (discussing the policy concerns underlying the amendment to the Maryland antitrust laws).

98. *See* Lindsay, *supra* note 9, at 2 (noting that the Maryland RPM prohibition is the only state antitrust statute expressly prohibiting RPM).

future mirroring the Maryland RPM prohibition, for the time being, RPM may be lawful in every state except Maryland.

### III. Resale Price Maintenance Under the Rule of Reason

*Leegin* is a relatively recent case, and therefore, it is unclear how courts will apply the rule of reason to vertical price restraints, such as RPM. However, vertical *nonprice* restraints, which limit a dealer's ability to resell a product in a particular geographic area or to a certain type of consumer,<sup>99</sup> have been subject to the rule of reason for over thirty years.<sup>100</sup> In *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>101</sup> the plaintiff, a dealer of Sylvania televisions, challenged a so-called location clause in its franchise agreement that limited the location from which the plaintiff could resell Sylvania televisions.<sup>102</sup> The *Sylvania* opinion recognized that vertical nonprice restraints, such as those included in the plaintiff's franchise agreement, can have both procompetitive and anticompetitive effects.<sup>103</sup> The Court decided, therefore, that the per se rule applicable to vertical restraints should no longer apply to vertical *nonprice* restraints, which would thereafter be subject to rule of reason analysis.<sup>104</sup>

The way lower courts have analyzed vertical nonprice restraints post-*Sylvania* could foreshadow how RPM will be treated under the rule of reason post-*Leegin*. Scholars have described the rule of reason standard articulated in *Sylvania* as a "toothless" mode of analysis that has "created a business climate . . . in which virtually any restraint of trade that arguably

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99. See BAUER & PAGE, *supra* note 17, § 12.9 (noting that vertical nonprice restraints place limitations on a dealer's ability to resell a product and "usually involve a sale conditioned upon the buyer's agreement not to resell other than in a designated geographic area or to a certain class of customers").

100. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (declaring that vertical nonprice restraints should be evaluated under the rule of reason).

101. See *id.* ("In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*.").

102. See *id.* at 37–38 (discussing the factual context of the case).

103. See *id.* at 54 (discussing how vertical restraints affect interbrand and intrabrand competition). The Court in *Leegin* also identified these competitive effects in their analysis of vertical price restraints. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890–94 (2007) (discussing the procompetitive and anticompetitive uses of RPM).

104. See *Sylvania*, 433 U.S. at 58–59 ("Accordingly, we conclude that the per se rule in *Schwinn* must be overruled. . . . [W]e conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*." (citations omitted)).

can be characterized as 'vertical,' . . . is per se legal."<sup>105</sup> A survey in 1991 revealed that in forty-one of the forty-five post-*Sylvania* cases involving vertical nonprice restraints, the plaintiff failed to show a Sherman Act violation under the rule of reason.<sup>106</sup> Since 1991, the only successful challenges of vertical nonprice restraints<sup>107</sup> have been in conjunction with a finding of monopoly power under § 2 of the Sherman Act.<sup>108</sup>

Two contributing factors to these statistics are the plaintiff's high burden of proof under the rule of reason<sup>109</sup> and the judicial development of a so-called "market-power screen."<sup>110</sup> Using this screen, courts require the plaintiff to allege that one of the parties to the challenged vertical nonprice restraint possesses market power as a prerequisite to proceeding with an antitrust challenge.<sup>111</sup> Application of the rule of reason to RPM might therefore result in effectively "per se legal" treatment under the antitrust laws in cases where the party imposing the restraint lacks market power.<sup>112</sup> The Fifth Circuit has already adopted a market-power screen for RPM, requiring plaintiffs to "plausibly allege the defendant's market power" to sufficiently allege a vertical price restraint.<sup>113</sup> Applying this principle, the Fifth Circuit rejected PSKS's amended complaint on remand from *Leegin*

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105. 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, 134 (1989).

106. See Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 70–71 (1991) (reporting the results of a survey conducted to determine how lower courts have applied the rule of reason standard articulated in *Sylvania*).

107. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 59–74 (D.C. Cir. 2001) (finding that certain nonprice restraints used by Microsoft Corp. violated § 2 of the Sherman Act under a rule of reason analysis); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 188–90 (3d Cir. 2005) (finding an exclusive dealing policy violated Section 2 of the Sherman Act after concluding that Dentsply International had monopoly power).

108. See 15 U.S.C. § 2 (2006) (prohibiting monopolistic conduct).

109. See *id.* (discussing how the plaintiff's high burden of proof has contributed to the creation of a "per se legal" standard).

110. See *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) ("Only if [the plaintiff] can allege facts that give rise to an inference that [defendant] had sufficient market power . . . must we proceed to the first step of the Rule of Reason analysis, which is to balance the effects the vertical restraint has on intrabrand and interbrand competition.").

111. See *id.* (describing how the "market-power screen" is applied).

112. See Ginsburg, *supra* note 106, at 67 ("I conclude that non-monopolists have been effectively freed from antitrust regulation of vertical nonprice restraints.").

113. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 09-40506, 2010 WL 3220384, at \*5 (5th Cir. Aug. 17, 2010).



as failing to define a relevant product market in which Leegin had market power.<sup>114</sup> Given the permissive treatment by federal courts of vertical nonprice restraints post-*Sylvania*,<sup>115</sup> and the Fifth Circuit's use of a market-power screen,<sup>116</sup> federal courts applying the rule of reason articulated in *Leegin* will likely find RPM lawful in all or almost all situations in which the manufacturer lacks market power. The remainder of this Note assumes that the Maryland RPM prohibition would prohibit conduct that § 1 of the Sherman Act would not.

#### IV. Federal Preemption

The Maryland RPM prohibition, with its per se proscription of RPM agreements, is in diametric conflict with *Leegin*'s interpretation of § 1 of the Sherman Act. Does *Leegin*'s interpretation of the Sherman Act, therefore, preempt the Maryland RPM prohibition?

The concept of federal preemption originates in the Supremacy Clause, which dictates that federal law should supplant any conflicting state law in a given field.<sup>117</sup> Congress can preempt state law in exercising its Article I enumerated powers in three ways: (1) an express statement to that effect; (2) federal occupation of a given field; or (3) conflict between state and federal law such that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>118</sup> The Maryland RPM prohibition implicates federal preemption because it declares RPM per se illegal, even though *Leegin* declares such agreements subject to rule of reason analysis. The practical effect of the Maryland RPM prohibition, therefore, is to prohibit conduct that likely will be permissible under the federal antitrust laws.<sup>119</sup>

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114. *See id.* ("Indeed, it is impossible to imagine that Leegin could have power over [the market for women's accessories].").

115. *See* Ginsburg, *supra* note 106, at 70–71 (stating that by 1991, over 90% of the cases decided since *Sylvania* found the use of vertical nonprice restraints permissive under the Sherman Act).

116. *See* *PSKS*, 2010 WL 3220384, at \*5 (applying a market-power screen to vertical price restraint claims).

117. U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

118. *See* *California v. ARC Am. Corp.*, 490 U.S. 93, 100–01 (1989) (articulating the three bases for finding preemption).

119. *See supra* Part III (discussing the legacy of *Sylvania* and its implications for vertical price restraints following *Leegin*).

