A Genealogy of Vertical Restraints Doctrine

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by

RUDOLPH J. PERITZ*

Since the Dr. Miles Medical Co. v. John D. Park & Sons Co. case in 1911,¹ the Supreme Court has viewed the Sherman Act as a congressional mandate to regulate the ways manufacturers may distribute their products. These vertical restraint cases have a simple, recurring plot. A terminated dealer or wholesaler, often a price cutter, complains that its manufacturer is in league with rival dealers or wholesalers who want to restrain competition in the product. In typical cases, the underlying restraint alleged is a resale price maintenance agreement or a clause confining dealer activities to a limited geographic area. The question in such cases is whether the Court should permit the manufacturer to terminate the complaining dealer or wholesaler.

The Court has sought to answer the question of wrongful termination by turning to section 2 of the Sherman Act and its requirement of an agreement in restraint of trade. The orthodox view of this doctrine is that the Court was, or should have been, concerned with the anticompetitive effects of the manufacturer’s conduct. The modern view is that the Court is, or should be, concerned with the effects on distributional efficiencies, which are characterized as a proxy for competitive effects. Neither view, however, brings any consistency or continuity to post-1911 vertical restraints doctrine. Rather, both approaches, proceeding from the assumption that competition policy represents the only legitimate

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¹. 220 U.S. 373 (1911).
normative basis for antitrust law, have yielded readings of the Court's vertical restraints opinions whose logic is a tangle of knotted doctrines in desultory movement between a per se rule and a rule of reason standard. One of the most insightful critics of current doctrine and scholarship can only remark on the doctrine's haphazard course: "Over the years, Congress and the courts have vacillated between disapproval and approval, never reaching a resolution of the issue satisfactory to their successors."  

This Article applies a new analytical framework to untangle the controversial and confusing web of doctrines that both the orthodox and modern approaches have characterized as propelling the Court through an enigmatic history of regulating vertical restraints. This new framework questions the current view that antitrust law has always been founded solely in a competition paradigm, whether the traditional mix of Jeffersonian, redistributional, and fair play policies, or the efficiency formulations currently in fashion. In contrast, my recent study of antitrust's early years chronicles a persistent and unyielding series of confrontations between two paradigms—competition policy and common-law property rights. While both paradigms exhibit some changes over time, they have remained central to vertical restraints doctrine since 1911. Indeed, ongoing tensions between them have constituted the very conditions for producing vertical restraints doctrine. Adopting this new framework of tensions between competition policy and common-law property rights, this study offers an analysis that clarifies the structure and dynamics of the Court's attempts to regulate manufacturers' distri-

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3. Peritz, The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument, 1984 DUKE L.J. 1205, 1280 [hereinafter Peritz, Predicament]. The new framework supplements the competition paradigm in two ways. First, it portrays the production of early antitrust law as a series of confrontations between competition policy and common-law property rights. Thus, ongoing tensions between the two paradigms—competition and property—are seen as the historical production factors for antitrust in the formative years. Second, the new framework shows these paradigms to be riven by an internal tension as well. Each paradigm, as it functioned in antitrust's formative period, reflected impulses to both liberty and equality. Peritz, The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition, 40 HASTINGS L.J. 285, 336-41 (1989) [hereinafter Peritz, Rule of Reason].

In this article, the terms "paradigm," "logic," "rhetorical mode," and "rhetoric" are treated as synonymous, each identifying a group of assumptions and beliefs, as well as a system of logical relations among the assumptions and beliefs.

4. Peritz, Rule of Reason, supra note 3. This new analytical framework was developed in the historical context of antitrust's formative years, by giving an alternative account of the Sherman Act's legislative history and early cases through the emergence of the "rule of reason" in 1911.
bution of their products. This clarification provides the ground for a funda-
mental critique of the Court’s current “free rider” analysis. This
Article concludes with a simple alternative to the “free rider” analysis.

The fundamental question for vertical restraints doctrine is how to
settle the controversies arising out of the complex web of relationships
among producers, wholesalers, retailers, and consumers. Consider two
modes of characterizing the issue. The familiar rhetorical mode, that of
competition, invites us to see the issue in terms of intrabrand competi-
tion. In other words, the proper inquiry should be the importance of
rivalry between dealers in the same manufacturer’s product. Employing
this rhetorical mode, one could argue that intrabrand competition is
good for consumers, because it tends to lower retail prices. Alterna-
tively, one could assert that a manufacturer’s restraint of intrabrand
competition is good for consumers, because a manufacturer would only
restrain competition in its own product to compete more effectively with
another manufacturer’s product. Otherwise, the manufacturer would en-
courage competition between its dealers to minimize its distribution
costs, lowering price to the consumer and increasing demand for its
product. Though these two views of the producer-consumer relation-
ship seem to conflict, they both deploy the rhetorical mode of competition.

In contrast, a rhetorical mode of property invites us to see the verti-
cal restraints doctrine issue in terms of the legal relationship between the
producer and its product. Employing this mode, one could argue that a
manufacturer should have the right to control the distribution and sale of
its product, just as anyone else has the right to dispose of her property.
Alternatively, one could assert that once a producer passes title to a re-
tailer, control should also pass to the retailer, because the product has
become the retailer’s property. Finally, the argument could be made that
a manufacturer’s dependence on dealer good will should allow termina-
tion of price cutters in order to protect a fair return to dealers who pro-
mote its product. Though these three views of the legal relations between
producer and product differ, they all employ a rhetorical mode of
property.

The Supreme Court has developed four overlapping doctrines under
the Sherman Act to resolve the controversies arising out of complex dis-
tributional networks.5 First, the so-called Colgate doctrine6 sanctions a

5. This Article is limited to conduct analyzed exclusively under the Sherman Act, in
order to keep the scope of this study manageable. Thus, I do not include, for example, either
the legislative histories of or the doctrine developed under the Clayton Act § 3 offenses of tying
and exclusive dealing.
manufacturer's unilateral termination of an uncooperative dealer. Given the fundamental right to dispose of one's property, the Court has fashioned a doctrine consistent with the notion that contracting is voluntary. Because it is not required to sell its goods to anyone, a manufacturer has the right to terminate a dealer.\(^7\) If, however, a terminated dealer proves that the manufacturer and other dealers agreed to restrain trade (by fixing resale prices, for example), then the dealer is given an opportunity to prove that its refusal to cooperate in an unlawful agreement motivated the termination.

The second doctrine developed by the Court provides that even when the terminated dealer proves an agreement restraining competition, the Court still must determine whether the restraint is unlawful. The standard of unlawfulness depends upon a distinction between price and nonprice restraints. This doctrine calls for a per se rule for price restraints and a rule of reason standard for nonprice restraints such as territorial or customer limitations. This unyielding view of resale price maintenance—that there is no justification for displacing the market pricing mechanism—resembles the competition logic of the literalist opinions in the horizontal cartel cases.\(^8\)

Under a third doctrine, the Court from time to time has given special treatment to agreements in restraint of competition that are ancillary to consignment or agency contracts, rather than to straight sales agreements. In 1977, however, Continental TV, Inc. v. GTE Sylvania, Inc.\(^9\) dissolved the distinction between consignment and sale, asserting that the two forms of agreement had the same competitive effects. In that opinion, the Court abandoned the common-law rationale, adopted in virtually every Supreme Court opinion since 1911, that a restraint ancillary to a consignment is justified by the manufacturer's retention of title to consigned goods. This entitlement had sanctioned extensive control of the product's distribution and sale, including some setting of resale prices.

The fourth and most recently adopted doctrine is the manufacturer's "free rider" rationale.\(^10\) Currently, this rationale can justify a manufacturer's termination of any dealer, including a price cutter, so long as there is no resale price maintenance agreement. When, for example, the manufacturer and dealers have agreed to restrain competition by

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\(^7\) Id. In practice, however, the producer has been given varying degrees of freedom in terminating a dealer.

\(^8\) They held to the broader belief that only "full and free competition" can produce fair prices. See Peritz, Rule of Reason, supra note 3, at 314-24.


\(^10\) See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08 (1911).
limiting each dealer to an exclusive territory, the manufacturer may be permitted to terminate a dealer who nonetheless competes outside its designated territory. The Court has sanctioned such conduct as a plausible way of promoting interbrand competition. By protecting "fair profits" of dealers who engage in promotional activities, the manufacturer is encouraging them to exert the best efforts necessary to compete effectively with rival products.

Antitrust analysis based on competition logic simply has not made sense of these threads of vertical restraint doctrine. In order to understand the workings of each of these four doctrines, and the common structure that they all share, we must supplement the orthodox paradigm of competition. For example, traditional antitrust analysis has misunderstood the property logics underlying the common-law distinction between consignment and sale, representing it as a seventeenth century anachronism, rather than an instance of common-law property rights, which have been a fundamental component of antitrust law since the legislative debates. Moreover, the same sort of property logic can be seen as motivating the modern "free rider" rhetoric, an interest akin to protecting property from theft. Thus, this Article seeks to contribute to a better understanding of modern vertical restraints doctrines by analyzing them within the framework of competition policy and common-law property rights in productive conflict.

This genealogy of vertical restraints doctrine is organized using the familiar distinction between price and nonprice restraints. Section I takes the political economy of logics in tension as the framework for making sense of the Supreme Court's landmark opinions dealing with price restraints. In the course of this chronological treatment of cases, concluding with the recently published *Business Electronics Corp. v. Sharp Electronics Corp.*,\(^\text{11}\) this section also analyzes the other vertical restraints doctrines as they appear in those cases. Section II takes up the Court's establishment and development of a separate category for nonprice restraints, as well as the other doctrines appearing in those cases. In sum, this study describes (1) how the continuous battle between competition and property logics has produced the Court's frequent vacillation between the rule of reason standard and the per se rule, as well as its nomadic movements within the quartet of vertical restraints doctrines; (2) how the expansion of the rule of reason standard evidences the overwhelming, though unacknowledged, strength of property logic in antitrust analysis of vertical restraints; (3) how a commitment to proliferate

independent entrepreneurs derived from the individual liberty to dispose of goods as one chooses; and (4) how, until recently, the "free rider" rationale has mediated the tension between the logics of competition policy and individual property rights.

I. Resale Price Maintenance: The Legacy of Literalism Transformed

The legacy of the Court's early "literalist" period is a vision of society based on an unmitigated commitment to competition policy. The literalists saw the antitrust laws as resting upon a policy of competition free of all contracts, combinations, or conspiracies in restraint of trade. They took that policy to mean free and unrestricted rivalry between numerous market participants of roughly equal size—something like the modern notion of workable competition. They were not persuaded by arguments that some restraints of competition could be reasonable and thus inoffensive to the Sherman Act.12 In contrast, the "rule of reason" faction objected to this unrelenting imposition of competition policy when it limited freedom of contract, thereby injuring common-law property rights.13 To the extent that resale price maintenance agreements have been adjudged illegal per se, that is, illegal without regard to their reasonableness, vertical price restraints doctrine can be understood as a legacy of the early literalists' unmitigated commitment to competition between numerous market participants of roughly equal size.

A. Common-Law Property Rights and Competition Policy

*Dr. Miles Medical Co. v. John D. Park & Sons Co.*14 offers a complex example of strategies to interpose common-law doctrines to mediate ten-

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13. See id. at 324-36.
14. 220 U.S. 373, 407-08 (1911); see, e.g., 324 Liquor Corp. v. Duffy, 479 U.S. 335, 335 (1987) (citing Dr. Miles with approval). But see Baxter, **Vertical Restraints and Resale Price Maintenance: A Rule of Reason Approach**, 14 ANTITRUST L. & ECON. REV. 13, 26 (1982) (in invalidating resale price maintenance in Dr. Miles, court relied on a proposition recognized in recent cases to have little relevance to antitrust analysis); Bork, **The Place of Antitrust Among National Goals**, in **BASIC ANTITRUST QUESTIONS IN THE MIDDLE SIXTIES: FIFTH CONFERENCE ON THE IMPACT OF ANTITRUST ON ECONOMIC GROWTH** 32 (Nat'l Indus. Conf. Bd. 1966) (the law of resale price maintenance and vertical market division has been rendered mischievous and arbitrary to this day by the premise laid down in Dr. Miles); Posner, **The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality**, 48 U. CHI. L. REV. 6, 8 (1981) (proposing that "purely vertical restrictions or distribution be declared legal per se"). Moreover, until their repeal in 1975, the so-called fair trade laws, which allowed state-sanctioned resale price maintenance, certainly evidenced congressional disapproval of *Dr. Miles.*
sions between competition and property logics. For the past seventy-eight years, Dr. Miles has stood for the proposition that resale price maintenance is illegal per se under the Sherman Act, despite legislative, judicial, and scholarly misgivings about its wisdom. The Court's opinion in the case says very little about the anticompetitive effects of such conduct and even less about the Sherman Act. What little it does say about competition involves intrabrand rivalry, a policy concern that is out of favor today. The published argument of counsel, as well as both opinions—Justice Hughes' majority opinion and Justice Holmes' lone dissent—address at great length a series of issues concerning the extent of Dr. Miles Medical Company's property rights in its patent medicine. Only after Justice Hughes decided that Dr. Miles retained no common-law property rights in the product sold to John D. Park & Sons did competition rhetoric enter the majority opinion. Justice Holmes argued that Dr. Miles Medical Company held both property and liberty rights that legitimated its dealer agreements fixing the resale prices of its patent medicine.

Unlike the typical dealer termination cases that followed, this suit was brought by the manufacturer, Dr. Miles, to enjoin a discount retailer from "maliciously interfer[ing] with a contract" to fix the resale prices of its wholesalers and retailers.\(^\text{15}\) Dr. Miles Medical Company alleged that "cut rate and department stores," such as John D. Park & Sons, neither promoted nor adequately stocked its product. Rather, they used it as a loss leader. Thus, Dr. Miles wanted to limit its trade sales to small dealers, because they were willing to promote the product in exchange for the promise of a "fair profit."\(^\text{16}\) In this regard, Dr. Miles was careful to point out that all dealers were treated equally.\(^\text{17}\)

Dr. Miles' charge suggested that John D. Park & Sons' use of the patent medicine as a loss leader was a competitive tort. That is, it "advertised, sold and marketed at cut rates . . . to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit."\(^\text{18}\) This conduct "injurious

\(^{15}\) 220 U.S. at 394.

\(^{16}\) Id. at 375. In claiming that its distribution plan was intended to protect the "fair profit" of the small dealers—the druggists who promoted its product—Dr. Miles alluded to a property logic that had already appeared in the House debates over the Sherman Act. For example, the Congressional Record reflects Representative Morse's concern that the 1888 Bill would destroy the "contract system" of selling goods, "the intention of which is to fix a fair and living profit to the merchant." 21 CONG. REC. 5954 (1890).

\(^{17}\) 220 U.S. at 381.

\(^{18}\) Id.
affected the reputation" of the product. Consequentely, sales of Dr. Miles' patent medicine declined because "demand for its remedies largely depended upon [the] goodwill and commendation" of druggists "and their ability to realize a fair profit." In current antitrust parlance, this tortious interference with contractual relations would label John D. Park & Sons a "free rider" of the most despicable sort. The so-called "free rider" appropriates good will created by the manufacturer and promoting dealers by selling a product at a reduced price, possible in part because the free rider's costs do not include promotional activities. Still, consumers clearly benefit from what is, after all, price competition, and the manufacturer certainly receives a benefit from any sales of its own products. But here, Dr. Miles' reputation was used to sell the products of other manufacturers—a doubled free rider effect.

In evaluating Dr. Miles' claim, the Court focused on an entirely different issue—Dr. Miles' liberty and property rights to use a contract system that restrained competition. The Court noted that "there are opposing contentions as to the construction of the [restrictive] agreements." Dr. Miles, the "Proprietor," contended that the agreements were consignment and agency contracts, and that the goods were held "for sale for the account of the Proprietor, the title thereto and property therein to be and remain in the Proprietor." In short, Dr. Miles argued that a manufacturer has the right to fix the prices at which its agents sell its property. While neither the defendant nor the Court disputed that proposition, John D. Park & Sons claimed that the agreements were, in effect, sales transactions and that Dr. Miles retained no effective property interest.

Justice Hughes began his consideration of the consignment contract issue by quoting Judge Lurton's opinion in the court below, which considered the agreements an effort "to disguise the wholesale dealers in the

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19. Id. at 375.
20. Id. at 374-75.
21. The complaint also charged that the defendants "mutilated" Dr. Miles' property by "obliterat[ing] the list of ailments and directions for use." Id.
22. Id. at 385, 390-91.
23. Id. at 395.
24. Id. at 376, 396 (quoting petitioner's charge).
25. Thus, it appears everyone agreed that a property claim of title retention overrides the literalist principle, developed in earlier horizontal cartel cases, that competition is the only legitimate arbiter of price. But unlike the broad discretion granted under the "rule of reason," Dr. Miles required a narrowly circumscribed property interest to entitle a manufacturer to set resale prices. For a description of a general shift from a title theory of property to a contract theory, see M. Horwitz, The Transformation of American Law, 1780-1860, at 162 (1977).
mask of agency” and which concluded that “the jobber must be regarded as the general owner and engaged in selling for himself.” After juxtaposing provisions in the contract with the plaintiff’s “inconsistent general allegations” in the bill, the Court finessed the ownership question of who held title with a narrow pleading issue: because Dr. Miles failed to aver that Park & Sons acquired the patent medicine from a consignee, the Court had no basis for Dr. Miles’ claim that it retained title to the goods in question. Thus, the Court proceeded on the assumption that Park & Sons acquired title to the goods, regardless of whether the agreements were enforceable agency or consignment contracts.

