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DEALER TERMINATIONS AND RESALE PRICE MAINTENANCE: PARADOX REVISITED

RICHARD E. DAY*

[I]n connection with the Sherman Act, it is delusive to treat opinions written by different judges at different times as pieces of a jig-saw puzzle which can be, by effort, fitted correctly into a single pattern."

In his famous critique, *The Antitrust Paradox*, then Professor Robert Bork noted that antitrust law is "law made primarily by judges," consisting of "a set of continually evolving theories about the economics of industrial organization." When he published his book in 1978, Professor Bork advocated a change in direction in the Supreme Court's antitrust enforcement to reflect "the progress of economic understanding." According to Professor Bork, "Precedent is not ultimately controlling; economic argument is."

As an adherent of the Chicago School of economics, Professor Bork argued that "[t]he only legitimate goal of American antitrust law is the maximization of consumer welfare." Consumers benefit by increases in productive efficiency, made possible by the integration of economic activities, which "always involves the implicit elimination of actual or potential competition." Therefore, according to Professor Bork, we should encourage such integration, including "those explicit and ancillary agreed-upon eliminations of rivalry that make the basic integration

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3. Id.
4. Id. at 36.
5. Id.
6. Id. at 51.
7. Id. at 28.
more efficient."  

Specifically, Professor Bork viewed all vertical arrangements between a supplier and its distributors, including resale price maintenance, as restraints ancillary to vertical integration that always should be lawful:

In a vertical case there is always economic integration between the parties, the transaction of supplying and purchasing, so that the main condition of the ancillarity test is satisfied. . . . A manufacturer, for example, could always perform the retailing function itself; therefore, nothing is lost if, instead, it requires of independent retailers the maintenance of their resale prices, or sales only within prescribed territories, or exclusive dealing in the manufacturer's products.  

At the time he wrote his book, Professor Bork considered the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania, Inc. a "hopeful development" in antitrust jurisprudence. The Sylvania Court overruled a previous decision holding that vertical nonprice restraints, like resale price maintenance, are per se illegal. Instead, it applied the rule of reason to uphold vertical territorial restraints. Ironically, Sylvania was written by Justice Powell, whose resignation created the vacancy on the Court for which Judge Bork was nominated. Although the Supreme Court has not yet upheld explicit resale price maintenance agreements, as advocated by Professor Bork, it has continued to draw much closer to his views since its about-face in Sylvania.

The recent decision in Business Electronics Corp. v. Sharp Electronics Corp. represents the Court's latest retreat from its

8. Id.
9. Id. at 29.
11. R. Bork, supra note 2, at 8, 419. Bork added: The hopeful development in the current Supreme Court's approach to antitrust . . . is a single case weighing in favor of a business practice its capacity to create efficiency. That approach seems obvious, but against the background of the jurisprudence of the last two decades it appears revolutionary. Applied generally, it could save antitrust as useful and respectable policy. It is too soon to tell whether the Court will follow up its new beginning.

Id. at 8.
earlier per se illegal treatment of resale price maintenance by any method except a simple unilateral refusal to deal. In 1968, plaintiff Business Electronics Corporation (BEC) became the first Houston retailer of electronic calculators manufactured by defendant Sharp Electronics Corporation. Sharp appointed Hartwell Office World as a second Houston retailer in 1972. After complaining a number of times about BEC's price cutting below Sharp's suggested resale prices, Hartwell gave Sharp an ultimatum: he would terminate his dealership unless Sharp terminated BEC within thirty days. Sharp agreed to Hartwell's demand in July 1973. BEC filed suit, alleging a per se illegal conspiracy between Sharp and Hartwell to terminate BEC for the purpose of eliminating price competition in the Houston calculator market. The jury found an "agreement or understanding" between Sharp and Hartwell to terminate BEC because of its price cutting. Under instructions by the trial court that such agreement would be per se illegal, the jury awarded damages, and the court entered judgment for $1.8 million in treble damages. The Fifth Circuit reversed, holding that an agreement between a manufacturer and one of its dealers to terminate a second dealer is not per se illegal as long as the surviving dealer retains "complete freedom to set whatever price it chooses." On certiorari to resolve a conflict in the circuits "regarding the proper dividing line between the rule that vertical price restraints are illegal per se and the rule that vertical nonprice restraints are to be judged under the rule of reason," the Court affirmed.

In defense of changing the categories of per se illegal restraints as circumstances change (including the make-up of the Court) Justice Scalia observed that "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically

16. 108 S. Ct. at 1517.
schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of per se illegality remains forever fixed where it was.\textsuperscript{17} Although Judge Bork did not make it to the Supreme Court, at least some of his views on the need for "a counterrtrend in the intellectual development of the law"\textsuperscript{18} apparently have.