The first two bases for preemption—express language declaring preemption and federal occupation of a given field—do not apply here. First, nothing in the *Leegin* opinion precludes concurrent state regulation of RPM agreements. Second, it is well-settled that antitrust is "an area traditionally regulated by the States," not the federal government.<sup>120</sup> As articulated by Senator Sherman, the intent of the Sherman Act was "to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states."<sup>121</sup>

The Supreme Court's interpretation of the Sherman Act in *Leegin*, therefore, will preempt the Maryland RPM prohibition only if an actual conflict exists, such that the Maryland RPM prohibition "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>122</sup> Some scholars would argue that the Court's decision in *California v. ARC America Corp.*<sup>123</sup> answers the preemption question in the negative, even where a direct conflict exists between state and federal antitrust law.<sup>124</sup>

In *ARC America*, several states that were indirect purchasers of concrete brought suit to recover for an alleged conspiracy to fix the price of concrete block.<sup>125</sup> Twelve years prior, in *Illinois Brick Co. v. Illinois*,<sup>126</sup> the

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120. *ARC Am. Corp.*, 490 U.S. at 101. Prior to the enactment of the Sherman Act, twenty-one states had already developed antitrust laws to regulate monopolies and unfair business practices. *See id.* at 101 n.4 ("At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws.").

121. 21 Cong. Rec. 2457 (1890) (emphasis added). Senator Sherman continued, "It is to arm the federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." *Id.*

122. *ARC Am. Corp.*, 490 U.S. at 101.

123. *See id.* at 105–06 (finding no support for federal preemption of state laws allowing indirect purchasers to bring suit against manufacturers for overcharges although prohibited from doing so under federal law).

124. *See* HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2403a, at 318 (2d ed. 2006) ("[T]he Supreme Court has made clear that state antitrust law is not preempted even when the state statute or state judicial or agency interpretations are inconsistent with prevailing federal law.").

125. *See California v. ARC Am. Corp.*, 490 U.S. 93, 97–98 (1989) (discussing the factual premise of the case).

126. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (prohibiting indirect purchasers of goods from recovering antitrust damages under the Clayton Act). In *Illinois Brick*, the State of Illinois alleged that concrete block manufacturers conspired to fix prices. *Id.* at 726–27. The State of Illinois commissioned government projects that incorporated

Court had held that only direct purchasers qualify as injured parties that can recover under the federal antitrust laws.<sup>127</sup> In response to *Illinois Brick*, states passed so-called "*Illinois Brick* repealers" to amend their state antitrust laws to permit indirect purchasers to recover damages resulting from violations of the state antitrust laws.<sup>128</sup> The plaintiffs in *ARC America*, therefore, sought damages relief under their state antitrust laws using the "*Illinois Brick* repealer" provision.<sup>129</sup>

The issue before the Court was whether *Illinois Brick*'s prohibition on recovery of damages by indirect purchasers preempted state statutes that permitted recovery.<sup>130</sup> Although there was a conflict between the state laws with "*Illinois Brick* repealers" and the interpretation of the federal antitrust laws in *Illinois Brick*, the state laws did not "pose an obstacle to the accomplishment of the purposes and objectives of Congress."<sup>131</sup> Both the state antitrust laws with "*Illinois Brick* repealers" and the federal antitrust laws had the same goal of "detering anti-competitive conduct and ensuring the compensation of victims of that conduct."<sup>132</sup> In addition, because the *Illinois Brick* opinion included no discussion of state law or preemption, it did not "suggest[] that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws."<sup>133</sup> The result in *Illinois Brick*, therefore, did not preempt the "*Illinois Brick* repealers."<sup>134</sup>

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concrete blocks. *Id.* at 735. The Court held that only a direct purchaser of concrete block (in this case, the government contractor who purchased the concrete block for the government project) was a party "injured in his business or property" entitled to sue under the Clayton Act, not another party "in the chain of manufacture or distribution." *Id.* at 729, 735–37. The Court reasoned that allowing both indirect and direct purchasers to recover would create a risk of multiple liabilities for defendants. *Id.* at 730–31. The Court also noted the difficulties in tracing an overcharge along the chain of distribution. *Id.* at 731–32.

127. *See id.* at 745–46 (limiting recovery under § 4 of the Clayton Act to direct purchasers).

128. *See ARC Am. Corp.*, 490 U.S. at 98 ("In their complaints, however, appellants also alleged violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers arguably are allowed to recover for all overcharges passed on to them by direct purchasers.").

129. *See id.* at 97–98 (discussing the nature of the plaintiff's claims).

130. *See id.* at 100 ("The issue before us is whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action.").

131. *Id.* at 102.

132. *Id.*

133. *Id.* at 102–03.

134. *See id.* at 105–06 ("The congressional purposes on which *Illinois Brick* was based

In the context of the Maryland RPM prohibition, the Court's analysis in *ARC America*, while instructive, is not conclusive. The *ARC America* opinion proceeded under the assumption that liability would be found under both the federal and state antitrust laws and addressed only the question of who could recover damages from the antitrust defendant.<sup>135</sup> The *Leegin* opinion, juxtaposed with the Maryland RPM prohibition, however, presents a situation in which a party would be found to violate the state antitrust law but likely would not under federal law.<sup>136</sup>

Although some scholars consider federal preemption in antitrust to be foreclosed from discussion by *ARC America*,<sup>137</sup> the Supreme Court's analysis in *Exxon Corp. v. Governor of Maryland*<sup>138</sup> is more appropriate, as that case involved a Maryland law that prohibited certain types of discounts that otherwise might have been permitted under the Robinson-Patman Act,<sup>139</sup> the federal price discrimination law. In *Exxon*, several oil companies challenged the constitutionality of a Maryland statute that prohibited petroleum producers or refiners from operating retail service stations in Maryland and required them to extend any temporary price reductions granted to dealers in response to local competitive conditions uniformly to all stations they supplied in the state.<sup>140</sup> The Court identified

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provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.").

135. See ROBERT M. LANGER, FEDERAL TRADE COMMISSION: RESALE PRICE MAINTENANCE WORKSHOP 10 (2009), available at [http://www.ftc.gov/os/comments/resale\\_pricemaintenance/00001.pdf](http://www.ftc.gov/os/comments/resale_pricemaintenance/00001.pdf) ("*ARC America*, however, dealt only with the question whether, assuming liability was pre-determined, a certain group of plaintiffs could recover under state law when that same group could not recover under federal law.").

136. See *id.* ("That issue is fundamentally distinct from the question whether a party can be liable for a price fixing conspiracy under state law yet not liable for the same conduct under federal law, and this distinction has not been lost on other commentators."); Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, 22 ANTITRUST 32, 33 (2007) ("*ARC America* dealt with a procedural or remedial rule, rather than a substantive rule of conduct. *Leegin*, however, dealt with a substantive rule of conduct: whether minimum RPM agreements are automatically illegal.").

137. See HOVENKAMP, *supra* note 124, at 318 (arguing that the Court's decision in *ARC America* establishes that state antitrust laws are never preempted by federal antitrust laws).

138. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133-34 (1978) (finding that a Maryland law requiring price reductions to be extended uniformly was not preempted by § 2(b) of the Robinson-Patman Act).