Dissenting, Justice Holmes saw no merit in the Court’s formalistic consideration of the consignment issue. He pointed out that a few simple changes in contract terms would allow Dr. Miles and other manufacturers to fashion airtight agency or consignment agreements and to avoid pleading pitfalls as well. With such changes in consignment contracts, manufacturers could safely fix prices. Indeed, Justice Holmes believed that Dr. Miles Medical Company’s agreements should have been enforced as consignment contracts. Nonetheless, Justice Hughes concluded for the majority that the price cutter could have “acquired title” without any malicious interference.

Having disposed of Dr. Miles’ claim of title to the goods, the Court’s opinion abruptly shifted from property to competition rhetoric: “the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers and thus to fix the amount which the consumer shall pay, eliminating all competition.” The Court’s view seems to make good sense: restraining competition meant fixing the price of someone else’s property. “Thus, a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about.” The tension between competition and property logics was mediated by privileging the latter: a property owner has the right to restrain competition by fixing a price for its goods. No one else does. The problem, of

27. Id. at 395 (citing Dr. Miles Medical Co. v. John D. Park & Sons Co., 164 F. 803, 805 (6th Cir. 1908)).
28. Id. at 397-98.
29. Id. at 397-99. The agreement allows sales between wholesalers. Park & Sons could have purchased the goods and received title, consistent with the agreement, from a wholesaler who purchased from another wholesaler.
30. Id. at 411.
31. Id. at 397-98.
32. Id. at 399.
33. Id. at 400 (quoting petitioner’s charge).
course, lay in determining what constitutes property ownership. Dr. Miles claimed that he maintained ownership of the goods through consignment and agency contracts. Although Dr. Miles lost on this issue, the Court did recognize that retention of title in goods gives the title-holder property rights that withstand the attack of competition logic. Only after clearing the discursive space of these property claims could competition rhetoric transform Dr. Miles' plan from the unilateral action of "agents" into the concerted action of a "combination." It was this doctrinal swing from consignment to sale that enabled the Court to reach competition's logical conclusion: "That these agreements restrain trade is obvious."\(^3\)

The Court considered two further claims that Dr. Miles retained effective property ownership in the goods. Both claims were urged in support of the contention that the restrictions, though sales, "are not invalid either at common law or under the Act of Congress of July 2, 1890."\(^3\) First, Dr. Miles claimed that it "manufactures medicines under secret formulas which are its exclusive property."\(^3\) By analogy to the copyright and patent laws' creation of statutory monopolies, "[t]rade secrets and articles embodying them are property monopolies and contracts relating thereto [are] not within the restraint of trade rule."\(^3\) In response, Park & Sons argued that "persons having only common-law rights can[not] make a contract warrantable only under the patent and copyright laws."\(^3\) In agreeing with Park & Sons' distinction between common-law and statutory property rights, the Court stated that "whatever rights the patentee may enjoy are derived from statutory grant."\(^3\) A "monopoly of production" in the form of a trade secret "does not enlarge [the] right of property" in the patent medicine.\(^4\) In the absence of such enlarged rights, there is a "public interest in maintaining freedom of trade . . . after . . . the producer has parted with his title."\(^4\) Though the common law recognized that trade secret holders had special rights analogous to those of patent holders, the Court refused

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34. \(\text{Id. at 400.}\)
35. \(\text{Id.}\)
36. \(\text{Id. at 386.}\)
37. \(\text{Id. at 387.}\)
38. \(\text{Id. at 390.}\)
39. \(\text{Id. at 401.}\)
40. \(\text{Id. at 403.}\) For an application of the production-sale distinction to draw the line between intrastate and interstate commerce, see United States v. E.C. Knight Co., 156 U.S. 1 (1895). But see United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").
41. 220 U.S. at 403.
to recognize any property right in the trade secret holder to restrain competition. The Court’s distinction in this context between trade secret property rights and patent based property rights was arbitrary, in the sense that its choice to treat them differently seems no more plausible than does treating them similarly. Certainly the Court gives no reason beyond their asserted difference. Yet, we recognize intellectual property rights in trade secrets and would not be shocked if the Court had included among such rights a right to control the distribution of goods embodying a trade secret. The effect of the Court’s arbitrary though plausible distinction was to reject the claim that Dr. Miles could protect itself and its dealers from the competition of John D. Park & Sons.

The final argument that Dr. Miles retained property ownership in the goods was that “irrespective of the secrecy of its process, [it] is entitled to maintain the restrictions [because] they relate to products of its own manufacture.”42 Park & Sons responded that the contract system is not only “in general restraint of trade and is therefore unlawful at common law,” but also “illegal under the provisions of the Sherman Antitrust Act.”43 The Court also rejected Dr. Miles’ final claim, first observing that it was not founded in a common-law property right, but rather “is sought to be derived from the liberty of the producer.”44 Without a property logic to impel it, the Court was not willing to act on this impulse toward liberty. In concluding that the restriction was “a general restraint upon alienation [which] is ordinarily invalid,” the opinion turned for authority to Lord Coke’s views on common-law property rights:

The right of alienation is one of the essential incidents of a right of general property in movables. . . . “If a man,” says Lord Coke, in 2 Coke on Littleton, § 360, “be possessed of a horse or any other chattel . . . and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him . . . .”45

The Court likened Dr. Miles’ vertical price restraint to a highly disfavored general restraint on alienation—that is, a sale conditioned on a promise not to resell. This characterization of the contract system in question recognized a property logic at work, but attributed its power to retailers like John D. Park & Sons, who held title to Dr. Miles’ patent medicine. Thus, whatever right Dr. Miles had depended “not upon an

42. Id. at 404.
43. Id. at 390, 392.
44. Id. at 404.
45. Id. (citing John D. Park & Sons Co. v. Hartman, 153 F. 24, 39 (6th Cir. 1907)).
inherent power incident to production and original ownership, but upon agreement.”46

Having disposed of three property ownership claims, Justice Hughes concluded his review of the common law with a dismissal of the claim, now based on “agreement”—that is, on a liberty of contract right to set prices. He wrote that “to sustain the restraint, it must be found to be reasonable.”47 But, having already made the citation to Coke on Littleton and the inference that fixing resale prices constitutes a general restraint upon alienation at common law, the Court simply held this agreement in restraint of trade unreasonable, because “interference with individual liberty of action in trading, and all restraints of trade of themselves [are] void.”48 In sum, protecting liberty in trading meant protecting the common-law property interest holder: “[t]he agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.”49 Park & Sons enjoyed the liberty of contract right to set prices because they held common-law title to the goods.

Given the Court’s requirement of an effective property right to legitimate a restraint of trade, the reference to Coke on Littleton, a cornerstone of the common law, is significant for two reasons. First, this common-law analysis of property rights turned the tables on the literalists who, like Justice Harlan in Northern Securities Co. v. United States,50 brushed off property arguments. Justice Hughes’ analysis proceeds from the assumption that competition policy must yield to fundamental property rights. Second, under this common-law analysis, Park & Sons’ right to set a price was “one of the essential incidents of a right of general property in movables.”51 The implication is that price competition depends upon enforcement of property rights. Thus, while the Court was affirming a public interest in competitive markets, it was embedding that interest in a property rhetoric close to the rule of reason position argued most urgently in the Northern Securities dissenting opinions.52 Another way of describing the effect of Justice Hughes’ opinion is that it affirmed a judicial mandate to protect fundamental individual rights of property from unreasonable legislative imposition of competition policy, an impli-

46. Id. at 405.
47. Id. at 406.
48. Id. The common law also had developed exceptions relating to the sale of an interest in a business or process. Id.
49. Id. at 407.
51. 220 U.S. at 411-12.
52. Peritz, Rule of Reason, supra note 3, at 324.
cation made explicit in the following term’s *Standard Oil Co. v. United States* opinion.\textsuperscript{53}

Thus, the *Dr. Miles* property rhetoric, animated by an impulse toward liberty, should not be confused with the earlier literalist jurisprudence of “full and free competition,” though both seem to maintain a political economy of independent entrepreneurs who have the freedom to set their own prices. The literalists, whose jurisprudence exercised a competition logic animated by an impulse toward equality, might have declared the entire consignment-sale distinction an irrelevant property argument. In short, the literalists had a primary commitment to competition, no matter what the property consequences. For example, the literalists wanted competitive markets, even if government-imposed competition resulted in regulation of property ownership, as it did in the *Northern Securities* case and as it would have done in subordinating consignment contracts to competition policy. In contrast, Justice Hughes in *Dr. Miles* wrote an opinion whose primary concern was the allocation of property rights between producer and dealer. Competitive markets were seen as a natural consequence of the rightful exercise of common-law property rights.

It is easy to see why the Court was not concerned with Justice Holmes’ observation that manufacturers could easily formulate enforceable consignment contracts and restrain competition among independent entrepreneurs like Park & Sons. Consignment agreements were seen as proper vehicles for the exercise of an individual’s fundamental right to control the disposition of her property. Competition simply had to take a back seat to this common-law right. In contrast, a literalist of the old stripe would have been concerned with Justice Holmes’ view because, regardless of the common law, a consignment was a contract in restraint of trade, and every contract in restraint of trade violated the Sherman Act as construed by the literalists.

The last task remaining for Justice Hughes was to evaluate Park & Sons’ defense that the resale price fixing agreement was illegal under the Sherman Act. Because all precedent under the Act involved horizontal restraints, it was probably no surprise that the Court looked to the relationship between horizontal price-fixing and the resale price maintenance at issue. As a context for the Sherman Act analysis, it is useful to recall that Dr. Miles claimed that Park & Sons’ discounting injured its reputation and business, and maliciously interfered with an agreement intended to assure a “fair profit” to dealers in order to encourage their promo-

\textsuperscript{53.} 221 U.S. 1, 69-70 (1911); see Peritz, *Rule of Reason*, supra note 3, at 321-24.
tional efforts, upon which Dr. Miles' success depended. The Court ignored the benefits to Dr. Miles, concerned instead that "the enlarged profits which would result from adherence to the established rates would go to... the favored dealers."\textsuperscript{54}

As authority under the Sherman Act, Justice Hughes cited \textit{United States v. Addyston Pipe & Steel Co.},\textsuperscript{55} in which Judge Taft formulated a distinction between direct and ancillary restraints as the proper mode of analyzing horizontal price fixing under the statute.\textsuperscript{56} Though there was no discussion of the case as authority, two points are clear. First, because Dr. Miles did not retain title in the goods at issue, the restraint had no property right to which to be ancillary. Thus, it had to be a direct restraint. This implication parallels the common-law authority of \textit{Coke on Littleton} regarding restraints on alienation. Second, because the benefit of "enlarged profits" to the favored dealers resembled the benefit to the price fixing cartel in \textit{Addyston Pipe}, it too had to be illegal per se under the Sherman Act. Hence, Dr. Miles could "fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions... by agreement with each other."\textsuperscript{57}

The Court concluded that Dr. Miles' plan, now characterized as an agreement among property holders (dealers), fell into the Sherman Act category of "agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices."\textsuperscript{58} Vertical agreements to restrain intrabrand competition, like horizontal agreements to restrain the interbrand variety, constituted private price fixing—an impermissible interference with the role of competition as the arbiter of price. The opinion closes with a final reference to the relationship between property and competition logics: "where commodities have passed into the channels of trade and are owned by dealers, ... the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."\textsuperscript{59}

\textsuperscript{54} 220 U.S. at 407. Though both the Dr. Miles Company and favored dealers benefit or suffer injury in parallel fashion (if the claim of dependence on dealer good will be believed), the Court nonetheless felt free in its analysis to ignore the benefit to the producer, because the producer had not retained title and thus had no rightful claim to a benefit.

\textsuperscript{55} \textit{United States v. Addyston Pipe & Steel Co.}, 85 F. 271 (6th Cir. 1898), aff'd. 175 U.S. 211 (1899).

\textsuperscript{56} 220 U.S. at 408.

\textsuperscript{57} \textit{Id}.

\textsuperscript{58} \textit{Id}.

\textsuperscript{59} \textit{Id} at 408-09.
Judge Taft’s distinction between direct and ancillary restraints, proposed in *Addyston Pipe*, was crucial for Justice Hughes’ analysis. It served as the connection between restraints at common law and those under the Sherman Act, and as the connection between vertical and horizontal price fixing agreements. This distinction, in a fashion similar to the restraint on alienation defined in *Coke on Littleton*, served as a doctrinal mediation between the competition and property logics. Under this distinction, if there is no supporting property right, a restraint is direct and unenforceable, and competition may not be restrained. If there is an underlying property right, a restraint is ancillary and enforceable, and competition may be restrained. In both cases, it is the individual property owner who has the right to dispose of her property, which includes the freedom to set the sale price. Competition depends upon property holders exercising their individual rights to set prices for their goods. Thus, agreements between rival property owners are a restraint of competition.

The problem with this formulation is how to resolve the question of property rights. While any given determination of property rights might make sense, the cumulative process of determining property rights is arbitrary. For example, the Court could have accepted Dr. Miles’ claim that its common-law trade secret rights should, like patent rights, allow it to restrain competition in its products. Alternatively, it could have defined more narrowly the rights of a patent holder to restrain competition. Each alternative is highly plausible and, in that sense, arbitrary. Nonetheless, one of the arbitrary alternatives had to be chosen, Justice Holmes notwithstanding, to maintain the tension between competition and property logics. If not, the logic given priority could annihilate the other. For example, if the Court had accepted Dr. Miles’ argument that its trade secret ownership should allow it to restrain competition, then the increase in effective property rights would constrict the area for competitive forces. If the Court had accepted Dr. Miles’ argument that its ownership of the patent medicine at the time of manufacture entitled it to restrain competition, then there would have been no room for competition. Competition logic would have been annihilated.

Another way of understanding the problem with defining property rights is to recast it as a question of how to identify the entity that holds the property right. Vertical restraints doctrine can be viewed as a series of attempts to resolve this entity problem. For example, if a transaction is characterized as a consignment, then the dealers are agents of a principal—the manufacturer. Price fixing ancillary to the consignment is nothing more than the principal’s individual exercise of property rights. But
if the transaction is characterized as a sale, then the dealers are property owners who, under the common law and the Sherman Act, must exercise their property rights individually. Whether vertical or horizontal, an agreement in restraint of trade is illegal because it means that the restraint is not an exercise of individual property rights. As the Court in *Dr. Miles* stated, the owner's liberty of contract right does not support a restraint of competition. Vertical restraints doctrines can be understood as a series of attempts to mediate the tension between property and competition logics.

In his dissent, Justice Holmes was willing to take the final step that the majority refused to take. He argued that liberty of contract, even without an underlying property right, should provide a sufficient basis for restraining competition. Offering a shorthand rendition of the expansive liberty of contract rhetoric already aired in his *Northern Securities* dissent, Justice Holmes declared that, regardless of who holds title, "the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." He stated further that when liberty of contract is the standard by which to judge restraints, there is no clear basis for choosing among the "originator," "first vendor," or "subordinate vendor" of the product because they all had such rights. Moreover, the "interest of the consumer" should fare no better, because "we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article ... as fixing a fair price." Thus, according to Justice Holmes, the Court had no clear ground for interfering with the agreements between Dr. Miles and its dealers.

Justice Holmes concluded his dissenting opinion with a reference to "fair price." But in contrast to the equalizing impulse working in the legislative debates and in Dr. Miles' complaint, which called for a policy of protecting fair profit to the independent entrepreneur, Justice Holmes' notion of a "fair price" was shaped by his commitment to liberty of contract. For Justice Holmes, "fair price" meant "the point of most profitable returns" or monopoly price. The appropriate place for rivalry was the "competition of conflicting desires" or in today's terms, elasticity of demand. In other words, this concept of freedom of contract would

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60. *Id.* at 407.
61. *Id.* at 411.
62. *Id.* at 411-12.
63. *Id.* at 412.
64. *Id.*; cf. S. PATTEN, THEORY OF PROSPERITY 60 (1902) (arguing that "consumers' power of substitution" brings prices down in monopoly markets).
allow the manufacturer to restrain competition between dealers, regardless of who holds title to the property in question. For Justice Holmes, free competition meant freedom from judicial enforcement of common-law doctrine regarding restraints of trade. It meant unconditional freedom to restrain intrabrand competition by resale price maintenance agreements.

In summary, *Dr. Miles* is important for several reasons. First, it introduced the three doctrinal threads that have tied together vertical price restraint opinions since 1911: the consignment-sale distinction; the unilateral or concerted nature of the restraint; and the "free rider" thread. Moreover, both the majority and the dissent agreed that competition logic must be subordinated to fundamental property rights, taken from common-law doctrines such as consignment and agency contracts. Finally, although *Dr. Miles* stands for the proposition that resale price maintenance is illegal per se under the Sherman Act, it should not be mistaken for a continuation of literalist jurisprudence. This Court was primarily concerned with setting clear limits for competition logic's intrusion into a regime of property rights.

B. Liberty of Contract and Unilateral Terminations

Eight years later in *United States v. Colgate & Co.*, a post-rule of reason Court again took up the doctrine of agreement, this time embracing the liberty of contract logic from Justice Holmes' dissent in *Dr. Miles*. Though highly attenuated for over sixty years, the *Colgate* doctrine, which stands for the proposition that a unilateral refusal to deal does not violate the Sherman Act, has regained its vigor in recent Court opinions.

In *Colgate*, the Court reviewed the adequacy of a criminal indictment, as authored by the Justice Department and as interpreted by the trial court. The indictment alleged that "the defendant . . . created and engaged in a combination with said wholesale and retail dealers . . . for the purpose and with the effect of procuring adherence on the part of such dealers . . . to resale prices fixed by the defendant . . . thus suppressing competition amongst [them]." In a unanimous opinion for the Court, Justice McReynolds stated that the government "proceeds solely

65. 250 U.S. 300 (1919).
67. 250 U.S. at 306.
68. Id. at 302-03.
upon the theory of an unlawful combination."\textsuperscript{69} The government agreed, claiming that the trial court's view of the indictment was consistent with the combination doctrine of Dr. Miles.\textsuperscript{70} On the other side, Colgate & Company argued that the trial court's opinion, taken as a whole, "construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same."\textsuperscript{71} In short, the parties' opposed interpretations derived from competition and property logics in conflict.