In the evolution to its present position, the Court has made many distinctions in the nature, purpose, and effect of vertical restraints. In two parallel lines of decision, the Supreme Court has vacillated in establishing a standard of proof for determining whether a supplier's refusal to deal with price-cutting dealers amounts to a "contract, combination . . . , or conspiracy"\textsuperscript{19} within the meaning of the Sherman Act\textsuperscript{20} and struggled with the choice between application of per se illegal and rule-of-reason standards to price and nonprice vertical restraints.\textsuperscript{21} The following brief review of relevant antitrust issues and concepts, together with some of the leading vertical restraint decisions, is offered to enable the reader to understand more fully the Court's change in direction and what it may portend. Included are some of the Court's relevant distinctions between horizontal and vertical restraints, price and nonprice vertical restraints, concerted and unilateral refusals to deal, and combinations and express or implied contracts and conspiracies.

\textsuperscript{17} Id. at 1524.
\textsuperscript{18} R. Bork, \textit{supra} note 2, at 419.
\textsuperscript{19} See Sherman Act § 1, 15 U.S.C. § 1 (1982), which reads:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


I. Rule of Reason vs. Per Se Illegality

A. Horizontal and Vertical Refusals to Deal Compared

Concerted business activity traditionally is divided into two categories: (1) horizontal restraints, which result from agreements between competitors, and (2) vertical restraints, which result from agreements between suppliers and dealers. In a classic horizontal concerted refusal to deal — known as a group boycott or concerted boycott — some competitors agree not to deal with one or more other competitors.22 Both the conspiracy and its impact on competition are horizontal; they occur at the same level of distribution of the product or service.

In contrast to the per se illegal treatment of horizontal concerted refusals to deal, vertical agreements by a supplier to deal exclusively with a particular dealer, so-called “exclusive distributorships,” generally have been upheld as reasonable “if competitive products are readily available to others.”23 This has been so even when the supplier terminates one or more competitors of the exclusive dealer.24

Some confusion has arisen in antitrust terminology because in exclusive distributorship cases, the competitive impact is horizontal — the elimination of the exclusive dealer’s competitor or competitors — while the agreement to refuse to deal is vertical between the supplier and the exclusive dealer. Typically, two vertical boycotts may be involved. One, known as a secondary boycott, occurs when a dealer threatens to cease dealing with a


supplier unless it terminates or refuses to deal with one or more competing dealers. The other occurs when a supplier terminates or refuses to deal with one or more competing dealers. When an agreement to terminate is found, it would be less confusing to recognize such an arrangement as a vertical agreement having a horizontal effect at the dealer level.

In practice, a combined vertical-horizontal agreement may be found in two situations: (1) a combination of dealers bringing concerted pressure on a distributor to terminate one or more competing dealers or (2) a single dealer bringing unilateral pressure on several suppliers to terminate one or more competing dealers. An example of the first situation is found in United States v. General Motors Corp. In that case the Supreme Court held that a manufacturer’s accession to numerous and collaborative demands from full-service automobile dealers to terminate those dealers who sold to competing discount dealers was per se illegal under section 1 of the Sherman Act. According to the Court:

We do not decide whether . . . General Motors could by unilateral action [terminate the dealers]. . . . We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the [dealers’ trade] associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose.

An example of the second situation is Klor’s, Inc. v. Broadway-Hale Stores, Inc. In that case the Court held that the plaintiff, a discount retailer of household appliances, had properly pleaded a vertical-horizontal conspiracy by alleging that a group of suppliers had acquiesced in a single dealer’s request to cease dealing with the plaintiff on the same terms.

This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a re-

26. Id. at 139-40.
tailer. . . . It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it 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. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.  

The Court addressed this terminological confusion between horizontal and vertical restraints in *Sharp*. In his dissenting opinion, Justice Stevens, joined by Justice White, quoted with apparent approval from the Third Circuit's opinion in *Cernuto, Inc. v. United Cabinet Corp.* Stevens reasoned that if a supplier terminates a dealer at the direction of a competing dealer, "the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier." From this premise he concluded that "the two-party agreement involved in this case is more like an illegal three-party agreement," such as the illegal per se horizontal-vertical boycotts in *Klor's* and *General Motors*, than "a legal independent decision."  

Justice Scalia's majority opinion interpreted the dissent to mean that the classification of a restraint depends upon the nature of its anticompetitive effects, rather than upon its genesis as a vertical or horizontal agreement. According to Justice Scalia, if this were the proper antitrust test, "there would be no such thing as an unlawful vertical restraint, since all anticompetitive effects are by definition horizontal effects." Therefore, he concluded, "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."  