139. See 15 U.S.C. § 13(b) (2006) (establishing the "meeting competition" defense to rebut a prima facie case of price discrimination).

140. See *Exxon*, 437 U.S. at 119-20 ("A Maryland statute provides that a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all 'voluntary allowances' uniformly to all service stations it supplies." (citations omitted)). The express purpose of the statute was to correct preferential treatment

the issue as whether the statewide price reduction requirement violated the Commerce Clause or Due Process Clause or was preempted by "congressional expression of policy favoring vigorous competition found in § 2(b) of the [Robinson-Patman Act]."<sup>141</sup> The Court of Appeals of Maryland upheld the Maryland statute, and the United States Supreme Court affirmed.<sup>142</sup>

The Court rejected the two preemption arguments proffered by the oil companies: "[T]he requirement that voluntary allowances be extended to all retail service stations is either in direct conflict with § 2(b) of . . . the Robinson-Patman Act, or, more generally, in conflict with the basic federal policy in favor of competition."<sup>143</sup> First, the oil companies attempted to prove that compliance with the Maryland statute might necessitate a violation of the Robinson-Patman Act.<sup>144</sup> The oil companies described various hypothetical situations in which requiring a statewide price reduction might result in "discrimination between consumers who would otherwise receive the same price."<sup>145</sup> The Court rejected the oil companies' hypothetical situations as an attempt to "seek[] out conflicts between state and federal regulation where none clearly exists."<sup>146</sup> The Court characterized the oil companies' alleged "conflict" as "the possibility that the Maryland statute may require uniformity in some situations in which the Robinson-Patman Act would *permit* localized discrimination" and found it insufficient to support a federal preemption claim.<sup>147</sup>

With respect to the Maryland RPM prohibition and the Court's interpretation of the Sherman Act in *Leegin*, a very likely hypothetical situation does exist in which Maryland would prohibit conduct that might otherwise be permissible under the Sherman Act. For example, a manufacturer with a low market share might impose RPM agreements on its dealers to compete more effectively against other larger competitors in response to free-riding in the market or to increase the level of product-

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given to company-owned gasoline stations during the petroleum shortage of 1973. *See id.* at 121 (discussing the policy behind the Maryland statute at issue).

141. *Id.* at 120.

142. *See id.* at 120–21 ("The Court of Appeals of Maryland answered these questions in favor of the validity of the statute . . . We affirm." (citations omitted)).

143. *Id.* at 129.

144. *See id.* at 130 ("Appellants' first argument is that compliance with the Maryland statute may cause them to violate the Robinson-Patman Act.").

145. *Id.*

146. *Id.* (quoting *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45 (1966)).

147. *Id.* at 131.

specific services offered to consumers. Under the Maryland RPM prohibition, that agreement, regardless of motivation or effect, would be irrebuttably presumed to be illegal.<sup>148</sup> Under federal law, however, the RPM provision would be subject to a rule of reason analysis.<sup>149</sup> Given the procompetitive effects of RPM on interbrand competition, a federal court likely would conclude that the RPM use is lawful because the procompetitive effects outweigh any elimination of intrabrand competition.<sup>150</sup> As the Court explained in *Exxon*, however, an alleged conflict in which state law would prohibit conduct that might be *permissible* under federal law is insufficient to find federal preemption.<sup>151</sup>

The oil companies also attempted to prove that the "meeting competition" defense provided in § 2(b) of the Robinson-Patman Act "establishes a federal right to engage in discriminatory pricing in certain situations."<sup>152</sup> The "meeting competition" defense permits the seller to rebut a *prima facie* case of price discrimination by "showing that his lower price . . . was made in good faith to meet an equally low price of a competitor."<sup>153</sup> The Court described the language in § 2(b), however, as merely granting a limited defense and dismissed the oil companies' contention, observing that it was "illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion."<sup>154</sup> Moreover, the Court found no conflict in the policy underlying both the Robinson-Patman Act and the Maryland statute: Both statutes "reflect a policy choice favoring the interest in equal treatment

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148. See MD. CODE ANN., COM. LAW § 11-204(b) (LexisNexis 2009) ("[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.").

149. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (finding that the rule of reason is the appropriate standard of review for vertical price restraints).

150. See *id.* at 886 ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

151. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 131 (1978) ("Instead, the alleged 'conflict' here is in the possibility that the Maryland statute may require uniformity in some situations in which the Robinson-Patman Act would *permit* localized discrimination." (citations omitted)).

152. *Id.*

153. 15 U.S.C. § 13(b) (2006).

154. *Exxon*, 437 U.S. at 132.

of all customers over the interest in allowing sellers freedom to make selective competitive decisions."<sup>155</sup>

Similarly, it is difficult to argue that the Supreme Court intended to establish a federal right to engage in RPM by interpreting the Sherman Act in *Leegin* to permit a rule of reason analysis for RPM.<sup>156</sup> *Leegin* recognized that RPM can have anticompetitive effects and cautioned federal courts to look specifically for anticompetitive uses of RPM.<sup>157</sup> Although the legacy of *Sylvania* suggests that federal courts ultimately may treat RPM effectively as "per se legal" under the rule of reason if the manufacturer lacks market power, a federal court is unlikely to find a federal *right* to engage in RPM, given the anticompetitive effects identified in *Leegin*.<sup>158</sup>

Together, the Maryland RPM prohibition, the Sherman Act, and the Supreme Court's interpretation of the Sherman Act in *Leegin* reflect a policy objective to eliminate anticompetitive practices from the market.<sup>159</sup> The only difference is that the State of Maryland has made a legislative judgment that there are few, if any, instances where procompetitive effects of RPM will outweigh its anticompetitive effects.<sup>160</sup> Because the underlying policy goals are the same, however, preemption would be inappropriate here, as it was in *Exxon*.<sup>161</sup>

155. *Id.* at 132–33.

156. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (applying the rule of reason to vertical price restraints).

157. *See id.* at 897 ("[C]ourts would have to be diligent in eliminating [RPM's] anti-competitive uses from the market.").

158. *See id.* at 892–94 (discussing potential anti-competitive uses of RPM).

159. *See* DEP'T OF LEGISLATIVE SERVS. OF MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE: H.B. 657, H. 426, 2009 Sess. (2009) ("The Maryland Antitrust Act is designed to promote fair and honest competition, free of conspiracies, combinations, or agreements which unreasonably restrain trade or commerce."); 21 Cong. Rec. 2558 (1890) (stating that one of the purposes of the Sherman Act was to eliminate conduct that "hinder[ed], interrupt[ed], and impair[ed]" fairness in the marketplace); *Leegin*, 551 U.S. at 897 ("Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market.").

160. *See* DEP'T OF LEGISLATIVE SERVS. OF MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE: H.B. 657, H. 426, 2009 Sess. (2009) ("The bill classifies a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service as an unreasonable restraint of trade or commerce under the Maryland Antitrust Act.").

161. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132 (1978) (finding no conflict between the policy concerns behind the Robinson-Patman Act and the Maryland statute at issue).