In construing the trial court's interpretation of the indictment, the Supreme Court focused on the element of "combination." To put this into context, the Court was confronted with an undisputed sale. There was no claim of consignment or agency, as there had been in Dr. Miles. Were all price restraints accompanying sales to be treated as unreasonable per se?

Most of the Court's spare opinion, which is less than seven pages long, simply recites the lower court's language. Despite the government's averment of combination, Justice McReynolds thought it significant that the court below said: "No charge is made that any contract was entered into."\textsuperscript{72} This was a curious observation because the trial court also viewed the indictment as presenting the question of whether Colgate was subject to prosecution "because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices."\textsuperscript{73} The indictment further alleged that, to carry out the purposes of the combination, Colgate

\[d]istribut[ed] among dealers . . . lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; . . . requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did . . . .\textsuperscript{74}

\textsuperscript{69.} Id. at 309.
\textsuperscript{70.} Id. at 306.
\textsuperscript{71.} Id.
\textsuperscript{72.} Id. at 304.
\textsuperscript{73.} Id. at 304-05 (emphasis added).
\textsuperscript{74.} Id. at 303. Note how this is not a simple refusal to deal, as it has been characterized. Rather, the Colgate Company's conduct is very much like the conduct found to violate the Sherman Act in United States v. Parke, Davis & Co., 362 U.S. 29 (1960). For a typical view that Parke, Davis is distinguishable by its program to enforce resale price maintenance, see Calvani & Berg, Resale Price Maintenance after Monsanto: A Policy Still at War with Itself, 1984 DUKE L.J. 1163, 1173.
Given that this course of dealing could amount to a combination to set a price, what distinguishes it from a contract to set a price, such as the transaction in *Dr. Miles*?

The trial judge characterized the indictment as presenting "for the determination of the court how far one may control and dispose of his own property." This portrayal of the manufacturer's interest echoed Justice Holmes' rhetoric of freedom of contract in *Dr. Miles*. "[A] manufacturer of a given article . . . [may] refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price." While this view seems to ignore the *Dr. Miles* majority's rejection of a "liberty" claim, it does reflect the intervening *Standard Oil* opinion's rule of reason jurisprudence, whose purpose was "to prevent [the Sherman Act] from destroying all liberty of contract and all substantial right to trade." Nonetheless, according to Justice McReynolds, there was a difference between the plans of Dr. Miles Company and the plans of Colgate Company: in the former, "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." Justice McReynolds' criterion was a liberty-based distinction between bilateral and other kinds of contracts. Only in a bilateral contract does a dealer explicitly promise to adhere to a price, in exchange for the manufacturer's promise to sell goods to the dealer.

In this case, the government's indictment did not allege that "the manufacturer and his customers bound themselves to enhance and maintain prices." The retailer never gave up its freedom of contract. "The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all." In short, the retailer retained the individual property right to set a price, and thus to compete. Justice McReynolds was careful to point out that there was no charge that the dealers had formed a cartel "or that the defendant acted other than with his customers individually." The Court was also willing, it

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75. 250 U.S. at 304-05.
76. *Id.* at 305.
77. United States v. American Tobacco Co., 221 U.S. 106, 180 (1911); *see* *Standard Oil Co. v. United States*, 221 U.S. 1, 60, 63-66 (1911).
78. 250 U.S. at 307-08.
79. Traditional contract doctrine defines a bilateral contract as a bargain founded in an exchange of promises. Other sorts of contractual liability do not derive from two parties binding themselves by exchanging promises. In a unilateral contract, only one party binds herself by a promise to perform. Implied contracts need not include any promise.
80. 250 U.S. at 305.
81. *Id.*
82. *Id.* at 306.
seems, to assume that the dealers' liberty to compete was not constrained by the Colgate Company's market or bargaining power. The Court cautioned that it was deciding a Sherman Act section 1 case. There was no claim that Colgate monopolized the industry.\textsuperscript{83} In consequence, there was no basis for assuming that dealers who competed and were terminated lacked the opportunity to sell competing products. With no claim of excessive market power held by Colgate, the Court seemed willing to make the inference that there was essentially equal bargaining power between Colgate and its dealers. In tune with the new rule of reason jurisprudence, this property-liberty logic wove a strong thread of agreement that successfully held off the government's competition-based arguments.

Nonetheless, the close distinction between the \textit{Colgate} and \textit{Dr. Miles} doctrines did not go unnoticed. The following term in \textit{United States v. Schrader's Son, Inc.},\textsuperscript{84} the Court felt compelled to respond to a district court judge who wrote:

Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the \textit{Dr. Miles Company Case} and the \textit{Colgate Company Case}. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement.\textsuperscript{85}

In his response to the trial judge's consternation over the identical competitive effects (fixed prices) of both schemes, Justice McReynolds could only repeat the property-liberty logic of his \textit{Colgate} opinion: "We had no intention to overrule or modify the doctrine of \textit{Dr. Miles}, where the effort was to destroy the dealers' independent discretion through restrictive agreements."\textsuperscript{86} In other words, "the parties are combined through agreements designed to take away the dealers' control of their own affairs and thereby destroy competition."\textsuperscript{87} The Court's concern with competitive effects depended upon the prior satisfaction of demands imposed by the rhetoric of freedom of contract.\textsuperscript{88}

\textsuperscript{83.} \textit{Id.} at 302.
\textsuperscript{84.} 252 U.S. 85 (1920).
\textsuperscript{85.} \textit{Id.} at 97 (citing \textit{United States v. A. Schrader's Son, Inc.}, 264 F. 175, 183 (N.D. Ohio 1919)).
\textsuperscript{86.} \textit{Id.} at 99.
\textsuperscript{87.} \textit{Id.} at 99-100.
\textsuperscript{88.} This analysis raises the contradiction of free competition: the notion of liberty can mean freedom from governmental power or market power. The former rejects governmental intervention while the latter calls for it. \textit{See} Peritz, \textit{Rule of Reason, supra} note 3, at 336-41.
Though later cases consistently shortened the Colgate doctrine's reach, it was never overruled. Despite its attenuation, a thread of agreement in vertical restraints doctrine continued to support the proposition that unilateral refusals to deal with discounting wholesalers or retailers was permitted under the Sherman Act.

C. Consignments and Price Competition

In 1926, the Court reconsidered the consignment branch of the Dr. Miles case in United States v. General Electric Co. The facts of General Electric supported a combination of property logics in restraint of competition, a combination so powerful that General Electric's contracts fixing resale prices were held legal per se.

General Electric was owner of the three patents that "cover completely the making of the modern electric lights . . . and secure to the General Electric Company the monopoly of their making, using and vending." General Electric and its major licensee, Westinghouse Company, controlled eighty-five percent of the total business in electric lights in 1921. Aside from its own direct sales to large consumers, General Electric's distribution plan consisted of "direct sales" of lamps on "consignment" and "negotiated by agents." "All of the lamps in such consigned stock are to be and remain the property of the company until sold." Upon delivery of the lamps to purchaser, "the title passes directly from [General Electric] to those purchasers." Consistent with its ownership claim, General Electric "assumed all risk of fire, flood, obsolescence, and price decline, and carries whatever insurance is carried on the stocks of lamps in the hands of its agents and pays what ever taxes are assessed."

90. The revival of this property-liberty logic in defense of dealer terminations is discussed infra notes 159-79 and accompanying text.
91. 272 U.S. 476 (1926).
92. Id. at 488.
93. Id. at 480-81. Under the patent law, "the patentee is given by statute a monopoly of making, using and selling the patented article." Id. at 485.
94. Id. at 481. In addition, other licensees accounted for 8% and unlicensed manufacturers accounted for 7%.
95. Id.
96. Id. at 482. The agreements also closed Dr. Miles' back door—its failure to restrict wholesalers from selling to other wholesalers. Id. at 482, 484.
97. Id. at 484.
98. Id. at 483.
The validity of the distribution plan turned "on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment." Justice Taft found no basis for treating the contracts as anything other than the consignment agreements General Electric claimed them to be. That is, "the owner of an article patented or otherwise is not violating the common law or the Anti-Trust Act by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer." Whether the owner of a statutory patent monopoly or a secret patent medicine formula, a company was entitled to use the consignment agreement to restrain intrabrand competition in the article.

Justice Taft, who earlier had brought the common-law doctrine of consignment to bear on analysis of horizontal restraints in his circuit court opinion in *Addyston Pipe*, had no doubts about applying this doctrine to find General Electric's vertical restraints legal per se. Certainly, the opinion could have upheld the restraint on the basis of the *Dr. Miles* distinction between statutory patent rights and common-law property rights. The General Electric Company's patent ownership constituted the statutory rights necessary to support the claim that the price fixing agreements were ancillary to a cognizable property right. Justice Taft, however, chose the much broader ground of common-law property rights of consignment. This gesture assured the continuing dominance of the rhetorical mode of property over its competition-based rival. In the *General Electric* case, this dominance meant essentially that there would be no competition at all, since intrabrand competition was avoided under that case and there was no interbrand competition to speak of.

The title logic of property ownership rights continued to sanction resale price maintenance, despite its restraint of the market's pricing function, until *Simpson v. Union Oil Co. of California* almost forty years later. From Justice Stewart's scathing dissent to Professor Baxter's recent characterization of the majority opinion as disingenuous, the Court's opinion in *Simpson* has been maligned. When viewed as a product of the conflict between competition and property logics, how-

99. Id. at 485.
100. Id. at 485-86.
101. Id. at 488. The remainder of the opinion analyzes the General Electric Company's patent monopoly within the framework of Sherman Act § 2.
102. Id. at 493-94 (affirming the trial court's dismissal of plaintiff's bill).
104. Id. at 25 (Stewart, J., dissenting); Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CALIF. L. REV. 933, 935 (1987).
ever, Justice Douglas’ opinion for the Court appears more candid and begins to look instead like an ill-advised attempt at a perhaps impossible task—to satisfy both logics.

In *Simpson*, a retail gasoline service station operator recovered treble damages from the Union Oil Company, who terminated him after he continued to sell gasoline at prices below that specified in the contract of consignment. The Court found that the combined impact of these annual leases of the station premises coercively laced [the dealers] into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons who otherwise might be competitive. The evil of this resale price maintenance program . . . is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal “consignees” who are in reality small struggling competitors seeking retail gas customers.105

The opinion’s fundamental problem is its reluctance to rely exclusively upon the Court’s new commitment to competition logic and in turn to adopt entirely the radical normative shift from *General Electric’s* property logic. Instead, the *Simpson* opinion seeks to replicate the *Dr. Miles* opinion’s strategy of defusing the manufacturer’s title-based claims as a prelude to the Court’s emphasis on competition logic. That strategy was convincing in *Dr. Miles* because the Court attacked consignment agreements that were not well drafted. But in *Simpson*, as in *General Electric*, such attack lacked conviction because the consignments had been fortified against precisely that strategy.

Before investigating the majority opinion’s maligned assault on the property logic of Union Oil Company’s consignment scheme, it is worth examining how the opinion formulates doctrine based on an explicit commitment to the value of competition. The Court wrote that “a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy.”106 As authority for the claim that competition constitutes that policy, Justice Douglas cited his own opinion in *United States v. Socony-Vacuum Oil Co.*, the most extreme rendition of the rule that *horizontal* price fixing agreements are illegal per se.107 “The evil of this resale price maintenance program . . . is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline . . . .”108 In short, the opinion declares that the “antitrust policy expressed in Acts of Con-

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105. 377 U.S. at 21.
106. *Id.* at 18.
107. 310 U.S. 150, 218 (1940) (Douglas, J.); *see* 377 U.S. at 21-22.
108. 377 U.S. at 21.
“gress” trumped the property rights associated with perfectly legal consignments.109

Thus, the Simpson opinion reinstates the old literalist maxim that competition is the only legitimate arbiter of price, thereby establishing competition as the predominant logic in vertical price restraints doctrine. Consistent with Justice Harlan’s Northern Securities rationale that Congress has the power to regulate property rights to protect or impose competition in interstate markets,110 Justice Douglas formulated an expansive logic of competition. This breadth is evident in the new connection forged between intra- and interbrand competition. In Dr. Miles, the connection was based on the presumed benefit to favored dealers resulting from vertical price restraints. Since the dealers benefitted, the vertical restraint was “just like” a horizontal agreement among dealers. But here, the Court presumed instead that the manufacturer benefitted. The combination of the consignment device used throughout the oil industry and the oligopoly structure of the industry at the manufacturer level amounted to administered prices.111 In short, typically there was price leadership rather than interbrand price competition. Thus, if there was to be price competition, it had to occur at the dealer level. With oligopoly pricing enforced by manufacturers’ vertical price restraints, there was no price competition at all. In the oil industry, intrabrand competition at the dealer level was seen as the only way of promoting interbrand competition.112

But apparently this powerful competition logic did not provide a sufficient basis for finding the arrangement illegal, perhaps because of the extreme doctrinal shift from General Electric’s per se legality to Simpson’s per se illegality and this shift’s implication that competition policy would now override the logics of all common-law property rights. Certainly, consignment represented a well-settled and powerful form of these rights. Could it simply be jettisoned? If so, perhaps all common-law property rights could suffer the same fate. Justice Hughes’ opinion in Dr. Miles serves as an example of the arbitrariness of defining property rights, and thus as the spectre of their demise. Given this threat to fundamental property rights, the Simpson opinion could not rely solely on the normative shift from the title theory of property rights to the market

109. Id. at 18.
111. 377 U.S. at 22 n.9 (citing Berle, Bigness: Curse or Opportunity?, N.Y. Times, Feb. 18, 1962, Magazine, at 18, 55, 58).
112. See Comanor, supra note 2, for an elegant economic analysis of the relationship between interbrand and intrabrand competition in the typical contemporary form of rivalry—monopolistic competition.
pricing function associated with competition. It had to defuse the strong property logic that produced the *General Electric* opinion's view that a consignment renders resale price maintenance a per se reasonable restraint of trade. But it could not allow competition logic to annihilate its property counterpart. The Court sought a new doctrinal mediation to keep property logic alive, by distinguishing the property logic of the current case from that in *General Electric* in two ways.

First, despite a distribution plan remarkably similar to General Electric's agency and consignment network, Justice Douglas portrayed the Union Oil Company scheme as a "[c]oercive type of 'consignment' agreement . . . ."113 "By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement" to fix prices.114 Although the Court left the element of coercion vague when it stated that "[i]t matters not what the coercive device is,"115 the opinion's internal logic is clear enough: the consignment device impinged upon the dealers' liberty, their "right of alienation," to borrow a phrase from Lord Coke, by way of Justice Hughes' opinion in *Dr. Miles*.116 Here, too, the restraint was illegal per se because the Court dissolved the manufacturer's underlying property interest. There was "nothing" to which the restraint could be ancillary. At the same time, the possibility of common-law property rights was not annihilated—at least in the abstract, noncoercive consignments were possible. More importantly, however, the common-law regime of private property rights survived. The paramount significance of its survival is most clearly illustrated when the focus shifts from manufacturer to dealer. For it is the dealers' individual property rights that empower them to set their own prices and thus to compete. It is the tension between competition and property logics that produces vertical restraints doctrine and its underlying political economy. Thus, this tension between them must survive.

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113. 377 U.S. at 24.
114. *Id.* at 21.
115. *Id.* at 17.
116. Justice Stewart's dissent recognized the implications of subordinating a title logic to a liberty logic of operative property rights. Disagreeing with the lower court's liberty-based view, which characterized the consignment as Simpson's "own free and deliberate choice," *id.* at 25 (citing Simpson v. Union Oil Co. of Cal., 311 F.2d 764, 769 (9th Cir. 1964)), the dissent insisted on the *General Electric* rationale: "control over price flows from the simple fact that the owner of the goods . . . has the unquestioned right to determine the price at which he will sell them." *Id.* at 29. Justice Stewart also pointed out that the coercive nature of a consignment is a question of fact to be determined on remand. *Id.* at 26. Justices Brennan and Goldberg agreed. *Id.* at 31. Furthermore, Justice Stewart seemed to recognize the underlying competition logic that produced the majority's concern with coercion, reminding them that the competitive effects of price restraints accompanying consignments are immaterial. *Id.* at 28 (citing United States v. General Elec. Co., 272 U.S. 476, 488 (1926)).
Although Justice Stewart in his dissent argued persuasively that, in comparing the General Electric Company and Union Oil Company consignment plans, purported "differences [in] tax and insurance burdens . . . disappear," the Court gave great significance to the fact that Simpson "[m]ust carry personal liability and property damage insurance by reason of the 'consigned' gasoline and is responsible for all losses of the 'consigned' gasoline in his possession." In short, the majority took those facts as evidence against the manufacturer's title theory of ownership. Later, the implications of this evidence were made explicit:

Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them . . . . Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop. Practically the only power they have to be wholly independent businessmen . . . . is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil. In other words, despite a dealer's assumption of all the risks of committing property to the rigors of competition, the Union Oil Company restrained the liberty of the dealer to dispose of that property. Each dealer had exchanged her liberty of contract for the right to sell Union oil. In evaluating this transaction between the manufacturer and the dealers, Justice Douglas took the expanded liberty-property logic of the Holmes dissent in Dr. Miles and turned it on its head. Whereas Justice Holmes argued that this logic rendered a manufacturer's price restraints reasonable, though he did not retain title, Justice Douglas argued that it rendered a manufacturer's restraints unreasonable, despite his retention of title. In the process, Justice Holmes' argument (and the rule of reason's logic as well) was transformed from a libertarian anti-interventionism into a Jeffersonian entrepreneurial defense of intrabrand competition.