This debate over terminology obfuscates the real issue:

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28. *Id.* at 212-13 (footnotes omitted).
29. 595 F.2d 164 (3d Cir. 1979).
30. 108 S. Ct. 1515, 1528 n.4 (Stevens, J., dissenting) (quoting *Cernuto*, 595 F.2d at 168). Stevens also added, "Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level." *Id.* (quoting *Cernuto*, 595 F.2d at 168).
31. *Id.* at 1529 (Stevens, J., dissenting).
32. See *id.* at 1523 n.4.
33. *Id.*
34. *Id.*
Should a vertical agreement having a horizontal competitive effect at the dealer level be per se illegal or judged under the rule of reason? This issue remains: whether one characterizes the restraint as vertical or horizontal, or more precisely, as a vertical agreement with a horizontal effect.

B. Vertical Price Fixing

Vertical price restraints between suppliers and dealers, like horizontal price fixing among competitors, long have been considered per se illegal. The doctrine traces its beginning to Justice Hughes' 1911 opinion in Dr. Miles Medical Co. v. John D. Park & Sons, which Professor Bork identified as "one decisive misstep that has controlled a whole body of law." Actually, this antitrust milestone was not an antitrust case. Dr. Miles, a manufacturer of proprietary medicines, sought to enforce its resale price maintenance program by contracts with wholesalers and retailers. The defendant wholesaler refused to enter into the required contract, and Dr. Miles sought to enjoin it from allegedly procuring medicines for sale at cut prices by inducing others to breach their contracts with Dr. Miles. The issue was the validity of the restrictive agreements that Dr. Miles sought to enforce. Justice Hughes, for the Court, affirmed the lower court's dismissal "for want of equity."

The Dr. Miles Court cited three separate bases to support its holding that resale price maintenance contracts are void and, therefore, unenforceable: (1) the common law principle that "a


36. 220 U.S. 373 (1911).
37. R. Bork, supra note 2, at 32.
38. 220 U.S. at 383.
general restraint upon alienation is ordinarily invalid”; 39 (2) the belief that a supplier, “having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic”; 40 and (3) the belief that a series of such vertical restraints with competing distributors had the same effect as horizontal price fixing agreements among the distributors, which are per se illegal under the Sherman Act, and, therefore, should be equally unenforceable at common law. 41

Taken separately or together, these principles would support a rule of per se illegality against all vertical restraints of trade. On the other hand, Justice Hughes also recognized the common law ancillary restraint doctrine: a restraint may be legal if reasonably necessary to effectuate “a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture.” 42 With respect to such ancillary restraints, Justice Hughes noted:

To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. 43

Prior to Dr. Miles, the ancillary restraint doctrine was advocated by Judge, later Chief Justice, Taft in United States v. Addyston Pipe & Steel Co. 44 As Judge Taft explained, a restraint of trade would be lawful if it was “ancillary to the main purpose of a [lawful] contract [and] was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose.” 45 This common-law doctrine provides a general test for all restraints with a practicable frame of reference: Is the restraint ancillary to a lawful main purpose? If so, is it reasonably

39. Id. at 404.
40. Id. at 409.
41. "As to this, the [supplier] can 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, and thus to achieve the same result, by agreement with each other." Id. at 408.
42. Id. at 407.
43. Id. at 406.
44. 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).
45. 85 F. at 283.
necessary to effectuate the lawful main purpose? If a restraint is nonancillary — a naked restraint of trade for the sole purpose of eliminating competition — it has no justification or redeeming virtue and, therefore, is per se unreasonable. If a restraint is ancillary, but goes further than what would be reasonably necessary to effectuate the lawful main purpose, it would be an unreasonable ancillary restraint.

Dr. Miles raised more questions than it answered. The Court's strict application of a per se rule against all restraints on alienation is inconsistent with its recognition of the applicability of the ancillary restraint doctrine to other vertical restraints. The major defect in the opinion is its lack of discussion about when, if ever, a vertical restraint on resale prices might be a reasonable ancillary restraint. If vertical price agreements never can be categorized as reasonable ancillary restraints, the Dr. Miles Court did not explain why. A broader question left open by Dr. Miles is whether all vertical restraints are to receive the same treatment, or if not, in what way vertical price restraints are to be distinguished and treated differently from vertical nonprice restraints.