In addition, the Supreme Court has been "generally reluctant to infer pre-emption."<sup>162</sup> Because preemption is based on "principles of federalism," the presumption is "in favor of state law and against the exercise of federal supremacy."<sup>163</sup> For example, in *Rice v. Santa Fe Elevator Corp.*,<sup>164</sup> the Supreme Court started its analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>165</sup> Even where the state and federal laws are "seemingly on a direct collision course," the Court has, in the past, expressed an aversion to finding "automatic preemption."<sup>166</sup> Thus, even in the unlikely event that a manufacturer who engages in RPM could articulate an express conflict between the Maryland RPM prohibition and federal law such that the Maryland RPM prohibition stands as an obstacle to Congress's goals in enacting the Sherman Act, a court would likely be hesitant to find federal preemption of the Maryland RPM prohibition.

#### V. The Commerce Clause

The Maryland RPM prohibition, as applied to commerce on the Internet, has the potential to regulate conduct occurring wholly outside the state. Does the Maryland RPM prohibition, therefore, violate the dormant Commerce Clause?

The Commerce Clause gives Congress the authority "[t]o regulate Commerce . . . among the several States."<sup>167</sup> The Framers granted Congress absolute power over interstate commerce to avoid the "economic Balkanization" that "plagued relations among the Colonies and later among the States under the Articles of Confederation."<sup>168</sup> The Commerce Clause embodies the "principle that our economic unit is the Nation" and as a

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162. *Id.*

163. Milton Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363, 1380 (1978).

164. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947) (finding that an Illinois law regulating grain warehouses was beyond the reach of the Illinois Commission under the Supremacy Clause because Congress had "declared its policy in the Warehouse Act").

165. *Id.* at 230.

166. Handler, *supra* note 163, at 1380 (citing Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 653 (1975)).

167. See U.S. CONST. art. I, § 8, cl. 3 ("[T]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .").

168. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).



result, "the states are not separable economic units."<sup>169</sup> The Supreme Court has accordingly inferred from the Commerce Clause a "dormant" or "negative" Commerce Clause that "limits the power of the States to discriminate against interstate commerce."<sup>170</sup>

The first step to analyzing a statute under the dormant Commerce Clause is to determine whether the state statute "regulates even-handedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce."<sup>171</sup> A statute impermissibly discriminates if it requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."<sup>172</sup> If the state regulation is discriminatory, it is "virtually *per se* invalid."<sup>173</sup>

The Maryland RPM prohibition regulates evenhandedly because it does not distinguish between in-state and out-of-state entities using RPM.<sup>174</sup> No matter their locale, manufacturers imposing RPM would be subject to liability under the statute. In the context of the Internet, however, the Maryland RPM prohibition results in impermissible economic protectionism or direct regulation of commerce occurring completely outside the state.

#### *A. In Defense of the Maryland RPM Prohibition*

In response to a Commerce Clause challenge to the Maryland RPM prohibition, the Maryland Attorney General or private plaintiff might first defend the Maryland RPM prohibition by pointing out that an out-of-state entity can simply choose not to do business in the State of Maryland if it does not wish to comply. In *National Electrical Manufacturers Association v. Sorrell*,<sup>175</sup> the Second Circuit considered a Commerce Clause challenge

169. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949).

170. *See Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (discussing the Court's jurisprudence with respect to the Dormant Commerce Clause).

171. *Hughes*, 441 U.S. at 336.

172. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1993).

173. *Id.*

174. *See MD. CODE ANN., COM. LAW § 11-204(b)* (LexisNexis 2009) ("[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.").

175. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001) (concluding that a Vermont statute requiring labels to be affixed to certain products containing mercury did not violate the Commerce Clause or the First Amendment).

to a Vermont law that required manufacturers of mercury-containing products to place a label on their products that displayed the product's mercury content and proper disposal procedures.<sup>176</sup> Manufacturers of lamps containing mercury argued that compliance with the statute might be prohibitively expensive because "the demand for [the products] in Vermont may be such that their increased price would so severely reduce consumption that the lamps could no longer be sold profitably in Vermont."<sup>177</sup> Because the manufacturer's decision to abandon the Vermont market would be based on economic necessity and not some factor under the state's control, the court held that the Vermont statute did not violate the Commerce Clause merely because some manufacturers might abandon the market if the cost of compliance became too high.<sup>178</sup>

The *Sorrell* opinion teaches, therefore, that if a manufacturer would choose to withdraw from the Maryland market out of economic necessity, there should be no Commerce Clause implications for the Maryland RPM prohibition.<sup>179</sup> As applied to manufacturers and internet dealers, however, there are three flaws with the argument that a manufacturer could simply withdraw from the Maryland market if it does not wish to comply with the Maryland RPM prohibition. First, in the internet context, selling into Maryland in compliance with the Maryland RPM prohibition is not practically possible while, at the same time, using RPM for sales into states where it would otherwise be permissible. Second, to withdraw effectively from the Maryland market while continuing to sell into other states, a manufacturer would have to impose a potentially per se illegal nonprice restraint on its internet dealers to prohibit them from selling to Maryland consumers. Finally, even if the manufacturer could withdraw from the Maryland market without risking liability, the practical effect of the statute would be to promote the interests of in-state "traditional" brick-and-mortar dealers over the interests of internet dealers.

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176. *See id.* at 107 (describing the Vermont statute).

177. *Id.* at 111.

178. *See id.* ("Because none of these variables is controlled by the state in this case, we cannot say that the choice to stay or leave has been made for manufacturers by the state legislature, as the Commerce Clause would prohibit.").

179. *See id.* (concluding that because the manufacturer abandoned the market out of economic necessity, the Vermont statute did not force the manufacturer to withdraw).

### 1. Impossibility of Compliance

The Second Circuit's conclusion in *Sorrell* with respect to a manufacturer's decision to withdraw from a state's market applies only to a situation in which a manufacturer leaves the market out of economic necessity, not because compliance is impossible.<sup>180</sup> The State or private plaintiff's argument that the manufacturer can simply abandon the Maryland market if it does not wish to comply with the Maryland RPM prohibition, therefore, assumes that compliance with the statute is possible over the Internet.

Because the Internet lacks geographic boundaries<sup>181</sup> and is dominated by price competition,<sup>182</sup> compliance with the Maryland RPM prohibition is virtually impossible if the manufacturer wishes to sell into Maryland without using RPM, but continue to use RPM in states where it would be permissible. The RPM agreement with internet dealers would have to include an express provision that would allow dealers to set their own prices in Maryland. Internet dealers wishing to use a lower price for Maryland sales would either have to display two prices,<sup>183</sup> one applicable in states where RPM is permissible and another applicable in Maryland, or it would have to incorporate technology that would display the price applicable to the individual internet user. The first option is unworkable given the nature of the Internet, and the second option might still expose the manufacturer to the risk of liability.

If an internet dealer posts two prices on its website to comply with the manufacturer's RPM agreement, non-Maryland consumers likely will

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180. *See id.* at 111 ("Because none of these variables is controlled by the state in this case, we cannot say that the choice to stay or leave has been made for manufacturers by the state legislature, as the Commerce Clause would prohibit.").

181. *See* *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d. Cir. 2003) (characterizing the Internet as "boundary-less").

182. *See* Brad Stone, *The Fight over Who Sets Prices at the Online Mall*, N.Y. TIMES, Feb. 8, 2010, at B1 (describing competition among internet dealers as a "race to the bottom").