In contrast to the first way in which Justice Douglas sought to defuse the power of the General Electric opinion's property logic, his second method involved a candid recharacterization of General Electric as a patent case:

The Court in the General Electric case did not restrict its ruling to patented articles; it, indeed, said that the use of the consignment device was available to the owners of articles "patented or otherwise." But whatever may be said of the General Electric case on its special facts, involving patents, it is not apposite to the special facts here.

117. 377 U.S. at 26 n.1.
118. Id. at 15.
119. Id. at 20-21.
120. Id. at 23 (citation omitted).
Implicit in the reference to patents as "special facts" is the sense that they entail a stronger property interest than do common-law consignments. Patents are a statutory monopoly, founded in explicit constitutional language, and Dr. Miles recognized them as more compelling than common-law trade secret rights. Here, Justice Douglas applied the same logic to common-law consignment rights. The problems with that logic, discussed earlier, reappear here as well. The problem of arbitrariness in defining property rights now takes the form of distinguishing coercive from noncoercive consignments. Moreover, the opinion's reference to "special facts here" compounds the problem: is the reference limited to the domain of property and coercive consignments, or does it also refer to the domain of competition and oligopoly markets? While drawing a wavering line to mediate between the two logics in conflict, the Court is clear about the power of statutory property rights of patent holders: "Long prior to the General Electric case, price fixing in the marketing of patented articles had been condoned, provided it did not extend to sales." In short, competition logic prevailed here and would prevail again when confronting common-law property logics in defense of resale price maintenance. The further exception of "special facts" was given little substance.

In sum, Simpson clearly and straightforwardly limited the General Electric property logic to its patent-related "special facts," despite the earlier opinion's explicitly broader holding. Nonetheless, Justice Douglas seemed reluctant simply to subordinate all common-law property rights to competition policy, perhaps because of the great doctrinal leap from the earlier standard of per se legality to the revised standard of per se illegality of resale price maintenance associated with consignments. The danger of that doctrinal leap was the implication that competition logic would now trump all common-law property rights. Thus, the Court felt compelled to characterize the Union Oil Company's plan as a "coercive type of 'consignment,'" despite the plan's effective identity with the General Electric Company's plan, whose title theory of property rights had produced the earlier doctrine of per se legality.

D. Common-Law Property Rights and Intrabrand Competition

The Simpson opinion shook loose a cornerstone of the common-law property regime when it subordinated a titleholder's rights to those of a consignee. Although the Court limited its holding to "coercive assign-

121. See supra notes 35-41 and accompanying text.
122. 377 U.S. at 24 (citation omitted).
123. Id.
ments," the message was clear: these traditional property rights no longer guaranteed that a manufacturer could safely restrain price competition among its dealers. A few years later, in *Albrecht v. Herald Co.*, the Court examined the fundamental liberty to choose one's own business partners. After *Albrecht*, little would remain of the *Colgate* doctrine, which protected the manufacturer's right to terminate an uncooperative dealer, so long as the action is unilateral.

Justice White, writing for the Court, produced a notion of "agreement" so expansive that few dealer terminations thereafter could be viewed as unilateral actions. The opinion limited the manufacturer's liberty of contract, by refining the logic that Justice Douglas employed in *Simpson* to eliminate consignment as a safe harbor for enforceable price fixing. Justice White's analysis in *Albrecht* made it clear that both opinions subordinated the manufacturer's liberty to set a price to the dealer's liberty to set it. The cumulative effect of individual dealers setting prices would be price competition. This redistribution of property rights from manufacturers to dealers carried with it an equalizing effect similar to the old "literalist" logic of competition, animated by a desire to maintain a class of "small dealers and worthy men." In the old railroad cartel cases, the class was protected from powerful combinations of rivals. In dealer termination cases, it would be protected from large individual producers or dealers. The common thread was a commitment to competitive markets, animated by a belief that equalizing market power was the precondition for industrial liberty or free competition.

*Albrecht* was one of many "independent carriers" who bought morning newspapers from the *St. Louis Globe-Democrat* at wholesale prices. These carriers sold the papers at retail "in exclusive territories which are subject to termination if prices exceed the suggested maximum" as advertised by the publisher, the Herald Company. After *Albrecht* had increased the charge to his 1200 customers by ten cents a month, the Herald Company warned Albrecht that it would solicit his readers. The publisher first sent letters to Albrecht's customers, then hired Milne Circulation Sales, Inc. to help solicit these customers. The Herald Company later gave to another carrier, George Kroner, the 314 customers who accepted the offer of a lower price. In response to the

124. 390 U.S. 145 (1968); see also United States v. Parke, Davis & Co., 362 U.S. 29, 45-46 (1960) (manufacturer's refusal to deal with wholesalers in order to elicit their willingness to deny manufacturer's products to retailers violated the Sherman Act).


126. 390 U.S. at 147.

127. *Id.* The transfer of customers was subject to return, should Albrecht comply with the price-fixing agreement. Raising serious questions about assumptions regarding the price-con-
Herald Company's offer to return the customers to Albrecht if he "discontinued his pricing practice," Albrecht filed suit, charging Herald Company with tortious interference with contractual relations, as well as "a combination or conspiracy in restraint of trade under § 1 of the Sherman Act." Albrecht's distributorship was canceled, and he sold his route of 900 remaining customers.

Albrecht charged a combination between the Herald Company and "plaintiff’s customers and/or Milne Circulation Sales, Inc. and/or George Kroner." The jury found for the Herald Company; the trial judge denied Albrecht's motion for judgment notwithstanding the verdict; and the Court of Appeals affirmed, stating that the defendant's "conduct was wholly unilateral." In reversing, Justice White wrote that "§ 1 of the Sherman Act... covers combinations in addition to contracts and conspiracies...." Overrunning the Colgate case's ground, though not overturning its rule, the Court declared that a combination arises when "acquiescence in the suggested prices was secured by threats of termination..." For the Colgate Court, "proceed[ing] solely upon the theory of an unlawful combination" was insufficient because no averment had been made that "the manufacturer, and his customer, bound themselves to enhance and maintain prices..." In Albrecht as well, there was no binding agreement. Tacit acquiescence, however, was now an effective proxy for a binding agreement.

Justice Harlan in his dissent disagreed with the majority's recognition of tacit acquiescence as a binding agreement. He argued that the Herald Company's "activity was in its essence unilateral" and reminded the Court that "it is quite proper for a firm to set its own prices." Justice Harlan believed that the conduct was unilateral because he viewed Milne and Kroner as Herald Company agents rather than consumers, only 314 of 1200 customers contacted by Milne switched to the lower priced distributor. Id.

128. Id. at 148.
129. Id. at 148 & n.5. Albrecht sought damages for the loss of 314 customers. Id. at 147.
130. Id. at 148 (quoting Plaintiff’s Complaint).
131. Id. at 148-49.
132. Id. at 149.
133. Id. (citing United States v. Parke, Davis & Co., 362 U.S. 29, 44-45 (1960)).
135. Tacit acquiescence is a proxy for agreement, at least when secured by threats of termination, whose inference is easily made. This view parallels the Simpson decision's characterization of Union Oil Company's distribution plan as founded in "coercive consignments." The doctrine of coercion is a traditional contract defense to rescind agreements, founded in the notion that coercion precludes voluntariness.
136. 390 U.S. at 161.
137. Id. at 160.
than independent entities. He compared the Herald Company's action to "pay[ing] one of its own employees to perform a routine task, or hir[ing] an outsider to do the same thing . . . ."\textsuperscript{138} The majority, on the other hand, refused to recognize this common-law right to hire agents to perform services. This refusal was akin to the \textit{Simpson} Court's denial of the common-law right to designate agents to sell goods on consignment.

In both \textit{Simpson} and \textit{Albrecht}, the Court resolved the issue of defining the property holder by the process of individuation. That is, property rights were attributed to individuals rather than entities, and to smaller rather than larger entities. The importance of producer size is not clear, although the disparities in bargaining power between Mr. Simpson and the Union Oil Company, and between Mr. Albrecht and the Herald Publishing Company, appear to be enormous. As in the \textit{Simpson} opinion, the suggestion in \textit{Albrecht} that liberty depends on rough equality is reminiscent of the "literalist" jurisprudence in the formative years. The difference lies in the modern Court's implicit recognition of the need to confront and maintain an underlying regime of property rights.

Here, the Court began by treating the Herald Company and Milne and Kroner as independent entities, each of whom entered into an agreement to restrain Albrecht's individual property or liberty right to set a price for his newspapers. In refusing to enforce an "agreement" that restrained those individual rights, the opinion allowed its property logic of individuation to proliferate "agreements":\textsuperscript{139}

\textit{P}etitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with the other carriers . . . . Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. [This] was not . . . . a frivolous contention.\textsuperscript{140}

Thus, the pleading requirement of a "combination or conspiracy" in restraint of trade was satisfied simply by alleging that the publisher combined with independent contractors, or with the terminated dealer's customers, or even with the terminated dealer. It is hard to imagine any dealer termination case that would fail for lack of concerted action.

Justice White's opinion for the majority holds much in common with the old literalist logic of competition, impelled by an impulse toward equalizing market power. Justices Peckham and Harlan (the elder)

\textsuperscript{138.} \textit{Id.}

\textsuperscript{139.} Milne's "aware[ness] that the aim of the solicitation campaign was to force petitioner to lower his price" and Kroner's knowledge that his participation "materially aided in the accomplishment of respondent's plan." \textit{Id.} at 150.

\textsuperscript{140.} \textit{Id.} at 150 n.6.
believed that industrial liberty required the breakup of cartels and trusts because of their effects on the process of competition and on a class of competitors called "small dealers and worthy men."\textsuperscript{141} The literalists turned aside all arguments based on injury to the property rights of those who entered into contracts in restraint of competition. They believed that the equalization of market power and the proliferation of competitors would have the natural consequence of enhancing industrial and political liberty, the consequence called for by the Sherman Act. Justices Douglas and White wrote opinions for the modern Court that reintroduced this impulse toward equalization. They redirected the equalization impulse, however, to redistribute bargaining power between large producers and small distributors. In both cases, there was no intimation of complaints from other distributors, either individually or in combination. This Court invoked a process of redistribution to equalize individual rights of liberty and property.

The modern majority believed that a consequence of a proliferation of rights holders would be the enhancement of competition—both intra- and interbrand. Although this assumption seemed to hold in \textit{Simpson} as applied to the oil industry, the proliferation of rights holders does not necessarily entail enhancement of competition. One need only recall that Albrecht's exercise of this right to set a price would not lead to any competition because all carriers of the \textit{Globe-Democrat} had exclusive territories. Justice Harlan made much of the exclusive territories provision in arguing that the agreement between the Herald Company and Albrecht should not even be treated as a price fixing agreement.\textsuperscript{142} Indeed, Justice Stewart and the court below agreed that this fixing of a \textit{maximum} price should be seen as the setting of a "fair price" to the consumer, in the absence of competition.\textsuperscript{143}

The Court responded as the literalists might have to this argument, heard long ago in the legislative debates and in the "ruinous competition" arguments of the railroad cartel cases.\textsuperscript{144} Justice White wrote that if "the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price fixing itself injurious to the public, the entire scheme must fall under \textsection 1 of the Sherman Act."\textsuperscript{145} If price competition required the elimination of both the territorial provision and the price ceiling, then the Court was prepared to find the entire

\textsuperscript{141.} United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).
\textsuperscript{142.} 390 U.S. at 166-67.
\textsuperscript{143.} \textit{Id.} at 168.
\textsuperscript{144.} \textit{See} Peritz, \textit{Rule of Reason, supra} note 3, at 291-303.
\textsuperscript{145.} 390 U.S. at 154.
agreement illegal per se.\textsuperscript{146} In sharp contrast to the dissenting Justices’ view that the Herald Company’s restraint was in the best interests of the public, the majority proceeded on the assumption that the public interest depended upon the dealers’ individual property rights and the price competition that would follow.\textsuperscript{147}

This difference of opinion about the best way to serve the public interest can be understood as a disagreement about the implications of individual liberty. Justice Harlan urged the Court to take a different view of the price restraint’s competitive effects by rethinking the relationship between liberty and competition. He began by asserting that to decide the case, someone’s liberty had to give way: either Albrecht could exercise his liberty to set a price or the Herald Company could exercise its liberty to contract with its dealers. One or the other would have to give way. In order to pose the question purely in terms of the price restraint, however, Justice Harlan had to sidestep the issue of territorial exclusivity. Otherwise, he would have found himself in the untenable position of justifying the pricing restraint by its mitigating effect on an arguably illegal territorial restraint. Justice Harlan avoided that difficulty by agreeing with Justice Stewart’s procedural analysis,\textsuperscript{148} which asserted that the Court should be bound by the parties’ “premise that the respondent’s granting of an exclusive territory to each distributor was a perfectly permissible practice.”\textsuperscript{149}

This procedural analysis allowed Justice Harlan two degrees of freedom. First, he could moot the logic of competition, because his procedural analysis represented the territorial restraint as a pre-existing condition that made intrabrand competition impossible and thus irrelevant. Second, within the regime of common-law property rights, his assumption of the restraint as a pre-existing condition allowed him to avoid the fact that the territorial restraint represented an instance of Albrecht’s liberty already having given way.\textsuperscript{150} Given these convenient assumptions, Justice Harlan could argue that the Court should have privileged the publisher’s liberty of contract and enforced the agreement restricting

\begin{footnotes}
\item 146. Id. at 152. 
\item 147. It should be noted that all of the Justices seemed to agree on one fundamental point— that the public interest involved consumer well-being, rather than manufacturer or dealer well-being. This is a shift from the Sherman Act debates’ predominant focus on producer or dealer interests. One way of viewing the modern discourse of vertical restraints is in terms of alignment with consumer interests: will the manufacturer or competing dealers best represent consumer interests? Like the “free rider” rationale, this discourse of economic effects adjusts the competition-property tension. 
\item 148. 390 U.S. at 156. 
\item 149. Id. at 168. 
\item 150. See supra notes 61-62 and accompanying text. 
\end{footnotes}
the dealer’s liberty to set a price. That is, given exclusive territories and thus the lack of competition, liberating Albrecht’s right to set a price would have no procompetitive effects. Rather, the Court should recognize the agreement setting a price ceiling as a reasonable limitation of monopoly power, not a restraint of competition. In short, Justice Harlan argued that the Herald Company’s setting of a maximum price was a reasonable restraint of Albrecht’s liberty because it served as a proxy for competition in a distribution plan of exclusive territories. The majority, however, refused to distinguish between setting minimum and maximum prices, viewing both as restraints on the dealers’ liberty of contract. Moreover, the majority refused to characterize the territorial restriction as a pre-existing condition beyond its scrutiny. Thus, it viewed the individuation of property rights (that is, liberty) as the warrant for striking down both restraints of competition between dealers of the Globe-Democrat.

With these sentiments in favor of “independent carriers” echoing the Simpson opinion’s Jeffersonian entrepreneurial defense of intrabrand competition, Albrecht all but eliminated the Colgate doctrine as a viable form of property logic. In contrast to the old literalist jurisprudence of “full and free competition” among rivals, the modern Court’s opinion is driven by the desire to minimize the size of the entity holding individual property rights in the distribution chain from producers to consumers. Not only the Herald Company, but also Milne, Kroner, Albrecht, and every other dealer held these rights. Each dealer’s rights included the individual liberty to dispose of its property. The logical (and often the

151. Justice Harlan offered two rationales for his view, both of which aligned the publisher’s interest with that of the consumer. First, he made reference to the particular facts of the Albrecht case, arguing that the price ceiling was a reasonable restraint of Albrecht’s monopoly power, rather than a restraint of competition. 390 U.S. at 168 (Stewart, J., dissenting); see also id. at 153 (White, J.) (citing Albrecht v. Herald Co., 367 F.2d 517, 524-25 (8th Cir. 1966)). Thus, there was no competition to be restrained. The Herald Company’s setting of a maximum price was a reasonable way of protecting consumers from the dealers’ monopoly power in their exclusive territories. Second, Justice Harlan made a theoretical argument whose assumptions were in part inconsistent with the Albrecht facts. He claimed that, again, the manufacturer’s setting of a maximum price was in theory consistent with the consumer’s interest in paying less because the lower price not only would increase demand for its newspapers but also would enhance competition with rival newspapers. Id. at 158-59. As the facts suggest, this need not occur. When Albrecht’s customers were given the opportunity to pay less, approximately 75% did not shift. It may be that demand for The Globe-Democrat was not price-sensitive. Moreover, there was no mention of rival newspapers. This suggests that the Herald Company’s price ceiling was an attempt to control distribution costs and appropriate the entire monopoly profit. This view, approving of profit-maximizing conduct, is reminiscent of Justice Holmes’ dissent in Dr. Miles. See supra notes 61-64 and accompanying text.

152. 390 U.S. at 152.
practical) consequence of this proliferation of independent dealers was thought to be intrabrand competition.

The notion of "agreement" constitutes a doctrinal mediation of the tension between competition and property logics, in much the same way that the common-law doctrine of consignment functioned before Simpson. In this regard, Albrecht is significant for two reasons. First, the Court came dangerously close to annihilating individual property rights of the publisher, while protecting those of the dealer. Once again, the arbitrariness of defining property rights is seen, this time in the shifting definition of "agreement" and by implication, in the shifting treatment of producer's and dealer's rights. Why choose one party or the other? One basis is the effect on competition, either intra- or interbrand. Another is attention to individual liberty, itself a shifting concept. There are numerous standards available to allocate these rights and numerous meta-standards for choosing among them. The notion of "agreement" creates another vertical restraints doctrine that requires the Court to make arbitrary choices about the extent of competition logic's intrusion into an underlying regime of individual property rights.