183. An internet dealer might avoid posting two prices by independently deciding that the resale price set in the RPM agreement will also be the price applicable in Maryland. Price competition on the Internet, however, has "unlocked a race to the bottom—with everyone from large corporations to garage-based sellers ravenously discounting products, and even selling them at a loss, in an effort to capture market share." Stone, *supra* note 182, at B1. If an internet dealer uses the RPM price in Maryland, other dealers will deliberately post a lower price, even at a loss, to destroy the internet dealer using the RPM price. It is, therefore, unlikely that an internet dealer would independently use the RPM price in Maryland.

"resist being charged higher prices than [Maryland] consumers for identical products."<sup>184</sup> Consumers will go on an internet dealer's website and try to capture the lower price applicable to Maryland consumers. If they cannot, significant consumer ill-will is likely to result. If the internet dealer responds to the consumer resistance and extends the non-RPM price to a non-Maryland consumer, the dealer risks termination by the manufacturer and could ultimately render the manufacturer's use of RPM to be a nullity. Once one internet dealer "breaks" the RPM price, others are likely to follow. The manufacturer's RPM program will break down as a result.

Instead of posting two prices, internet dealers could attempt to incorporate technology into their website that would allow the internet dealer to distinguish between consumers based on geographic location.<sup>185</sup> The internet dealer could track the internet protocol (IP) address of a user's computer to determine the user's geographic location.<sup>186</sup> The manufacturer exposes itself to potential liability under the Maryland RPM prohibition, however, if a Maryland internet user employs internet anonymizers or accesses the Internet remotely and is sold the product at the RPM price.<sup>187</sup> Other technologies using "static Internet addresses, credit card numbers, and direct user authentication" have similar problems.<sup>188</sup> Because consumers often resist attempts to collect identifying information over the Internet without their express consent,<sup>189</sup> consumers take active steps to anonymize their internet transactions. While these methods might allow an internet dealer's website to display different prices based on the user's

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184. Yannis Bakos, *The Emerging Landscape for Retail E-Commerce*, 15 J. ECON. PERSP. 69, 73 (2001).

185. See Alessandro Acquisti & Hal R. Varian, *Conditioning Prices on Purchase History*, MARKETING SCI., Vol. 24, No. 3, at 367, 367 (2005) (discussing how sellers can use technology to condition prices on characteristics of the individual consumer). This assumes that the RPM policy would allow the internet dealer to use this type of technology. Most manufacturers would require the RPM price to be posted for all consumers accessing the internet dealer's website.

186. See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 810 (2001) ("Much more promising are developing technologies that allow webpage content providers instantly to determine the content receiver's geographical identity on the basis of the Internet protocol (IP) address of the user's computer.").

187. See *id.* at 810–11 ("[T]hese geographical identification technologies can presently be defeated by Internet anonymizers, remote sessions via Telnet, and remote dial-up connections.").

188. Acquisti & Varian, *supra* note 185, at 367.

189. See *id.* at 367–68 ("In addition, consumers can voice their displeasure for pricing policies perceived as discriminatory or intrusive, as happened after the famous Amazon.com price experiment." (citations omitted)).

geographic location, they have serious flaws that will potentially expose the manufacturer to liability.

At least one court has found, however, that these user-identification technologies could be workable. In *SPGCC, LLC v. Blumenthal*,<sup>190</sup> the Second Circuit upheld a Connecticut consumer protection statute that prohibited the sale of gift cards subject to dormancy fees or to an expiration date<sup>191</sup> because SPGCC could use credit card billing addresses to distinguish between consumers who lived in Connecticut and those who lived elsewhere.<sup>192</sup> The Second Circuit acknowledged this was a "near-perfect" method but did not discuss SPGCC's risk of liability if a Connecticut consumer used an anonymous payment technology or an out-of-state billing address.<sup>193</sup> If the potential for liability is not a factor in considering whether a manufacturer can comply with the Maryland RPM prohibition, a court could use the Second Circuit's reasoning to reject the contention that compliance is impossible if the manufacturer wants to use RPM in other states. Given the precarious nature of user-identification technology, however, the potential for liability probably makes these technologies unworkable for use in complying with a state internet regulation.

In the internet context, compliance with the Maryland RPM prohibition is practically impossible if the manufacturer wants to use RPM in other states and sell its products over the Internet to Maryland consumers. A manufacturer must either abandon its RPM programs in states where they would otherwise be legal or stop selling its product over the Internet to Maryland consumers. The first option demonstrates the Maryland RPM prohibition's impermissible extraterritorial reach, and the second option might expose the manufacturer to further liability under the Maryland antitrust laws for the use of vertical nonprice restraints in furtherance of a vertical price restraint.

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190. *See* SPGCC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d. Cir. 2007) (upholding a Connecticut consumer protection law related to the sale of gift cards against a Commerce Clause challenge).

191. *See id.* at 187 (describing the Connecticut Gift Card Law).

192. *See id.* at 195 ("SPGCC has readily available a near-perfect means of distinguishing between online consumers of the Simon Giftcard who reside in Connecticut and those who reside elsewhere—their credit card billing addresses.").

193. *See id.* (describing how SPGCC could use credit card billing addresses to distinguish between internet consumers).

## 2. *The Use of a Vertical Nonprice Restraint in Furtherance of a Price Restraint*

If a manufacturer chooses to withdraw from the Maryland market rather than comply with the Maryland RPM prohibition, the manufacturer would need to impose a vertical nonprice restraint on its internet dealers. Vertical nonprice restraints place limitations on a dealer's ability to resell a product and "usually involve a sale conditioned upon the buyer's agreement not to resell other than in a designated geographic area or to a certain class of customers."<sup>194</sup> The manufacturer would prohibit the internet dealers from selling the manufacturer's product to persons located in Maryland, and the internet dealers would have to post on their websites that they do not sell to Maryland residents.

Vertical nonprice restraints are subject to the rule of reason,<sup>195</sup> but when used in furtherance of a vertical price restraint, a Maryland court might find them per se illegal in this context using the Seventh Circuit's reasoning in *Spray-Rite Service Corp. v. Monsanto Co.*<sup>196</sup> Spray-Rite Service Corporation (Spray-Rite) alleged that Monsanto Company (Monsanto) conspired with its distributors to fix the resale price of Monsanto's product in violation of § 1 of the Sherman Act.<sup>197</sup> Spray-Rite claimed that "Monsanto terminated [its] distributorship, adopted compensation programs and shipping policies, and encouraged distributors to boycott Spray-Rite in furtherance of [a price-fixing] conspiracy."<sup>198</sup> With respect to Monsanto's compensation programs and shipping policies, the district court instructed the jury that the use of customer or territorial restraints as part of a price-fixing plan or boycott is per se unlawful.<sup>199</sup> On appeal, Monsanto argued that its compensation programs and shipping policies were vertical nonprice restraints subject to the rule of reason.<sup>200</sup>

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194. BAUER & PAGE, *supra* note 17, at § 12.9.

195. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (declaring that vertical nonprice restraints should be evaluated under the rule of reason).

196. *See Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1251 (7th Cir. 1982) (affirming the jury verdict that Monsanto conspired with its distributors to fix the resale prices of Monsanto's products).

197. *See id.* at 1232 (discussing the nature of Spray-Rite's suit against Monsanto).

198. *Id.* at 1233.

199. *See id.* at 1237 ("The court instructed the jury that it is per se unlawful for a manufacturer to utilize customer or territorial restrictions as part of a comprehensive price-fixing plan or boycott.").

200. *See id.* ("Monsanto claims that the court should have instructed the jury to determine the lawfulness of its compensation programs and shipping policies pursuant to the

The Seventh Circuit rejected Monsanto's argument and approved the jury instruction that stated "Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful *if undertaken as part of an illegal scheme to fix prices.*"<sup>201</sup>

Because interpretation of the Maryland antitrust laws is guided by federal precedent,<sup>202</sup> Maryland could use the Seventh Circuit's reasoning to hold a manufacturer liable for prohibiting its internet dealers from selling in Maryland in connection with its use of RPM in other states. The manufacturer is then presented with a "Catch-22" if it wishes to use RPM in states where it would otherwise be permissible. If the manufacturer abandons the Maryland market, as the state or private plaintiff would suggest it could, it could be held liable under the Seventh Circuit's reasoning if its decision to prohibit internet dealers from selling to Maryland consumers is in connection with its decision to use RPM in other states. A manufacturer's decision to stop selling its product over the Internet to Maryland consumers will likely be in furtherance of its RPM programs in states where they are permissible because the only way that a manufacturer can use RPM outside of Maryland is by withdrawing from the Maryland market. To avoid liability completely, therefore, the manufacturer will have to abandon its RPM use in all states because of the Maryland statute's extraterritorial reach.

### 3. *The Benefit to In-State Dealers*

Although the Vermont law was upheld in *Sorrell*, the Second Circuit suggested that if a state regulation "creat[ed] market incentives that encourage out-of-state manufacturers to abandon a state market while encouraging in-state manufacturers to pick-up the slack," the regulation might violate the Commerce Clause.<sup>203</sup> Assuming that a manufacturer can withdraw from the Maryland market by prohibiting its internet dealers from selling to Maryland consumers, the manufacturer will decide to stop selling its product in Maryland because RPM can be very beneficial to the

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rule of reason rather than the per se rule.").

201. *Id.* at 1237 (emphasis added).

202. See *Quality Disc. Tires, Inc. v. Firestone Tire & Rubber Co.*, 382 A.2d 867, 869 (Md. 1978) (noting that in adopting the Maryland Antitrust Act, the Maryland General Assembly intended that lower courts be guided by federal interpretation of federal antitrust laws dealing with the same conduct); *Natural Design, Inc. v. The Rouse Co.*, 485 A.2d 663, 666 (Md. 1984) (same).

203. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d. Cir. 2001).

manufacturer. As a result, in-state brick and mortar establishments will "pick-up the slack" as sales that would have otherwise occurred over the Internet would then be made by in-state brick and mortar dealers.<sup>204</sup> In-state brick and mortar dealers will, therefore, benefit at the expense of internet dealers from the manufacturer's decision to stop selling its product to Maryland consumers over the Internet.

While the Maryland statute regulates evenhandedly, the market incentives it creates result in a concerted benefit to in-state brick and mortar establishments. As previously discussed, compliance with the Maryland statute is not possible over the Internet if the manufacturer wishes to use RPM in states where it would be permissible.<sup>205</sup> The statute, therefore, creates "market incentives" that will lead a manufacturer to decide to abandon the Maryland market if it wants to use RPM in states where it would be permissible, and in-state brick and mortar establishments will capture the business lost by internet dealers. The *Sorrell* opinion suggests that if the statute has this effect, it might violate the Commerce Clause regardless of any extraterritorial effects it might have.<sup>206</sup>

### B. The Extraterritoriality Principle

The extraterritoriality aspect of the dormant Commerce Clause "establishes a per se bar against state laws regulating commerce occurring 'wholly outside of the State's borders.'"<sup>207</sup> In the 1980s, the Court developed three principles to guide an extraterritorial analysis in response to Commerce Clause challenges to state price-affirmation and anti-takeover statutes.<sup>208</sup> Over the past decade, these principles have been applied in the

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204. See *id.* (suggesting that state regulations could create market incentives encouraging "in-state manufacturers to pick-up the slack").

205. See *supra* Part V.A.1 (discussing the impossibility of compliance).

206. See *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 111 ("[A] regulation might violate the Commerce Clause by creating market incentives that encourage out-of-state manufacturers to abandon a state market while encouraging in-state manufacturers to pick-up the slack . . .").

207. Michael J. Ruttinger, Note, *Is there a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545, 549 (2007) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

208. See *id.* at 556 ("The Extraterritoriality Principle emerged as a prohibition on statutes regulating out-of-state transactions, with the goal of mitigating the regulatory chaos created by state 'affirmation laws' and 'anti-takeover laws,' which began to proliferate in the 1980s." (citations omitted)).



internet context to statutes seeking to regulate content posted on the Internet.

### 1. *The Extraterritorial Reach*

First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."<sup>209</sup> In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*<sup>210</sup> and *Healy v. Beer Institute*,<sup>211</sup> the Court applied this principle to strike down two state statutes that impermissibly regulated the price of beer and liquor outside of the enacting state.

In *Brown-Forman*, the Court considered a challenge to a New York statute that required every liquor distiller or producer to affirm that the price of liquor charged to New York wholesalers was no higher than the lowest price charged to wholesalers anywhere else in the United States.<sup>212</sup> While the statute was evenhanded and asserted a legitimate state interest—providing residents with the lowest possible prices—it directly regulated commerce in violation of the Commerce Clause.<sup>213</sup> The effect of the New York statute was to preclude liquor distillers and producers from lowering their prices elsewhere once they posted their New York prices.<sup>214</sup> Thus, while the New York law applied only to sales of liquor in New York, it impermissibly regulated prices to be paid for liquor in other states.<sup>215</sup>

In *Healy*, the Court considered a challenge to a Connecticut statute that "require[d] out-of-state shippers of beer to affirm that their posted

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209. *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982).

210. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986) (finding that a New York price-affirmation statute violated the Commerce Clause by directly regulating commerce outside the State's borders).

211. *See Healy v. Beer Inst.*, 491 U.S. 324, 335–40 (1989) (finding that a Connecticut price-affirmation statute violated the Commerce Clause by regulating commerce outside the State's borders).

212. *See Brown-Forman*, 476 U.S. at 575–76 (describing the New York price-affirmation statute).

213. *See id.* at 584 (striking down the New York price affirmation statute as a violation of the Commerce Clause).

214. *See id.* at 582 (noting that once a distiller posted its prices in New York, it could not change its prices elsewhere during the relevant month).