The case is significant for a second reason—the difference of opinion over the relationship between individual liberty and competition. Whereas the majority asserted that protecting the individual liberty of dealers maximizes competition, Justice Harlan argued that a producer's exercise of its liberty of contract (to restrain dealer liberty) can sometimes improve or even replace competition. The majority's view was impelled by the belief that equalizing the distribution of property rights benefitted the exercise of individual liberty. Like the old literalist jurisprudence, the Court opinions in Simpson and Albrecht identified the strength of their political economy with the class of "small dealers and worthy men," whereas Justice Harlan and those who agreed with him cast their lot with the class of large manufacturers.

E. Common-Law Property Rights and Interbrand Competition

Although the Court currently retains the view that resale price maintenance is illegal per se, two recent cases signal a rhetorical return to the pre-Simpson era of expansive property rights for producers. In the first case, Monsanto Co. v. Spray-Rite Service Corp., 153 although the Court refused the Justice Department's invitation to reconsider the per se illegality of resale price maintenance, it did give notice that the dealer's

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153. 465 U.S. 752, 763-64 (1984); see also 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341 (1987) (reaffirming that retail price maintenance "has been a per se violation of § 1 of the
burden of proving an illegal price restraint would be greater. This notice consisted of a lengthy discussion rehabilitating two discarded arguments—the "free rider" rationale and the Colgate doctrine.\(^{154}\) The second case, *Business Electronics Corp. v. Sharp Electronics Corp.*,\(^{155}\) has had the effect of further shrinking the notion of a "price fixing agreement," consequently increasing the freedom of producers to terminate price-cutting dealers or distributors.

In both cases, price competition among dealers was seen as less important than the producer's liberty to dispose of its product as it chooses. The Court viewed producers' choices of distribution plans as worthy of protection because they were seen as strategies to enhance interbrand competition.\(^{156}\) This new linkage between producers' liberty of contract and *inter* brand competition parallels the logic deployed in *Simpson* and *Albrecht*—that protecting dealers' liberty to set a price enhances *intra* brand competition.\(^{157}\) The difference lies in the allocation of the liberty of contract right to dispose of one's property. Justice Holmes observed in his *Dr. Miles* dissent that a commitment to liberty cannot provide the logic for its allocation.\(^{158}\) The remainder of this section analyzes the current Court's arguments for shifting these rights back to the producer.

(1) *Monsanto Co. v. Spray-Rite Service Corp.*

The Monsanto Company had terminated the dealership rights of Spray-Rite, a family-owned "discount operation" and "10th largest of approximately 100 distributors of Monsanto's primary corn herbi

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Sherman Act 'since the early days of national antitrust enforcement' " and citing *Monsanto and Dr. Miles*).

Assistant Attorney General Baxter, in an *amicus* brief, asked the Court to reconsider the *per se* standard. 465 U.S. at 753, 761 n.7.

154. The Court adopted the expanded property rhetoric of Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50-51 (1977), written four years earlier, which itself revived the rhetoric of White Motor Co. v. United States, 372 U.S. 253, 263 (1963), the first Supreme Court opinion to operationalize a category of nonprice restraints. For an earlier opinion, see, e.g., Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). In these cases, the Court did shift from a *per se* rule to a *rule of reason* standard to evaluate manufacturers' rights to impose nonprice restraints on their dealers and distributors. The *Monsanto* opinion adopts this new property logic. See *infra* notes 253-88 and accompanying text for a discussion of the *GTE Sylvania* opinion.


156. The Court paid no heed to critics who argue that other strategies are equally effective and less destructive of dealer competition. See *infra* note 273 and accompanying text.

157. See *supra* notes 124-52 and accompanying text.

Although the Monsanto Company argued that the termination was due to Spray-Rite's failure to hire trained sales personnel who could educate customers and thereby promote the product, the Court found evidence sufficient to show that the termination was motivated by the Monsanto Company's desire to maintain a resale price fixing conspiracy.\textsuperscript{160}

Writing for a united Court,\textsuperscript{161} Justice Powell addressed the only issue on appeal—whether "proof of termination following competitor complaints is sufficient to support an inference of concerted action."\textsuperscript{162} That is, was there adequate proof of a "price fixing agreement"? The Court based its analysis of this issue on "two important distinctions that are at the center of this and any other distributor-termination case": (1) "concerted and independent action," and (2) "concerted action to set prices and concerted action on nonprice restrictions."\textsuperscript{163} Justice Powell candidly observed that these distinctions "are often [d]ifficult to apply in practice" because their "market impact . . . [or] economic effect . . . is in many, but not all, cases similar or identical."\textsuperscript{164} But when the competition rhetoric of "market impact" cannot differentiate among these forms of "arguably anticompetitive conduct,"\textsuperscript{165} it is unclear why these doctrinal distinctions between concerted and unilateral action, and between price and nonprice restraints are maintained.

Justice Powell gave no explicit rationale, simply stating that the differences are important because "price-fixing agreements . . . are subject to per se treatment and treble damages" and nonprice restraints are not.\textsuperscript{166} Given the finding of a price fixing agreement, the Court held the termination a per se violation of section 1 of the Sherman Act. A familiar property logic appearing later in the opinion suggests the basis for this fundamental distinction: "to permit the inference of concerted action on the basis of receiving complaints alone . . . would . . . inhibit manage-

\begin{itemize}
\item \textsuperscript{159} Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 756-57 (1984).
\item \textsuperscript{160} Id. at 765-66.
\item \textsuperscript{161} Justice Brennan wrote a one paragraph opinion concurring in the result and in the Court's retention of the per se standard. Id. at 769. Justice White took no part in the case.
\item \textsuperscript{162} Id. at 758 (citing Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1238 (7th Cir. 1982)).
\item \textsuperscript{163} Id. at 760-61. Justice Powell seemed to be referring to (1) the \textit{Colgate} doctrine permitting unilateral restraints and (2) the \textit{White Motor} distinction between price and nonprice restraints, discussed infra notes 200-24. There is a later reference to the "free rider" thread as well. Id. at 763. For a discussion of the consignment thread's unraveling, see infra notes 253-73 and accompanying text.
\item \textsuperscript{164} Id. at 762.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id. at 763.
\end{itemize}
ment’s exercise of its independent business judgment . . . .” In short, to treat evidence of dealers’ complaints about discounting as conclusive proof of a price fixing agreement would interfere with the manufacturer’s liberty and property interests. The opinion made explicit its antecedents: “Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer’s demand in order to avoid termination.” In impliedly overruling the Albrecht opinion’s doctrine of combination by acquiescence, the Court revived the Colgate doctrine’s bilateral notion of limiting individual liberty by requiring a “meeting of the minds” or “a common scheme”: “evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.”

In requiring some sort of bilateral communication, the Court would seem to have returned to the Colgate opinion’s view that a dealer is presumed to have retained its liberty to set a price unless it explicitly promises to take the manufacturer’s price. Yet, the Court did not return to this view. The Court is no longer concerned with the dealer’s liberty or with the restraint’s impact on dealer competition. Instead, its constricted view of “agreement” enlarges the manufacturer’s liberty of contract right to restrain competition, for the explicit purpose of limiting dealer liberty to set prices for its products. This radical reversal in the importance of dealer price competition rests upon the so-called “free rider” rationale.

The “free rider” rationale is contained in the Monsanto opinion’s distinction between price and nonprice restraints on competition. As section II, below, discusses in detail, this distinction is both elusive and important. It is elusive not only because the competitive effects of both kinds of restraints are often indistinguishable, but also because “manufacturers and distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.” It is important because failure to make the distinction “could deter or penalize perfectly legitimate conduct.” The reference to “legitimate conduct” is to “agreements on often costly nonprice re-

167. Id. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3d Cir. 1980)).
168. Id. at 761.
169. Id. at 764 n.9.
170. See supra notes 65-90 and accompanying text for a discussion of the Colgate doctrine.
171. 465 U.S. at 762-63.
172. Id. at 762.
173. Id. at 763.
strictions,” such as presale promotion, inventory level requirements, or sales staff training. “The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for [such] programs . . . .”

This concern for “sufficient profit” echoes the property logic of “fair profit” heard as early as the legislative debates preceding the Sherman Act and the Dr. Miles Company’s losing arguments. The Monsanto opinion permits manufacturers to enforce nonprice restraints on all dealers to encourage their promotional activities, despite the indirect effect of restraining price competition among dealers. Incentives to encourage promotional activities, the Court believes, constitute a legitimate strategy to enhance interbrand competition, even though there are less restrictive strategies that make sense.

To protect the profits of full service dealers, the manufacturer “will want to see that free riders do not interfere.” The following is a quick sketch of the “free rider” rationale—a two dimensional likeness in terms of property and competition logics. First, a “free rider” is a discounting retailer who engages in price competition, rather than in nonprice marketing strategies. Price competition is anathema to dealers who engage in promotional activities or provide service facilities, and to manufacturers who want them to provide such activities and facilities. There is substantial controversy regarding the fairness of permitting manufacturers to terminate price cutters, because their elimination effectively imposes the costs of promotional activities on all consumers, whether they prefer services or lower prices.

Second, a commitment to property logic has produced the pejorative term “free rider,” rather than the neutral term “price discounter,” or the ameliorative term “price competitor.” As Judges Posner and Easterbrook have told their readers: “When people use a valuable good without paying for it, economists call them free riders.” In other words, their ethical concern with free riders is the taking of another’s property. Tantamount to theft, free riding involves the appropriation of a promoting dealer’s “fair profit.” That fair profit is earned by the dealer’s promotional efforts on behalf of the manufacturer.

174. Id. at 762-63.

175. See Peritz, Rule of Reason, supra note 3, at 297-303.

176. There are other ways to promote interbrand competition. See infra note 264 and accompanying text.

177. 465 U.S. at 763 (citing Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

178. I want to postpone until my discussion of nonprice restraints doctrine a full explanation of the “free rider” rationale for restraining intrabrand competition.

(2) *Business Electronics Corp. v. Sharp Electronics Corp.*

Last term in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court further increased its commitment to the "free rider" rationale and diminished the role of "agreement" in vertical price restraints doctrine. Justice Scalia's opinion was so heavily invested in the free rider rationale that facts tending to show its inapplicability were simply ignored. Regarding the question of what now constitutes a price fixing "agreement," it is clear that the opinion's narrow view will tend to throw dealer terminations into the lawful category of "unilateral" conduct.

The facts of *Sharp Electronics* are as follows. Sharp Electronics authorized two dealers—Hartwell and Business Electronics Corp. (BEC)—to sell its calculators in the Houston area. Hartwell complained repeatedly about BEC's price cutting. Finally, Hartwell threatened to stop carrying Sharp products unless Sharp terminated BEC. Sharp agreed to terminate BEC, and BEC then filed suit against both Sharp and Hartwell, claiming that they had conspired to terminate BEC on account of its price cutting.181

In an analysis weakened by contradictions and errors, Justice Scalia characterized the issue as locating the "proper dividing line between" price and nonprice restraints.182 Early in the opinion, he identified the doctrinal compass for finding that line: "Departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing."183 Yet, later in the opinion, Justice Scalia enforced the very formalism apparently renounced.

Justice Scalia took issue with Justice Stevens' argument in his dissenting opinion, that BEC's termination should be viewed as a horizontal restraint (and thus illegal per se). Repeating Justice Hughes' well-known reasoning in *Dr. Miles*, Justice Stevens' dissent based its view on the restraint's economic effects—it is "just like" a cartel or group boycott.184 Rather than disputing Justice Stevens' rendition of the horizontal effects, Justice Scalia wrote: "A restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."185

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181. Id. at 1518.
182. Id. at 1517. Two obvious errors are, first, the characterization of the *Standard Oil* case as representative of the earliest decisions of the Court, id. at 1519, and second, the acceptance of Mr. Bork's erroneous view of ancillary restraints, id. at 1522 n.3. For analyses of these issues, see Peritz, *Rule of Reason*, supra note 3, at 314-24.
183. Id. at 1519 (citing Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977)).
184. Id. at 1530-32.
185. Id. at 1523 n.4.
Although this inconsistency between the majority's *theory* of economic effects and its *practice* of formalistic line drawing might appear to be of limited significance, it underscores a central flaw in Justice Scalia's analysis. That flaw is a formalistic reliance on presumptions, in disregard of facts inconsistent with the presumptions, and thus, in disregard of economic effects.

In antitrust jurisprudence, such disregard of economic effects constitutes a rule of per se (il)legality. Although Sharp Electronics' conduct was adjudged a nonprice restraint, calling for a rule of reason analysis, the implication of Justice Scalia's new formalism is a return to a policy of vertical restraints as legal per se, recalling the General Electric era of consignments as an unassailable method for imposing vertical restraints.

In *Sharp Electronics*, the most important example of this formalism is an unmitigated reliance on the free rider rationale for protecting the manufacturer's right to terminate a price cutter. The Court presumed that discounting dealers are free riders who by their very nature appropriate the value of other dealers' promotional activities, thereby disrupting the best laid plans of manufacturers to improve their positions in interbrand competition. The legality of such terminations is based on the further presumption that privileging the manufacturer's rights to eliminate these "market imperfections" gives them the control they need in planning programs to succeed in interbrand competition.

But as Justice Stevens observed in his thoughtful dissent, BEC's termination was the result of Hartwell's ultimatum, not Sharp's restraints to enhance interbrand competition. In fact, there were no vertical restraints. Moreover, there was no evidence that Hartwell's higher prices constituted a "fair profit" earned from promotional activities. Rather, Hartwell simply wanted to eliminate a price cutter so that it could charge higher prices. Nonetheless, the Court slavishly held to its

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186. See infra notes 200-88 and accompanying text for a discussion of nonprice restraints. It is interesting to note that Justice Scalia cites the overruled General Electric opinion. *Id.* at 1524. Is this the first indication of a revival of consignment rights?

187. *Id.* at 1523.

188. *Id.* at 1528-30. Justice Stevens also argued that the Court's analysis, based on the distinction between price and nonprice restraints, was inappropriate because there was no territorial or price restraint imposed. Neither category as traditionally composed had any descriptive value in the case. Rather, the restraint should be analyzed according to the doctrine of ancillary restraints, with particular attention to its horizontal effects. *Id.* at 1528-31. According to this analysis, the restraint was not ancillary to any agreement and thus was direct or "naked." Moreover, the producer was not motivated by a desire to enhance interbrand competition, but rather, was coerced by a dealer with market power. Finally, the termination eliminated intrabrand competition in the Houston area. Given the termination's nature as a direct restraint and its purely anticompetitive effects, the Court should find it illegal per se.
free rider theory. Thus, it appears that BEC, as a discounter, was a free rider per se—that is, regardless of the economic circumstances.

Justice Scalia's formalistic analysis has had the practical effects of annihilating dealer property rights and burying dealer competition—it perhaps has made dealer terminations legal per se. At first blush, this seems to be an overstatement of the new formalism's effects since it has not taken into account dealer terminations to enforce price restraints. As both Monsanto and Sharp Electronics confirm, dealer terminations to enforce price restraints remain illegal per se. Although price restraints still fall under the per se rule, the Court has shrunk the category of price restraints to the point of collapse. In shifting the doctrinal dividing line between price and nonprice restraints, the Court in Sharp Electronics found the following jury instructions to be an unacceptable statement of resale price maintenance doctrine:

If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer yes to [the question whether Sharp violated the Sherman Act]. . . . If a dealer demands that a manufacturer terminate a price cutting dealer, and the manufacturer agrees to do so, the agreement is illegal if the manufacturer's purpose is to eliminate the price cutting.\footnote{189} The Court was not willing to treat proof of such facts as adequate evidence of an agreement to restrain price competition, although such proof met the Monsanto standard.\footnote{190}

According to Justice Scalia, something more must be proved to throw the agreement into the imploding category of vertical price restraints. The terminated dealer also must offer convincing evidence that the complaining dealer "express[ly] or implied[ly] agree[d] to set resale prices at some level."\footnote{191} Such evidence is necessary because, the Court admitted, "all vertical restraints . . . have the potential to allow dealers to increase 'prices' and can be characterized as intended to achieve just that."\footnote{192} Moreover, the Court's analysis assumed that the manufacturer's intent in imposing nonprice restraints is to "reduce intrabrand

\footnote{189. Id. at 1518.}
\footnote{190. See supra notes 159-79 and accompanying text.}
\footnote{191. 108 S. Ct. 1515, 1519-25 (1988). The Circuit Court wrote that the complaining dealer "retain[ed] complete freedom to set whatever price it chooses." Id. at 1518 (citing Business Elec. Corp. v. Sharp Elec. Corp., 780 F.2d 1212, 1218 (1988)). Justice Scalia presented familiar reasons for extending the manufacturer's right to terminate a price cutting dealer, including the free rider rationale. Other justifications included the presumption that no manufacturer cartel was plausible and that vertical integration, a presumably likely and legal alternative, posed a greater threat. Id. at 1520-22.}
\footnote{192. Id. at 1521-22.
price competition . . .". In short, the doctrinal distinction between price and nonprice restraints makes no economic sense in terms of competitive effects. It appears, then, that the doctrine's value was unrelated to the logic of competition. Rather it provided a language for allocating property rights between manufacturers and dealers, by designating some restraints as price restraints and thus illegal per se, and others as nonprice restraints and de facto legal under the rule of reason. By increasing the terminated dealer's burden of proving a "price restraint," the Court compressed the category of illegal restraints. In consequence, the majority redistributed property rights from dealers to manufacturers, allowing the manufacturer a free hand in restraining intrabrand competition.