215. *See id.* at 583 ("That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." (citations omitted)).

prices for products sold to Connecticut wholesalers are, as of the moment of posting, no higher than the prices at which those products are sold in the bordering States of Massachusetts, New York, and Rhode Island."<sup>216</sup> Connecticut attempted to distinguish its price affirmation statute from the price affirmation statute in *Brown-Forman* as "contemporaneous" rather than "prospective," but the practical effect of both statutes was the same.<sup>217</sup> For example, in light of the Massachusetts beer-pricing statute, the Connecticut statute had the impermissible effect of controlling Massachusetts prices by forcing brewers to take into account their Connecticut price when setting their Massachusetts price.<sup>218</sup> Such an effect would create "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude."<sup>219</sup>

With respect to the Maryland RPM prohibition, the statute regulates evenhandedly and in the brick and mortar context should present none of the problems identified in *Brown-Forman* and *Healy*. A manufacturer can simply choose not to engage in RPM with Maryland brick and mortar dealers. Moreover, the manufacturer should not need to consider the Maryland statute when making decisions regarding use of RPM with out-of-state brick and mortar dealers. The manufacturer is free, under the Maryland RPM prohibition, to impose RPM on these out-of-state dealers. In the internet context, however, the Maryland statute has the same extraterritorial reach as did the state statutes in *Brown-Forman* and *Healy*. If the manufacturer wishes to use RPM over the Internet in states where it would be permissible, it must take into account the Maryland statute when making those agreements.

It is virtually impossible for states to regulate content posted to the Internet without having an extraterritorial reach "[b]ecause the internet [sic] does not recognize geographic boundaries."<sup>220</sup> In a series of cases

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216. *Healy*, 491 U.S. at 326.

217. *See id.* at 335 (discussing the State's argument that the Connecticut law differed materially from the New York law struck down in *Brown-Forman*).

218. *See id.* at 337-38 (discussing how the Connecticut law interacts with the current Massachusetts price-affirmation law).

219. *Id.* at 337.

220. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003). While statutes that seek to regulate content posted on the Internet have been summarily rejected by courts as a violation of the Commerce Clause, state regulations of unsolicited commercial email or spam have been upheld because the commercial emailer chooses between one recipient and another by purposefully sending the emails. *See Ferguson v. Friendfinders*, 115 Cal. Rptr. 2d 258, 264 (Cal. Ct. App. 2002) (finding that a California statute regulating spam did not violate the Commerce Clause but it only applies when email is sent to a California resident

involving state statutes that sought to regulate the dissemination of sexually explicit content over the Internet, federal courts applied the Court's reasoning in *Brown-Forman* and *Healy* to strike down the statutes as a violation of the Commerce Clause.<sup>221</sup> Once internet users post content to a website, it is available to all users, and there is no way to prevent residents of any particular state from accessing the post.<sup>222</sup> As a result of the state statute regulating the posted content, the out-of-state internet user must self-censor or be subject to liability in the enacting state.<sup>223</sup> The practical effect of the statute, therefore, is to "subordinate the user's home state's policy . . . to [the enacting state's] local concerns" by forcing internet users to stop engaging in conduct that "may be legal in the state in which the user acts . . . [but would] subject the user to prosecution in [the enacting state]."<sup>224</sup> Because the state statutes regulating content posted on the Internet had the effect of regulating conduct outside of the enacting state, the statutes had an impermissible extraterritorial reach in violation of the Commerce Clause.<sup>225</sup>

The Maryland RPM prohibition, as applied in the internet context, has the same practical effect. The only way the manufacturer can avoid liability under the Maryland antitrust laws is to abandon its RPM programs with internet dealers in states where they would otherwise be permissible. This effect is analogous to the situation in which an out-of-state internet user must censor its posted content rather than risk liability under a different state's internet regulation. The application of the Maryland RPM

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by an email service with equipment in California); *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 842–43 (Md. Ct. Spec. App. 2006) (finding that a Maryland statute regulating unsolicited commercial email did not violate the Commerce Clause because First Choice made the "business decision" to purposefully send emails to Maryland residents); *State v. Heckel*, 24 P.3d 404, 412 (Wash. 2001) (finding that a Washington statute regulating unsolicited commercial email did not violate the Commerce Clause because the statute only addressed conduct of spammers in targeting Washington residents).

221. See *Dean*, 342 F.3d at 102–04 (using the Court's reasoning in *Healy* and *Brown-Forman* to analyze a state statute regulating sexually explicit content posted on the Internet); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 173–77 (S.D.N.Y. 1997) (same).

222. See *Am. Libraries Ass'n*, 969 F. Supp. at 167 (noting that once an internet user posts information to the Internet, it is virtually impossible to determine who has accessed the content).

223. See *id.* at 174–75 (describing the only way that an internet user located outside of New York can post content to the Internet and avoid liability).

224. *Id.* at 177.

225. See *Dean*, 342 F.3d at 104 (finding that the Vermont law regulating content on the Internet violated the Commerce Clause because it directly regulated commerce in other States); *Am. Libraries Ass'n*, 969 F. Supp. at 177 (finding that because the New York statute regulated conduct occurring outside the State's borders, it violated the Commerce Clause).

prohibition to the Internet, therefore, has the effect of "subordinat[ing]" other states' antitrust policies to Maryland's "local concerns" by forcing manufacturers to stop engaging in conduct that "may be legal in the state in which the [manufacturer] acts . . . [but would] subject the [manufacturer] to prosecution in [Maryland]." <sup>226</sup> The Court in *Brown-Forman* and *Healy* made it clear that a state regulation cannot have the practical effect of forcing an out-of-state entity to take into account another state's regulatory regime when setting its prices. As applied to the Internet, the Maryland RPM prohibition has this precise effect and therefore has an impermissible extraterritorial reach.

## 2. *The Intent of the Legislature*

The second tenet of an extraterritorial analysis is that the intent of the legislature is irrelevant when a state statute directly controls transactions occurring wholly outside the state's borders. <sup>227</sup> The issue is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." <sup>228</sup> While the Maryland Attorney General or a private plaintiff might argue that Maryland has a legitimate state interest in providing its residents with the lowest prices possible, <sup>229</sup> the intent of the Maryland General Assembly is irrelevant. <sup>230</sup> The Maryland RPM prohibition has the practical effect of regulating conduct occurring wholly outside the state and thus has an impermissible extraterritorial reach, regardless of the state's legitimate local purpose.

## 3. *Complying with Inconsistent Regulations*

Finally, an extraterritorial analysis must "consider[] how the challenged statute may interact with the legitimate regulatory regimes of

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226. *Am. Libraries Ass'n*, 969 F. Supp. at 177.

227. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.").

228. *Id.*

229. *See* DEP'T OF LEGISLATIVE SERVS. OF MD. GEN. ASSEMBLY, FISCAL AND POLICY NOTE: H.B. 657, H. 426, 2009 Sess. (2009) (discussing the policy concerns underlying the amendment to the Maryland antitrust laws).

230. *See Healy*, 491 U.S. at 336 (noting that the intent of the legislature is irrelevant if the state statute directly regulates commerce occurring wholly outside the State).

other States and what effect would arise if not one, but many or every, State adopted similar legislation."<sup>231</sup> Considering how vocal state attorneys general have been about the Court's decision in *Leegin*,<sup>232</sup> it is appropriate to assume that there will be proposed legislation mirroring the Maryland RPM prohibition in many other states. When deciding whether the Maryland RPM prohibition has an impermissible extraterritorial reach, it is important, therefore, to consider how similar legislation in other states might affect the application of the Maryland statute.