Justice Stevens in his dissenting opinion argued that the Court, by shifting its focus to interbrand competition, ignored recent Supreme Court precedent, which had treated intrabrand competition as important for a number of reasons. "Thus, although the majority neglects to mention it, fostering intrabrand competition has been recognized as an important goal of antitrust law . . . ." Not only can restraints of intrabrand competition hurt consumers, their cartel-like economic consequences can also harm terminated dealers in the same way that boycotts do. Echoing the call for industrial liberty heard throughout the history of vertical restraints doctrine, Justice Stevens repeated: "Thus, a boycott [or restraint] 'is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.' " Intrabrand competition is important because it supports a class of "small dealers and worthy men." "The protection of price competition from conspiratorial restraint is an object of special solicitation under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders.' " Once held together by a logic of competition practiced by

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193. *Id.*

194. I call nonprice restraints de facto legal for two reasons. First, Justice Scalia's new formalism transforms a rule of reason standard into an illegality rule based on an unquestioned presumption. Second, even with a bona fide rule of reason standard, the difficulty of proof and tremendous cost of litigating such a case create practical obstacles so great that a plaintiff must be willing to risk a heavy investment to prosecute a rule of reason case.

195. *Id.* at 1532 (citing Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-57 (1977)).

196. *Id.* at 1533 n.14.

197. *Id.* at 1529 n.5 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959)).

198. *Id.* (citing United States v. General Motors Corp., 384 U.S. 127, 148 (1966)).
the old literalists and more recently by the Court that produced the Simpson and Albrecht opinions, the values of intrabrand price competition, independent entrepreneurs, and consumer well-being have fallen into disrepute.

The collapse of this vision of industrial liberty can be characterized in terms of the doctrinal shifts from the Simpson and Albrecht opinions to the recent Monsanto and Sharp Electronics opinions. First and foremost, a powerful attraction to the free rider rationale has transformed the treatment of liberty and property rights. In the earlier cases, these rights shifted between producers and dealers, both of whom were seen as having legitimate claims to those rights. The current free rider rationale, however, has justified not only a shift of these rights to the producer but also a delegitimation of dealer claims to them. Discounters are no longer viewed as price competitors but rather as the knaves portrayed in Justice Holmes' dissenting opinion in Dr. Miles.199

How has antitrust policy come to the point of calling price competitors thieves? Understanding the logic of "free riders" calls for an appreciation of its doctrinal context. The logic first assumes a distinction between intrabrand and interbrand competition. Without that distinction, the manufacturer's presumed intent to improve its competitive position against its rivals makes no sense because competition is seen as occurring at the dealer level. The free rider rationale assumes second that interbrand competition is the important category of rivalry. Those two assumptions, however, are not only controversial, but also of recent vintage. The Dr. Miles Company's "fair profit to promoting dealers" argument, for example, fell on deaf ears: Justice Hughes analyzed its claim in common-law property terms. Third, the logic of "free riders" assumes a distinction between price and nonprice restraints. Without it, there would be no basis for differentiating between restraints. They all would be treated identically. Indeed, for over fifty years, the Court simply talked about a generic category of vertical restraints.

In the ninety-eight year history of Supreme Court antitrust doctrine, the categories of price and nonprice restraints and inter- and intrabrand competition are relative newcomers. The categories are only twenty-five years old, having first appeared around the time of Simpson and Albrecht. Thus, they are not natural or logical categories, as they sometimes appear to be in the Court's recent opinions. Rather, they are products of antitrust history. The decline of industrial liberty, the commitment that once motivated the literalist, as well as the more recent Simpson and Al-

199. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 386 (1911).
brecht opinions, accounts for the appearance of these two categories over the last twenty-five years. Tracing the directions that nonprice restraints doctrine has taken documents a shift from the individuation of property rights that proliferated independent entrepreneurs, to a free rider rationale that now endangers them.

How is it that the Court has come to protect the manufacturer's liberty and property rights from the dealer's right to set a price? Is it a preference for interbrand competition, or a political economic commitment to the health of a class of large producers? Alternatively, does the Court view the competitive process as private transactions free from governmental intervention? The final section of this study explores these alternative explanations for the Court's current position by giving an historical account of the two doctrines underlying the free rider rationale: price versus nonprice restraints and intra- versus interbrand competition. Both doctrines, as well as the free rider rationale, are produced by and seek to mediate the tension between competition policy and private property rights.

II. Nonprice Restraints: Free Riders and Intrabrand Competition

Although Dr. Miles held that resale price maintenance was illegal per se, Justice Hughes (and everyone else) presumed that properly drafted consignment contracts would allow a manufacturer to control the disposition of its goods from production to consumption. Underlying that presumption was the belief that competition was subordinate to common-law consignment rights. The primacy of common-law consignment rights also motivated the General Electric doctrine, which held sway from 1927 through the Great Depression and the New Deal, through the Eisenhower years of troops in Korea and the National Guard in Little Rock, and into the Lyndon Johnson years. It remained in force until 1964, when the Simpson opinion shook a cornerstone of common-law property rights by elevating competition policy above a fundamental property right (consignment) that had remained unchallenged for a period that began before Lord Coke wrote Coke on Littleton.

In the last year of General Electric's consignment regime—one year before Simpson—a new property rhetoric appeared to limit competition policy, even in transactions that did not take the form of consignments. In White Motor Co. v. United States, the Court created a separate category for nonprice restraints associated with straight sales

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200. The fair trade laws then in force represented a legislative limitation of Dr. Miles: In
transactions. For the first time, a rule of reason standard appeared in vertical restraints doctrine. A nonprice restraint ancillary to a sales transaction, such as a territorial or customer limitation, could be a reasonable restraint of trade. Like the manufacturers in the cases preceding *White Motor*, the White Motor Company imposed both price and non-price restraints on its distributors and dealers. Why then did this Court, soon to write the *Simpson* opinion liberating gasoline service station proprietors to compete with one another, deem a truck manufacturer's territorial and customer restraints on dealers deserving of special protection under the rule of reason?

A triangular logic animated by an impulse toward equality led the Court in *White Motor* to remove nonprice restraints from the rule of per se illegality. What distinguished the White Motor Company from the Union Oil Company in *Simpson* was White's smaller size and its weak market position. Given these economic circumstances, the Court was confronted with White Motor Company's argument to maintain in-

any states that had fair trade laws, the producer could lawfully impose vertical price restraints. See Peritz, *Rule of Reason*, supra note 3, at 301 n. 80.

201. 372 U.S. 253, 262-63 (1963). The White Motor Company manufactures trucks and sells them (and parts) to dealers and to various large users. The government argued that the following typical territory clause was illegal per se under section 1 of the Sherman Act:

[Dealer] is hereby granted the exclusive right . . . to sell during the life of this agreement, in the territory described below, White and Autocar trucks purchased from Company hereunder. . . . [Dealer] agrees to develop the aforementioned territory to the satisfaction of Company, and not to sell any trucks purchased hereunder except in accordance with this agreement, and not to sell such trucks except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in said territory.

*Id.* at 255-56.

White Motor Company argued that "the territorial clauses [were] necessary in order for [it] to compete with those who make other competitive kinds of trucks . . . ." *Id.* at 256. For the system to be effective against the existing competition of the larger companies, a [dealer] must make vigorous and intensive efforts in a restricted territory, and if he is to be held responsible for energetic performance, it is fair, reasonable, and necessary that [White Motor Company] protect him against invasions of his territory by other . . . dealers . . . .

*Id.*

The Court reversed the trial court's holding that White Motor Company's customer and territorial restrictions on its dealers were illegal per se, remanding for further proceedings to investigate the economic and business circumstances surrounding the restraints, in order to determine whether a per se rule or a rule of reason standard should be applied. The case was subsequently settled by consent decree. White Motor Co. v. United States, 1964 Trade Cases, ¶ 79,762 (N.D. Ohio). The Court's reversal and remand was taken to announce a rule of reason standard for vertical nonprice restraints. See, e.g., Sandura Co. v. Federal Trade Comm'n, 339 F.2d 847, 849-50 (6th Cir. 1964).

dependent producers. The Court's new rule of reason standard for non-price restraints evidenced a solicitude for the White Motor Company's struggle to compete against the "Big Three" automakers—General Motors, Ford, and Chrysler. The logic supporting the Court's willingness to protect White Motor Company's restraints has three parts: a free rider rationale, a distinction between price and nonprice restraints, and a distinction between inter- and intrabrand competition. The logic is also triangular in the sense that each part touches and supports the other two. Removing any one side would collapse the entire structure, which functions as a complex mediation of competition policy and common-law property rights.

Each leg of the Court's logic was new. First, the free rider rationale was different from Dr. Miles Company's argument in 1911 because it included an impulse toward proliferating independent producers, as well as the familiar "fair profit" for dealers. Second, the Court had not treated the distinction between price and nonprice restraints as significant before. Finally, to modern eyes, a nascent distinction between inter- and intrabrand competition was already evident in the Dr. Miles case. Although Justice Hughes for the Court recognized no such distinction within the logic of competition, Justice Holmes' dissent applied a liberty of contract rhetoric that called for the "competition of conflicting desires"—that is, consumers shifting to substitute products when prices get too high.\(^203\) In today's typical markets, characterized by product differentiation, this notion of shifting includes moves from, for example, Coke to Pepsi, or from Ford to Chevrolet to Hyundai. It is fair to say that Justice Holmes' view of legitimate competition could have included what we today would call interbrand competition, though Justice Holmes did not characterize it in these terms.

For Justice Holmes, however, allowing rivalry among dealers in Dr. Miles patent medicine entailed interference with the right of "people [to] manage their own business in their own way."\(^204\) Later, both the Colgate and General Electric doctrines would serve a similar commitment to protecting the producer's property rights. The right to restrict competition in one's own goods has always been a major premise of the property logics at work in vertical restraints doctrine.\(^205\) The "free rider" ration-

\(^{203}\) Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 411-12 (1911) (Holmes, J., dissenting).
\(^{204}\) Id. at 411; see supra note 61 and accompanying text.
\(^{205}\) The fundamental problem with this premise has been the arbitrariness of the process of allocating property rights. See, e.g., supra notes 58-62 and accompanying text.
ale includes a form of this premise—the right to restrain others from appropriating the value of one's promotional activities.

It was the White Motor opinion that finally adopted a free rider rationale as the basis for granting the manufacturer—here, an independent producer—some rights to restrain competition in its products. The trial court had granted the government's motion for summary judgment, imposing a rule of per se illegality on all vertical restraints. Appealing only the motions regarding nonprice restraints, the White Motor Company argued that its territorial and customer limitations were restrictions necessary for it to compete effectively against large rivals in the truck manufacturing business—General Motors, Ford, and Chrysler. As an incentive "for energetic performance, it is fair, reasonable, and necessary that appellant protect [the dealer] against invasions of his territory by other distributors or dealers . . . ." Justice Clark in his dissent echoed Justice Hughes' opinion for the Court in Dr. Miles, which refused to give any weight to the manufacturer's position, then seen as a liberty-based argument. Justice Clark characterized the independent producer's argument as nothing more than an attempt "to make a virtue of business necessity, which has long been rejected as a defense." 206

Although the White Motor Company's distribution plan plainly restrained competition among dealers, the Court simply observed that the restrictions' effects on competition were not sufficiently clear for a per se rule. 208 At the very least, it is clear that the Court no longer held to a unitary logic of competition. If it had subscribed to that view of competition, a restraint of competition among dealers would have constituted clear effects on competition. Now, however, there were two strains—inter- and intrabrand competition—that could lead to different conclusions about competitive effects. Justice Douglas wrote for this Court that the restraint of one's distributors and dealers could be necessary to compete with other manufacturers. But, as he would soon write in Simpson, restraining dealers could also exacerbate an already uncompetitive manufacturer market. In short, a commitment to proliferating independent entrepreneurs led the Court to consider the competitive state of markets at both the dealer and manufacturer levels.

To describe the White Motor Company opinion's production of a binary rhetoric of competition, the remainder of this section examines the analyses of Justices Douglas for the majority, Brennan in concur-

206. 372 U.S. at 254-56.
207. Id. at 278 (citing Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373, 402-03 (1911)).
208. Id. at 263.
rence, and Clark in dissent, of the Government's two major arguments seeking to characterize the White Motor Company's nonprice restraints as illegal per se. An investigation of these two arguments reveals the following form of triangular logic, already introduced at the beginning of this section. The first leg of the triangle was the free rider rationale. The second was the distinction recognized between inter- and intrabrand competition. The two legs created a new angle of analysis for the Court, in the sense that a free rider rationale had no function without a binary rhetoric of competition. In other words, if this Court imagined simple competition, regardless of brand (as did the Dr. Miles Court), then each dealer would compete with all other dealers, regardless of brand. Thus, a manufacturer would be seen as competing with other manufacturers only at the wholesale or dealer level and not at retail. Another way of describing the vortex of these two legs is to imagine a binary logic of competition without a recognized free rider rationale. In White Motor Company, the rationale provided the analytical angle for drawing distinctions between inter- and intrabrand competition. Without the free rider angle, the distinction would lose its purpose. Manufacturers would have no reason to urge the Court to recognize two kinds of competition because their rationale for terminating price-cutters would be unavailable. They could not argue that restraining intrabrand competition benefits interbrand rivalry. In sum, these two legs of the Court's triangular logic can be thought of as mutually constituted: each was necessary for the other's viability.

But neither was sufficient for the other's viability. Each also supported and was supported by the third leg of the Court's triangular logic: the distinction between price and nonprice restraints. Take for example, this leg's vortex with the binary rhetoric of competition. If the Court recognized no distinction between price and nonprice restraints, if all vertical restraints were (il)legal per se, then again, the reason for distinguishing between inter- and intrabrand rivalry would be lost. If all vertical restraints were (il)legal per se, then manufacturers would have no reason to argue that nonprice restraints should be treated differently because of their positive effects on interbrand competition. Here too, these two legs of the Court's triangular logic can be thought of as mutually constituted.

This structure allowed the Court to adjust tensions between competition policy and common-law property rights at both dealer and manufacturer levels. But the structure's strength was also its weakness: it was always in danger of collapse because it was produced by a series of judgments about competition policy and property rights. Should the Court
alter its judgment, deciding, for example, that all vertical restraints are illegal per se,\textsuperscript{209} one leg of the structure would crumble. That is, the distinction between price and nonprice restraints would lose its purpose (because they all would be illegal). In consequence, the binary rhetoric of competition and the free rider rationale would also lose their purposes: regardless of their values (inter- or intrabrand, free rider or not), the termination and the underlying restraint would be illegal per se. The producer could impose no vertical restraints, regardless of its desire to enhance its competitive position.

The government's first argument took the form of the preceding example. The Justice Department urged that the trial court's summary judgment and thus its ruling of per se illegality as applied to nonprice restraints was appropriate because these restraints could not be isolated from the White Motor Company's price restraints, themselves illegal per se. The majority responded that there was no evidence that the "price fixing was 'an integral part of the whole distribution system.'"\textsuperscript{210} In short, the government was required to show that the system was essentially a price fixing system. Otherwise, the new category of nonprice restraints would not be illegal per se. The problem created was deciding whether any particular restraint was a price restraint, because all vertical restraints have effects on intrabrand price competition.\textsuperscript{211}

Justice Brennan, in his concurring opinion, treated the government's argument as an "analogy to resale price maintenance," an analogy that he rejected because "[w]hile territorial restrictions may indirectly have a similar effect upon intrabrand competition, the effect on interbrand competition is not necessarily the same as that of resale price maintenance."\textsuperscript{212} The common thread running through both the majority's opinion and Justice Brennan's concurrence was the limitation of competition logic at the dealer level to its central tenet of market pricing. In other words, the White Motor Company's right to compose its own strategies to survive against the Big Three automakers was limited by the dealer's right to compete on price. Not only did price competition survive at the dealer level, but the dealer's right to dispose of its property survived as well.

\textsuperscript{209} The common-law property rights that could justify such a shift include, for example, the logic that the manufacturer had retained title. Another possibility is seen in the \textit{Sharp Electronics} opinion's new formalism. \textit{See supra} notes 180-94 and accompanying text.

\textsuperscript{210} 372 U.S. at 260.

\textsuperscript{211} \textit{See supra} notes 201-07 and accompanying text.

\textsuperscript{212} 372 U.S. at 268 (emphasis in original).
In contrast to the majority and concurrence, Justice Clark's dissent argued for a broader, unitary logic of competition. To Justice Clark, a nonprice restraint's "intended and actual effect is the same as, if not even more destructive than, a price-fixing agreement or any of its per se counterparts."\(^2\)

In its second argument seeking to connect the White Motor Company's practices to earlier case law, the government asked the Court to extend the per se illegality of "horizontal arrangements among competitors to divide territory, to a vertical arrangement by one manufacturer restricting the territory of his distributors or dealers."\(^3\) As Justice Clark observed, the government's argument tracked the Court's opinion in *Dr. Miles*: "the existence of interbrand competition has never been a justification for an explicit agreement to eliminate competition."\(^4\)

The majority, however, saw the case in a different light. The Court observed that vertical restraints "may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business."\(^5\) This commitment to proliferate independent entrepreneurs allowed the Court to recognize the White Motor Company as an independent producer in need of special solicitude. Given the doctrinal latitude created by the distinction between price and nonprice restraints, the Court could say: "This is the first case involving a territorial restriction in a vertical arrangement; and we know too little of [its] actual impact . . . ."\(^6\) Clearly, the vertical arrangement had the avowed purpose and uncontroverted effect of restraining intrabrand competition.\(^7\) Thus, the only unknown impact of this vertical arrangement was its effect on interbrand competition. The Court went on to say, "Horizontal [restraints] . . . are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect."\(^8\)

\(^{213}\) Id. at 279 (emphasis added). Justice Clark argued that territorial restraints had more severe anticompetitive effects because price restrictions are more easily breached and tougher to enforce. Id. at 280.

\(^{214}\) Id. at 261 (emphasis in original). Note the property logic embedded in the phrase "one manufacturer restricting his distributors." Id. (emphasis added).

\(^{215}\) Id. at 278.

\(^{216}\) Id. at 263. The opinion makes reference to the failing company defense to an antimerger cause of action under section 7 of the Clayton Act. Id. at 263-64; cf. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371-72 n.46 (1963) (failing company defense might have some larger contours as applied to bank mergers because of the great public impact).

\(^{217}\) 372 U.S. at 261 (emphasis in original).

\(^{218}\) Moreover, the Court did not limit the per se illegality of horizontal arrangements to interbrand agreements; all horizontal agreements were presumed to have anticompetitive impact. Id.

\(^{219}\) Id. at 263.
Justice Brennan concurred in the value of such restraints: "Indeed, the principal justification which the appellant offers for the use of these limitations is that they foster a vigorous interbrand competition which might otherwise be absent. Thus, in order to determine the lawfulness of this form of restraint, it becomes necessary to assess the merit of this [claim]."\(^{220}\) Justice Brennan was also concerned that perhaps "the territorial restraints were imposed upon unwilling distributors by the manufacturer to serve exclusively his own interests."\(^{221}\) His opinion, however, goes on to show precisely how such an arrangement always serves more than the manufacturer's interest. It may be necessary "to subdivide his sales territory in order to ensure that his product will be adequately advertised, promoted, and serviced."\(^{222}\) This need may be even greater "in the case of a manufacturer starting out in business or marketing a new and risky product . . . simply in order to acquire and retain outlets, to guarantee his distributors some degree of territorial insulation as well as exclusive franchises."\(^{223}\) The explicit purpose of territorial insulation is the promise of higher profits to attract distributors and dealers. The higher profits are protected from "aggressive competitors"—usually dis-counter-s who prefer to compete on price. From a promoting dealer's perspective, they are free riders, that is, they are enjoying the benefit of product promotion without contributing to its cost. Indeed, in every marketing effort that calls for distributors or dealers to promote a product, vertical restraints benefit manufacturers to the extent that they also benefit promoting distributors—that is, to the extent that the restraints protect the higher profits that encourage distributors and dealers to engage in promotional activities, thereby increasing demand for the manufacturer's products.

In sum, the White Motor Company's free rider rationale led the Court to reason that restraining intrabrand competition in a small company's product could enhance interbrand rivalry. It concluded that, in the interest of protecting both independent producers and independent dealers, White Motor Company should be permitted to protect the fair profit of its dealers in exchange for their promotional efforts. In allowing some dealer restraints, the Court would serve the goal of proliferating competitors at both the dealer and producer levels. The establishment of two categories of restraint created the possibility of treating some restraints differently from others. But it also created the problem of allo-

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220. Id. at 268.
221. Id. at 267.
222. Id. at 269.
223. Id.
cating property rights between dealers and producers. It seemed that dealers should have the liberty to dispose of their goods and compete with one another. After all, they bought the goods in sales transactions. The White Motor Company did not retain title; the dealers did. Still, the Court had to recognize some producer property rights to restrain dealer competition. The division between price and nonprice restraints represents such an arbitrary allocation of property rights to the producer.224 Now, the producer could restrain nonprice competition, but could not directly stop dealers from exercising the fundamental property right of setting a price. Thus, both producers and dealers retained some property rights and some right to compete. But imprisoned in the category of nonprice restraints was the free rider—that is, the (terminated) dealer who wanted to compete on price.

A. Common-Law Consignment and Nonprice Restraints

One year after the Supreme Court created the possibility of reasonable restraints ancillary to straight sales transactions, the Simpson Court eliminated the General Electric doctrine's special treatment of restraints ancillary to consignments, finding Union Oil Company's resale price maintenance agreements illegal per se.225 Had the Simpson opinion rendered all restraints illegal per se, unless ancillary to a noncoercive consignment?226 Or did the White Motor opinion's special category of nonprice restraints shield some dealer restrictions?

It was four years later that United States v. Arnold, Schwinn & Co.227 addressed these questions. The Court's analysis of the bicycle manufacturer's nonprice restraints deployed the common-law rhetoric of consignment, rather than the White Motor opinion's "free rider" rationale, while retaining the distinctions between price and nonprice restraints, and between inter- and intrabrand competition.228 In short, the

224. It is arbitrary in the sense that the converse is also seen as reasonable. See supra notes 58-62 and accompanying text.
225. Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24 (1964).
226. There was also the practical question of what consignments, if any, would be considered noncoercive.
228. Three indications of this boundary shift appear in the text. First, despite White Motor's explicit instruction to judge nonprice restraints according to the rule of reason, Schwinn did not appeal the trial court's per se standard. See 388 U.S. at 368; United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 343 (N.D. Ill. 1965). Apparently, the government, trial judge, and Schwinn agreed that Simpson's logic of competition trumped the White Motor removal of nonprice restraints from the per se category. One can only surmise here because the trial court judge cited only one case in his 21-page opinion—United States v. Bausch & Lomb
Schwinn opinion retained the triangular logic, but replaced the free rider leg with consignment rights. Taking on the role of connecting inter- and intrabrand competition, consignment rights logic has the virtue of simplicity: legal doctrine about passage of title has been well settled for many years. It is easy to decide who has the property rights to particular goods, and thus, who has the liberty to control their disposition. In consequence, the relationship between inter- and intrabrand competition is simplified: a consignment transaction allows the producer to implement strategies to improve its competitive position. A straight sales transaction allows dealers to be free of (unreasonable) restraints. Finally, the producer and dealer are left to negotiate the form of the transaction. Thus, such final deference to relative bargaining power could have the effect of benefitting parties with already established market power. The commitment to proliferating competitors would require special attention to the market power of the party imposing the restraint.

Schwinn’s distribution scheme involved both consignment and sales transactions with its bicycle distributors and dealers, who were not restricted to handling only Schwinn products. The 22 distributors, over 5000 specialty bicycle shops, and B.F. Goodrich stores who handled Schwinn bicycles were franchised subject to various territorial, customer, and location restrictions. In the 10-year period following Schwinn’s institution of its plan, its market share fell from 22.5 percent to 12.8 percent. At the same time, however, its unit and dollar sales increased substantially. Unlike the Court’s view of White Motor Company, this Court seemed to view Schwinn neither as a newcomer nor as a failing company.

Optical Co., 321 U.S. 707 (1944)—for the proposition that proof of price fixing renders the entire conspiracy illegal per se. 237 F. Supp. at 329. Second, although there was no claim that Schwinn’s consignments were “coercive,” as described in Simpson, everyone agreed that those restraints should be judged by the rule of reason; General Electric’s per se legality position, based on the title logic of consignment, was abandoned. Third, the government argued that the restraints accompanying consignments were unreasonable simply because of their intra brand effects, even though White Motor clearly subordinated the importance of such effects to interbrand effects. 388 U.S. at 369; see White Motor Co. v. United States, 372 U.S. 253, 260-61 (1963). The free rider rationale appeared only in Justice Stewart’s opinion, concurring in part and dissenting in part. 388 U.S. at 383-84.

229. This Article’s bias throughout is that a rule of reason standard is tantamount, in practical terms, to legality.

230. For a discussion of Justice Stewart’s argument to return to the White Motor opinion’s analysis, see infra notes 237-40 and accompanying text.


232. Id. at 374.
The government argued that the trial court’s application of a rule of reason to Schwinn’s customer limitations in sales transactions was erroneous in light of the per se standard applied to corresponding territorial limitations. The Court was urged to apply the per se standard to both nonprice restraints because both “are in the nature of restraints upon alienation which are beyond the power of the manufacturer to impose upon its vendees.” Citing Dr. Miles as authority, the Court wasted little time agreeing that “the decree should be revised to enjoin any limitation upon the freedom of distributors [and retailers] to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose.” Thus, where Schwinn had passed title by sale and could not assert the property logic of agency or consignment, nonprice restraints were illegal per se, even though there was no “finding that the restrictions were part of a scheme involving unlawful price fixing.”

The Court’s replacement of White Motor’s free rider rationale with the common-law property logic of consignment also changed the relationship between price and nonprice restraints. The free rider rationale created a logical space between price and nonprice restraints. There was room for two categories of restraints, and thus for the possibility of allowing some restraints and proscribing others. In contrast, the logic of

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233. The government also argued that the Court should reverse the trial court’s finding that Schwinn’s restraints ancillary to consignments were reasonable. Richard Posner, appearing for the government, argued that these customer and territorial limitations were unreasonable restraints of trade because of their impact on intrabrand competition. Id. at 375. Consistent with the White Motor and Simpson cases’ view of intrabrand competition as subordinate to interbrand rivalry, the Schwinn Court refused to consider the effects on intrabrand competition, observing that there was adequate competition with other brands of bicycles, not only because of the availability of reasonably interchangeable substitutes, but also because of the dealers’ and distributors’ handling of such substitutes. Id. at 383-84.

Apparently, the government thought that the Court would deem the Arnold, Schwinn’s 12.8% market share large enough to distinguish it from the White Motor opinion’s Jeffersonian overtones. Though this was a plausible argument to make, given contemporaneous merger cases like United States v. Von’s Grocery Co., 384 U.S. 270 (1966) (post-merger market share of 7.5% of the retail grocery business in the Los Angeles area), the lower court opinion itself was filled with such Jeffersonian sentiments in Arnold, Schwinn’s favor. See, e.g., United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 334 (N.D. Ill. 1965) (“And penalized for what? Being a pygmy, compared to its giant bicycle competitors, Sears, Roebuck & Co. and Montgomery Ward & Co.? . . . David and Goliath . . . pygmy pitted against a Cyclops . . . a microscopic Lilliputian . . . .”).

234. 388 U.S. at 377. The government also argued that different treatment would be “illogical and inconsistent.” Id. But Justice Stewart, dissenting, argued that the territorial restraint was really horizontal and therefore illegal per se. Id. at 389-91. There is nothing in the trial court opinion to substantiate this view.

235. Id. at 378.
236. Id. at 373.
consignment, already established for centuries, provided a well-worn (formalistic) path between legal and illegal restraints: regardless of category, all restraints ancillary to straight sales were illegal per se.

Justice Stewart, dissenting vehemently, argued at length against the Court's "new per se rule." "No previous antitrust decision of this Court justifies its action. Instead, it completely repudiates the only case in point, White Motor." Justice Stewart "cannot understand how [Schwinn's] marketing system becomes per se unreasonable and illegal in those instances where it is effectuated through sales." He was "completely at a loss to fathom how the Court can adopt its per se rule" regarding sales and "yet uphold identical restrictions . . . when distribution takes the form of consignment" because there is no demonstration "that these restrictions are in their actual operation somehow more anticompetitive."

Justice Stewart was absolutely correct; there was no demonstrated difference in competitive impact. Rather, it was the common-law property right of consignment that animated the majority's distinction. Justice Stewart dismissed this distinction as a "barren formalism." "Our choice must be made on the basis not of abstractions but of the realities of modern industrial life." Regarding the "ancient rule against restraints on alienation," Justice Stewart remarked that "it is hardly the practice of this Court to embrace a rule of law merely on grounds of its antiquity." He then offered two property logics of his own, both favoring the manufacturer's "legitimate interest in . . . his products once he [has] sold them." First, "the common-law doctrine of restraints on alienation is not nearly so rigid." "[O]nly unreasonable restraints should be proscribed, and . . . partial restrictions could be justified when ancillary to a legitimate business purpose and not unduly anticompetitive in effect." In short, the manufacturer is justified in projecting control over property, even though title has passed. Second, the assumption that "a manufacturer had no legitimate interest in what happened to his products once he had sold them to a middleman . . . no longer holds true in a

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237. Id. at 389 (emphasis added).
238. Id. at 388-89 (citation omitted).
239. Id. at 382 (emphasis added).
240. Id. at 389 (emphasis added).
241. Id. (citing Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 320 (1949) (Douglas, J., dissenting)).
242. Id. at 391.
243. Id. at 392.
244. Id. at 391.
245. Id. at 391-92 (citing, inter alia, United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898)).
day of sophisticated marketing policies, mass advertising, and vertically integrated manufacturer-distributors.”

It is “inappropriate for the Court to base its overthrow of contemporary commercial policies on judicial views of the reign of Queen Elizabeth,” particularly because “these arrangements may operate identically in terms of economic function and competitive effect.”

Thus, according to Justice Stewart, the “realities of modern industrial life” require the manufacturer to have more extensive powers than the common-law doctrine of consignment permits. It was not only the identity of “competitive impact”—from nonprice (sales) restraints and from nonprice (consignment) restraints—that motivated this call for equal treatment. In theory, equal treatment of restraints on competition, particularly on intrabrand competition among dealers of a successful national concern such as Schwinn, could call for a unitary rule of per se illegality. But here, Justice Stewart argued for a unitary rule of reason standard. In much the same way as the Court in *White Motor* viewed the truck manufacturer as a struggling independent among the Big Three, Justice Stewart characterized the Schwinn Company as “hop[ing] to meet the competition of the giant chain distributors.”

Moreover, the opinion made much of the bicycle producer’s plan to sell only to “small independent bicycle shops,” rather than mass distributors. In seeking to justify the Schwinn Company’s franchising policy, Justice Stewart urged the Court to look beyond the facts of the particular case:

> The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. . . . If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen.

The majority was not swayed by this commitment to proliferate dealers, perhaps because the Schwinn Company was viewed as a large

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246. *Id.* at 392.
247. *Id.* at 392-93 (citations omitted).
248. *Id.* at 386, 387.
249. *Id.* at 384.
250. *Id.* at 383. While Schwinn’s market share was cut in half (from 22.5% to 12.8%), its dollar and unit sales increased substantially. It should be noted that Schwinn’s major domestic competitor, Murray, marketed through large chain distributors and increased its market share from 11.6% to 22.8%.
251. *Id.* at 386-87 (citing Susser v. Carvel Corp., 206 F. Supp. 636, 640 (S.D.N.Y. (1962))). But, of course, it is antitrust policy regarding dealer terminations that has a great deal to say about how much independence these entrepreneurs enjoy.
successful firm, or perhaps because the formalism of the common-law logic of consignment did not create a logical space for making the discriminations necessary to empower a commitment to proliferate dealers.\textsuperscript{252} Without the free rider rationale, the Court's triangular logic collapsed, leaving unitary notions of competition and vertical restraints, whose unitary rule was illegality per se, unless trumped by the traditional property logic of consignment and agency.

B. Free Riders and Independent Producers

The \textit{Schwinn} case's restoration of common-law consignment rights was "the subject of continuing controversy and confusion" for a decade, until \textit{Continental TV, Inc. v. GTE Sylvania, Inc.}\textsuperscript{253} overruled the per se illegality standard for all nonprice restraints accompanying straight sales transactions. Characterizing the \textit{Schwinn} opinion as "announcing its sweeping \textit{per se} rule . . . with no explanation of its sudden change in position," Justice Powell writing for the majority in \textit{Sylvania}, concluded that "the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to \textit{Schwinn}.'\textsuperscript{254} It was the \textit{White Motor} decision that introduced the rule of reason to vertical restraints doctrine, based on a triangular logic of free riders, interbrand competition, and nonprice restraints. \textit{Schwinn} then collapsed the rule of reason analysis into a question of common-law consignment rights whose property logic gave clear (formalistic) direction to the allocation of freedom to dispose of property and to the extent of competition at both producer and dealer levels. The \textit{Sylvania} decision restored the earlier triangular logic by replacing the consignment leg with the free rider rationale first deployed in \textit{White Motor}.\textsuperscript{255} Consequently, the issues of interbrand competition and nonprice restraints regained analytical importance.

\textsuperscript{252} See supra notes 227-30 and accompanying text.
\textsuperscript{253} 433 U.S. 36, 58 (1977).
\textsuperscript{254} Id. at 51, 59 (emphasis added).
\textsuperscript{255} The \textit{Sylvania} Court simply treated nonprice restraints as an unquestioned category whose only precedents were the paradigmatic \textit{White Motor} opinion and the anomalous \textit{Schwinn} case. \textit{Id.} at 49-51. Justice Powell's opinion for the Court echoes Justice Stewart's dissent in \textit{Schwinn}. \textit{See United States v. Arnold, Schwinn & Co.,} 388 U.S. 365, 382 (1967) (Stewart, J., dissenting). But the \textit{White Motor} regime had governed for a very short time. For those who, like Justice Powell writing for the Court, take \textit{White Motor} as the only legitimate precedent in the category of nonprice restraints, reason ruled for a term of four years. But this view, most sympathetic to the rule of reason, ignores two intervening cases that undoubtedly changed the contours of vertical restraints doctrine—the two resale price maintenance cases, \textit{Simpson} and \textit{Albrecht}, the second case involving not only price but also nonprice restraints. \textit{Albrecht v. Herald Co.}, 390 U.S. 145, 153-54 (1968). Both opinions imposed a regime of competition, whose per se standard left no room for the narrow logic of consignment, much
Like the White Motor Company (and unlike Schwinn), GTE Sylvania was a relatively small and struggling company. By the time it instituted a new distribution plan “in the hope of attracting the more aggressive and competent retailers,” it had seen a “decline in its market share to a relatively insignificant 1% to 2% of national [television] sales.” Justice Powell could have distinguished the Schwinn case on a number of grounds, including The Schwinn Company's strong market position. Instead, he chose to challenge directly the Schwinn opinion's rationale for categorizing a vertical restraint as illegal per se or subject to the rule of reason—“the pivotal factor was the passage of title.” Justice Powell viewed this distinction as unfounded, declaring that the “opinion provides no analytical support for these contrasting positions.” Limiting his notion of “analytical support” to the logic of competition, Justice Powell concluded: “Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions is significantly affected by the form of the transaction.” Justice Powell was right; but he was also wrong. He was right that competition logic did not

less the expansive liberty-property logic of White Motor. If the Simpson and Albrecht cases are factored into the analysis, then the rule of reason held sway for one year.