In *Healy*, the concern was that other states might pass legislation similar to the Connecticut contemporaneous price-affirmation statute. The effect would be a "price gridlock" on a national scale if states passed state price-affirmation statutes that "linked in-state prices to the lowest price in any State in the country."<sup>233</sup> The federal government has the right to regulate prices nationally under the Commerce Clause; thus, national regulation of pricing cannot "be accomplished piecemeal through the extraterritorial reach of individual state statutes."<sup>234</sup> With respect to the Maryland RPM prohibition as it applies to the Internet, the potential for additional state legislation regulating RPM agreements might create a similar "price gridlock" that would force manufacturers to comply with the strictest state regulation to avoid liability in other states.

In a series of cases in which former professional athletes attempted to use state antitrust statutes to challenge league practices,<sup>235</sup> the state antitrust laws, as applied to professional sports leagues, were struck down as a violation of the Commerce Clause. If state regulation of professional sports leagues was permissible, "the internal structure of the leagues would require compliance with the strictest state antitrust standard."<sup>236</sup> If state antitrust regulation "requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular

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231. *Id.*

232. See Mitnick, *supra* note 93, at 63 (describing how the state attorneys general have reacted to the *Leegin* opinion).

233. *Healy v. Beer Inst.*, 491 U.S. 324, 340 (1989).

234. *Id.*

235. See *Flood v. Kuhn*, 443 F.2d 264, 265 (2d Cir. 1971) (examining the plaintiff's attack on baseball's reserve system); *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867, 873-76 (S.D.N.Y. 1975) (discussing the plaintiffs' antitrust claims against the National Basketball Association); *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 676 (Cal. 1983) (discussing Partee's claim that five of the National Football League's operating rules violated state antitrust laws).

236. *Flood*, 443 F.2d at 268.

state law would exact constitutes . . . an impermissible burden on interstate commerce."<sup>237</sup> At least one author has expressly stated that these cases apply to state regulation of the Internet.<sup>238</sup> The Internet, like a professional sports league, operates across all states, and if various state regulations have the effect of forcing an internet user to comply with the strictest state regulation, there are Commerce Clause implications.

If internet users are subject to varying state internet regulations, compliance will be "effectively impossible if they are to engage in interstate commerce."<sup>239</sup> Because content posted on the Internet is accessible to users in every state, internet users will be forced to comply with the strictest state regulation when posting content to the Internet. Currently, because Maryland is the only state that expressly prohibits RPM agreements under its antitrust laws, manufacturers must comply with the Maryland statute in all of their transactions involving the Internet. If other states pass similar laws that fall short of prohibiting RPM agreements, the manufacturer will still be forced to comply with the Maryland statute. Even if other states pass statutes that mirror the Maryland statute, there will still be impermissible extraterritorial effects because the manufacturer will have to abandon its RPM programs in states where they would be permissible. "This kind of potential regional and even national regulation of the pricing mechanism for goods" is the exclusive field of the federal government and cannot be accomplished using piecemeal state legislation.<sup>240</sup>

### *VI. Towards a Uniform Standard*

The Maryland RPM prohibition's effect on interstate commerce reveals a pressing concern about the role of federalism in the antitrust context. Influenced by the concept of "dual federalism," the framers of the Sherman Act did not intend to "displace all state regulation of the economy,"<sup>241</sup> and thus, designed the Sherman Act to supplement rather than supersede existing state antitrust regulations.<sup>242</sup> Over time, however,

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237. *Id.* at 267.

238. See LANGER, *supra* note 135, at 6 (discussing how the professional sports league cases could be used to evaluate state regulations of RPM agreements and the Internet).

239. Goldsmith & Sykes, *supra* note 186, at 807.

240. Healy v. Beer Inst., 491 U.S. 324, 340 (1989).

241. Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 627 (2006).

242. See 21 Cong. Rec. 2457 (1890) (discussing the underlying policy objectives of the Sherman Act).

federal law has surpassed state law as the predominant source of antitrust law, and it has become increasingly unclear what role state antitrust laws should have in a national economy.<sup>243</sup> The Maryland RPM prohibition's extraterritorial reach suggests that the role of state antitrust laws should be limited at the national level.

By prohibiting conduct that might be permissible under federal law, the Maryland RPM prohibition has made it impossible for manufacturers to develop a national business plan. Manufacturers must adapt their dealer agreements to comply with different standards, increasing transaction costs and disrupting efficient use of the national economy. Failure to comply with the varying standards will result in "magnif[ied] and protract[ed]" uncertainty in litigation and increased litigation costs.<sup>244</sup> There should be a uniform standard applicable at the state and federal level, so businesses can operate throughout the United States with relative certainty that their actions comply with the law.

Senator Herb Kohl has twice introduced a bill that would align federal law with the Maryland RPM prohibition, creating a uniform standard under which businesses could develop a national business plan.<sup>245</sup> Senator Kohl's bill would amend the Sherman Act to restore application of the per se rule to RPM.<sup>246</sup> Both Senator Kohl's bill and the Maryland RPM prohibition act as a blunt instrument, however, condemning conduct with potential procompetitive, as well as anticompetitive effects. Because *Leegin* identified procompetitive effects associated with RPM, any uniform standard should attempt to protect procompetitive uses of RPM from per se illegal treatment.

Congress should enact legislation that would serve as a uniform standard under which businesses could develop procompetitive RPM programs. To avoid inconsistency at the state level, such legislation should expressly preempt state legislative attempts to deviate from the federal standard. The proposed legislation should try to incorporate the three

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243. See generally Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877 (2003).

244. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001).

245. See Discount Pricing Consumer Protection Act, S. 148, 111th Cong. (1st Sess. 2009) (restoring the rule that RPM agreements violate the Sherman Act); Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (1st Sess. 2007) (same).

246. See Discount Pricing Consumer Protection Act, S. 148, 111th Cong. ("To restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act.").

factors identified in *Leegin* as markers of anticompetitive uses of RPM.<sup>247</sup> For example, Congress could amend the Sherman Act to expressly prohibit vertical price restraints instigated by dealers or by manufacturers with significant market power.<sup>248</sup> This type of nuanced approach would serve the policy objectives identified in *Leegin* and would provide a uniform standard to which manufacturers could comply at the national level.

### VII. Conclusion

If the Maryland Attorney General or a private plaintiff sues a manufacturer whose product subject to RPM is sold over the Internet to a Maryland consumer, the manufacturer should be able to defend successfully by claiming that the Maryland RPM prohibition is unconstitutional. While it is unlikely that *Leegin's* interpretation of § 1 of the Sherman Act preempts the Maryland RPM prohibition, the Maryland statute violates the dormant Commerce Clause. Because manufacturers cannot comply with the Maryland RPM prohibition unless they abandon RPM programs in states where they would otherwise be permissible, the Maryland RPM prohibition regulates conduct outside Maryland and in doing so, violates the dormant Commerce Clause.

Besides violating the dormant Commerce Clause, the Maryland RPM prohibition is problematic because it substantively differs from *Leegin's* interpretation of § 1 of the Sherman Act. Congress should develop a uniform standard applicable at the state and federal level, so attorneys can work with manufacturers to develop a national business model that complies with the antitrust laws.

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247. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897–98 (2007) (discussing three factors that could help a lower court apply the rule of reason to vertical price restraints).

248. See *id.* (discussing the dangers associated with RPM initiated by dealers and by manufacturers with market power).