Justice Powell's treatment is problematic not only because intervening cases are not accounted for, but also because the very distinction between price and nonprice restraints is controversial. As Justice White observed in his insightful concurring opinion, “I suspect this purported distinction may be as difficult to justify as that of Schwinn under the terms of the majority's analysis.” 433 U.S. at 70 (citing Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 COLUM. L. REV. 282, 298 (1975)).

256. 433 U.S. at 38. The distribution plan was instituted in 1962. By 1965, market share increased to 5%. Id.

257. Justice Fortas wrote that the Schwinn Company did not fall under the White Motor case because there was no evidence of “possible factors relevant to a showing that the challenged vertical restraint is sheltered by the rule of reason because it is not anti-competitive.” United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 (1967). The consignment logic that followed, however, belied any concern for competitive impact. Justice Powell wrote: “Although Schwinn did hint at preferential treatment for new entrants and failing firms, the District Court below did not even submit Sylvania's claim that it was failing to the jury.” 433 U.S. at 46-47 n.12.

258. 433 U.S. at 52.

259. Id. at 54.

260. Id. Justice Powell's claim of no “analytical support” for Schwinn's distinction between consignment and sale transactions brings to mind the old warning about living in glass houses. For arguments that Justice Powell's distinction between price and nonprice restraints has no analytical support, see Justice White's concurring opinion, 433 U.S. at 69, and sources cited therein, and Justice Scalia's opinion for the Court in Business Elec. Corp. v. Sharp Elec., 108 S. Ct. 1515, 1519-23 (1988). Notwithstanding Justice Powell's claim, there is, as I have shown, “analytical support,” but it is not competition logic. Rather, it is a common-law logic for allocating property rights, calcified over the last few centuries, but certainly logical: whoever has title wins.
produce the distinction. He was wrong, however, that no logic supported the distinction between sales and consignment transactions. In a footnote, Justice Powell observed that in Schwinn, the Court “stated that to impose vertical restrictions in sale transactions would violate the ancient rule against restraints on alienation.”261 The footnote characterizes this rule as unreasonable, by pointing out that “most commentators . . . have regarded the Court’s apparent reliance on the ancient rule as both a misreading of legal history and a perversion of antitrust analysis.”262

As this Article has shown, however, the “ancient rule” is only one example, though the most long-lived, of a regime of property rights that has been just as important as competition logic to the production of antitrust doctrine and analysis. In the history of vertical restraints doctrine, the Schwinn opinion represents but one more instance in a long series of struggles between logics associated with competition policy and property rights, and struggles to adjust the tensions between them. It was Justice White, concurring in Sylvania, who sensed the importance of property logics to antitrust doctrine: “as Judge Browning argued in dissent below, the notion in many of our cases involving vertical restraints [is] that independent businessmen should have the freedom to dispose of the goods they own as they see fit.”263 Justice White then wrote:

But while according some weight to the businessman’s interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply embedded in our cases than the notions of free rider and distributional efficiencies borrowed by the majority from the new economics of vertical relationships.264

Having excluded the logic of common-law property rights (consignment) from the realm of legitimate analysis, the Court could then claim

261. 433 U.S. at 53 n.21.
262. Id.
263. Id. at 67.
264. Id. at 68-69. There are two significant limitations in Justice White’s view, though it clearly allows for a better reading of vertical restraints doctrine than the Court’s position. First, the view is unable to distinguish between different forms of property logic. For example, if the transaction is a sale and not a consignment, then the manufacturer and dealer have countervailing liberty/property interests. Thus, they can negate one another, leaving an uncontested competition logic to produce doctrine. That is the dynamic in Simpson. And even when the liberty/property interest is portrayed as unitary, the configuration is volatile; its instability can allow the logic’s benefit to shift to the dealer as in Dr. Miles, or to the manufacturer as in White Motor. But if the manufacturer retains title, then there is a distinctive and stable property logic on call to restrain competition. That is the Schwinn position. Second, Justice White’s view fails to see the relation between the Court’s free rider logic, his view, and the overthrown consignment rubric. As this Article demonstrates, they are all products of the social forces of property logic.
that vertical restraints on competition are reasonable only insofar as they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." The authority for this claim was the unsubstantiated assertion that "these 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason." But as Justice White correctly observed in his concurring opinion, there are other implications more deeply embedded in vertical restraints doctrine than distributional efficiencies. In fact, the Court had adopted a free rider rationale only fourteen years earlier, in White Motor. Prior to that time, vertical restraints were seen as having "redeeming virtues" more typically characterized in terms maligned by this Court—virtues traditionally associated with the common-law property rights of consignments.

Justice Powell next recounted the ways in which "manufacturers can use such restrictions to compete more effectively against other manufacturers." One way to compete more effectively is to employ vertical restraints, such as territorial limitations, in order "to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." That is, vertical restraints protect promoting or servicing dealers by keeping their customers from other dealers. These restraints benefit the manufacturer because promotional activities and services "affect a manufacturer's goodwill and the competitiveness of his product." But "these services might not be provided by retailers in a purely competitive situation." Why? "Because of market imperfections such as the so-called free rider effect." Based on the (economically irrational) category of nonprice restraints and its presumed impact on interbrand competition, the Court found it to be (economically) rational for manufacturers to restrain free riders.

Who are these free riders? They are dealers or distributors who do not promote the manufacturer's product. Instead, they prefer to compete on price. Are they "market imperfections" or price competitors?

265. Id. at 54. There is no explanation of why the product is "his" rather than the dealer's. This turning of the liberty/property premise to the manufacturer's benefit is an example of the logic's volatility. See supra note 264.
266. Id.
267. See supra note 264.
268. 433 U.S. at 55.
269. Id.
270. Id.
271. Id.
272. Id.
Given the Court's triangular logic of free riders, interbrand competition, and nonprice restraints, discounting prices can be characterized as interfering with strategies designed to improve a producer's competitive position vis-à-vis other producers. Worse than that, price cutters misappropriate the value of such strategies.

But other views of price-cutting are possible. As Professor Pitofsky has pointedly shown, there are effective means other than vertical restraints to improve the efficiency of distribution and sales networks.273

One solution to the problem of free riders involves provisions in sales agreements (or separate agreements) promising to pay dealers to engage in promotional servicing activities. With such pay-as-you-promote provisions, no dealers could free ride, because each promoting or servicing dealer would be compensated directly for promotional activities.274 Such unrestrained competition between dealers would benefit the consumer by lowering prices. The increased demand for the product at lower prices would also benefit the manufacturer, whose demand function derives from demand at the retail level.275 Finally, it would make economic sense for dealers to engage in promotional or servicing activities that are paid for by the producer. Dealers who do not take the offer would be less competitive, for two reasons. First, they would have no cost advantage to compete in price, because promoting dealers would not bear the costs of promotion.276 Second, they would suffer a disadvantage in nonprice competition. In this scenario, price cutters could not "ride free." Their success at competing on price would then depend on their greater efficiency, not on a (so-called) misappropriation of the benefit of others' promotional and servicing activities. Under a rule of reason standard, manufacturers could be allocated the burden of proving that a practice was a reasonable restraint of trade. In arguing for the reasonableness of a restraint of intrabrand competition and the termination of

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274. Immediate, direct payments might offer a better incentive than the possibility of more customers. Also, supervision problems could be mitigated, in the sense that it may be more efficient and less disruptive to discontinue one nonexclusive dealer's promotion payments than to embark on a program of taking away and reassigning exclusive territories.

275. There might be situations in which the pay-as-you-promote alternative is more costly to the manufacturer, thereby raising the cost to the dealer and thus to the consumer. However, the manufacturer would not be paying unless the dealer promoted. That makes relative cost an empirical question whose investigation would enter into a rule of reason analysis. Or we could simply make a judgment that the higher costs are justified by the improvement in the competitive process.

276. The advantage, if any, would go to more efficient promoters.
uncooperative dealers, manufacturers would have a severely diminished free rider rationale to justify the restraint. They would have to convince a court that the territorial, customer, or price restraint imposed was a less restrictive alternative than a pay-as-you-promote provision. They would have to argue that such a provision was, under a rule of reason standard, more anticompetitive than a vertical restraint. Indeed, courts should require such showings in cases currently before them.

The recent White Motor and Sylvania decisions have affirmed the traditional principle for evaluating a producer's restraint of dealers or distributors. That principle is a solicitude for "a class of independent businessman." Justice Powell's opinion for the Court applied this principle to critique the Schwinn decision's logic of consignment: because large firms are more likely to be able to afford consignment transactions, the social policy implications are "inconsistent with [the Court's] articulated concern for the ability of smaller firms to compete effectively with larger ones." Justice White, concurring in the judgment, used the same principle in an attempt to reconcile the Schwinn decision with his earlier opinion for the Court in White Motor: "The Court need only hold that a location clause imposed by a manufacturer with negligible economic power . . . has a competitive impact sufficiently less restrictive that the Schwinn restraint to justify a rule of reason standard."

The principle for allocating property rights (and thereby adjusting the balance between inter- and intrabrand competition) raises the difficult issue of defining "smaller firms" or "negligible economic power." Justice Powell was uncomfortable with what he saw as a narrow definition: "The advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms. Sylvania was faltering, if not failing, and we think it would be unduly artificial to deny it the use of valuable competitive tools." Can a faltering firm have more than Sylvania's "insignificant 1% or 2%" share of a market? The Court would have to face these questions about market share unless it extended to


278. 433 U.S. at 56.

279. Id. at 71.


281. That, of course, does not mean that a rule of reason standard is called for. The Court has already articulated a shifting burden of proof methodology in horizontal merger cases. See Philadelphia Nat'l Bank, 374 U.S. at 363. There is also a "mini-rule of reason" introduced to horizontal price fixing doctrine. See Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441
all producers, regardless of their market share, the property right to restrain dealers. In that instance, any producer, simply by imposing a vertical restraint, would qualify as a "faltering firm." No vertical restraints would violate such a rule of reason analysis under section 1 of the Sherman Act.

Justice Powell continued by setting the ground rules for a section 1 analysis: "Interbrand competition . . . is the primary concern of antitrust law."282 No authority was cited for this proposition, perhaps because it was seen as self-evident. But given the unitary logic of competition that produced vertical restraints doctrine until the White Motor decision, Justice Powell's assertion is at the very least ahistorical, if not controversial. Still, as the Court itself recognized, even if interbrand competition is the primary concern, it has never been the only concern. The benefit of a restraint at the manufacturer level must outweigh the harm at the dealer level.283 At that point, Justice Powell's analysis took a curious turn in noting that "the degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer."284 This statement makes little sense because, as the Simpson case illustrates, neither that proposition nor its converse is always true.285 Instead, intrabrand and interbrand competition are more often intimately related. If they were wholly independent, then the manufacturer's only motivation for vertical restraints would be to limit dealer rivalry. The Court could attribute to GTE Sylvania no other reason for wanting to restrain intrabrand competition. Indeed, the Court could not have embraced the Sylvania opinion's free rider rationale, which asserted that such restraints increase interbrand competition.286 The rationale was founded on a belief in direct connections between intra- and interbrand competition. A producer's restraint of dealer competition was seen as having a direct impact on its prospects in rivalry with other producers.

If the Court took seriously its statement about the independence of the two levels of competition, it would have to abandon the triangular logic it had just restored. The free rider rationale would no longer call for an analysis of the relationship between the two levels of competition—they would be seen as functionally unrelated to one another. If

U.S. 1, 24 (1979). In considering BMI's creation of a new product to be part of the rationale for a "mini-rule of reason" analysis of horizontal price fixing, it appears that property sentiments akin to the General Electric opinion's consignment logic are emerging. Id. at 21-22.
282. 433 U.S. at 52 n.19.
283. Id. at 57 n.27.
284. Id. at 52 n.19.
285. See supra notes 103-23 and accompanying text.
286. See, e.g., 433 U.S. at 54.
priority were ascribed to interbrand competition, the free rider rationale would collapse into a property logic of "fair price" to dealers or misappropriation of good will, annihilating the level of intrabrand competition. Although this reading of Justice Powell's opinion might appear to be no more than a farfetched theoretical possibility, it is a reality. It represents the position taken last term in Justice Scalia's opinion for the Court in Sharp Electronics.\(^{287}\) First of all, Justice Scalia did not concern himself with the question of market power—either at the producer level or at the dealer level. Thus, the Court lost track of the traditional preference for independent entrepreneurs that had been expressed in the Sylvania opinion, which the Court cited so extensively in Sharp Electronics. Second, the opinion simply presumed that a price cutter is a free rider and thus, that its termination is justified. As Justice Stevens implied in his dissenting opinion,\(^{288}\) the Court's formalization of the free rider rationale had the effect of excluding the traditional antitrust policies associated with intrabrand competition. Finally, the formalized free rider rationale cannot mediate between competition policy and property rights. Like the common-law logic of consignment, the formalized "free rider" is simple: the property rights to dispose of property have been allocated to the producer, except for those contracts that fall into the microscopic category of price restraints. Because they have virtually no property rights, dealers cannot compete.

When this allocation of property rights is viewed within the context of Justice Scalia's lack of concern for market power, it appears that the only difference between the current regime and the General Electric era is that today's producer need not go to the expense of a consignment plan. All nonprice restraints of dealers and distributors are de facto legal. In structural terms, there is the danger that the ongoing tension between competition policy and property rights will dissipate. Competition would mean "whatever a producer decided to do," short of entering a cartel. Unless the Court in later opinions reconsiders its current understanding of Sylvania and the free rider rationale, a century of commitments to maintaining a class of independent entrepreneurs and to protecting consumer well-being through "full and free competition" will survive only in the microscopic category of vertical price restraints.

\(^{287}\) See supra notes 180-94 and accompanying text.
\(^{288}\) See supra notes 195-98 and accompanying text.
Conclusion

This study ends with four concluding remarks. First, it is clear that the traditional competition paradigm for antitrust law excludes half of vertical restraints doctrine between 1911 and 1988. That is why the current view makes no sense. This study demonstrates that a fundamental tension between the conflicting logics of competition and property has produced vertical restraints doctrine since the Dr. Miles case. Each argument of counsel and opinion of the Court represents a momentary battle and temporary truce in the ongoing tensions between these rival logics. A series of these battles and truces produced the doctrines regulating producers' restraints of distributors and dealers. In short, the genealogy of modern vertical restraints doctrine can no longer be mistaken for a progressive history of the synthesis of competition and antitrust doctrine.

Second, current vertical restraints doctrine is largely the product of property logics in restraint of competition. Over the years, the right to a "fair profit," consignment rights, the freedom to dispose of one's goods and services, and the free rider rationale for terminating price cutters are all historical instances of property logic in restraint of competition. The extreme and sometimes frequent shifts in vertical restraints doctrine make much more sense in terms of a series of confrontations between the conflicting rhetorics of competition policy and common-law property rights, especially in light of the internal tension visible in both rhetorics. This internal tension has been driven by commitments to liberty and equality. The shift from General Electric's deference to the property rights of the manufacturer/consignor to Simpson's articulation of solicitude for independent service station owners can be understood as a shift from property logic to its competition counterpart. It can also be understood in terms of the liberty-equality tension within either logic. For example, Simpson's competition logic makes reference to an overwhelming inequality of size and bargaining power between the Union Oil Company and Mr. Simpson. That inequality was seen as allowing Union to coerce dealers who were not at liberty to set their own prices. Given an oligopoly structure at the manufacturer level, the Court saw no likelihood of competition without restoring the dealer's liberty to set a price. The problem, of course, was that the manufacturer's liberty fell victim to the Court's resolution of the conflict. Nonetheless, the Court was more concerned with protecting the liberty of the class of independent entrepreneurs—a sentiment heard since the Sherman Act's legislative history and the Court's "literalist" period.

Third, this study of the "free rider" rationale—associated in recent vertical restraints cases with the new economics of distributional effi-
ciency—introduces an analytical structure for understanding how the tension between competition policy and common-law property rights has produced the efficiency norm in its various forms. An understanding of the complex relationship between competition policy and the efficiency norm requires a recognition of the logic of common-law property rights, as well as commitments to liberty and equality.

Within the context of vertical restraints doctrine, the volatile relationship between distributional efficiency and competition policy suggests that courts should require manufacturers to carry a burden of proving that, under the rule of reason, a nonprice restraint of intrabrand competition is a less restrictive alternative than pay-as-you-promote provisions suggested by Professor Pitofsky and others. Moreover, courts should examine the market position of manufacturers, perhaps in terms of market power, in judging the reasonableness of nonprice restraints. Such restraints should not be permitted as of right. Rather, in sharp contrast to the Court's recent opinion in *Sharp Electronics*, a manufacturer should be required to show a compelling competitive need for a restrictive practice. Precedent for such scrutiny can be found in the failing company and nascent industry defenses already recognized in merger cases.\(^{289}\)

This inquiry would be part of the manufacturer's claim that it must discipline free riders in order to enhance its competitive position.

Finally, the distinction between price and nonprice restraints should be retained, despite all of its problems, because it creates the analytical ground for adjudicating the conflict between the needs of manufacturers and the need for a class of independent entrepreneurs. Modern antitrust doctrine should not abandon this tradition of special solicitude for industrial liberty, for the independent entrepreneur's freedom to compete. The alternative disserves not only entrepreneurs but also consumers, because the increasing concentration of ownership of the means of producing and distributing goods and services in the late twentieth century is deeply troubling, not only in economic terms of competition policy and property rights, but also in socio-political terms of traditional commitments to liberty and equality.

\(^{289}\) Justice Powell seemed to recognize this possibility in *GTE Sylvania.* See 433 U.S. at 53 n.22; *supra* note 254 and accompanying text.