Later in the same year, the Court made the rule of reason a centerpiece of antitrust jurisprudence. The Court stated that all restraints are to be judged by the rule of reason, but recognized that certain restraints may be per se unreasonable. Thus, like the ancillary restraint doctrine, the rule of reason recognizes two categories of restraints: (1) those that are per se unreasonable and (2) those that are to be judged by balancing the procompetitive benefits against the anticompetitive effects. The rule of reason might have been reconciled with the ancillary restraint doctrine simply by defining the per se category as meaning "nonancillary restraints" and judging the remaining ancillary restraints under the same rule-of-reason standard as the ancillary restraint doctrine. The Court, however, ignored Judge Taft's warning and "set sail on a sea of doubt" to determine, case-by-case, whether particular conduct should be classified as per se illegal. The classic example of the problems created by this approach is the Court's vacillating treatment of vertical nonprice

47. 85 F. at 284.
restraints.

C. Vertical Nonprice Restraints

Perhaps the most dramatic antitrust reversal following changes in the Court's makeup is its treatment of vertical nonprice restraints. In its 1963 opinion in *White Motor Co. v. United States*, the Court felt that it knew "too little of the actual impact" of vertically imposed territorial and customer restrictions to categorize them as per se illegal. Just four years later, in *United States v. Arnold, Schwinn & Co.*, the Court applied the reasoning of *Dr. Miles* in holding that nonprice customer and territorial restraints following the sale of a product are per se illegal "restraints on alienation," while upholding similar restraints on agents or consignees under the rule of reason.

The Court's decision in *Schwinn* was logically consistent with all three theories expressed in *Dr. Miles*. In addition to the asserted common-law proscription of restraints on alienation, restricting a dealer's choice of customers and sales territory has the same effect as similar restraints horizontally imposed. Inasmuch as the latter have been condemned as per se illegal market division, so should the former under *Dr. Miles*. Finally, under *Dr. Miles*, once the product is sold by the supplier, "the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

48. Exclusive dealing and tying arrangements under section 3 of the Clayton Act are beyond the scope of this article. For a discussion of these practices, see Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal*, 29 Ohio St. L.J. 593 (1968).
50. See id. at 261. The Court added:
Horizontal territorial limitations . . . 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. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business and within the 'rule of reason.' We need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as per se violations of the Sherman Act.
52. 220 U.S. at 409.
Ten years after Schwinn, the Court again reversed itself in Continental T.V., Inc. v. GTE Sylvania, Inc.,53 upholding non-price vertical restraints under the rule of reason.54 In the one opinion Professor Bork had considered a “hopeful development,” Justice Powell, for the Court, used language suggestive of the ancillary restraint doctrine. Powell emphasized the reasonable need for the vertical customer and geographical restraints to effectuate the lawful main purpose of promoting “interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.”55 According to Justice Powell, “These ‘redeeming virtues’ are implicit in every decision sustaining vertical restrictions under the rule of reason.”56 The logical inconsistency with the rationale of Dr. Miles is again paradoxical, and unless resale price maintenance can be distinguished from vertical nonprice restraints, it would appear that Sylvania opened the door to eliminating Dr. Miles’ per se illegal treatment of resale price maintenance as well.

II. UNILATERAL VS. CONCERTED REFUSALS TO DEAL

A. The Colgate Doctrine

Section 1 of the Sherman Act applies only to “contracts, combinations . . . , and conspiracies”;57 in short, it reaches only concerted restraints of trade. Unilateral conduct is illegal only under section 2 and only when it amounts to monopolization or attempted monopolization.58 In 1919, just eight years after Dr.

54. How could this turnabout have happened in so short a time? The simple answer is that the decisions were not rendered by the same Court. The only two Justices who participated in both Schwinn and Sylvania were Brennan and Stewart. Brennan had voted with the majority in Schwinn and wrote the dissenting opinion when it was reversed in Sylvania. Justice Stewart wrote the dissenting opinion in Schwinn and joined the majority in reversing it in Sylvania. Justice White, the only other Justice on the court for both decisions, did not participate in Schwinn and concurred with the majority in Sylvania that the restraint was not per se unreasonable, but would have distinguished, rather than overruled, Schwinn. Thus, the Court’s reversal of position in Sylvania did not result from a change of mind by any Justice, but rather from a change in the membership on the Court.
55. 433 U.S. at 54.
56. Id.
57. See supra note 19.
58. A unilateral refusal to deal may violate section 2 of the Sherman Act if its
Miles, the Court used this distinction in *United States v. Colgate & Co.* to uphold the right to select those with whom one chooses to deal. As stated by Justice McReynolds:

In the absence of any purpose to create or maintain a monopoly, the [Sherman] [A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.  

Many viewed Colgate as an end run around *Dr. Miles’* permissible ban on resale price maintenance. The right to refuse to deal

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purpose or effect is to create or maintain a monopoly. *See* Aspen Skiiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (refusal to engage in joint marketing arrangement with one or more competitors); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922) (refusal to deal with one or more customers or suppliers to foreclose competition or gain a competitive advantage or destroy a competitor).

59. 250 U.S. 300 (1919).

60. *Id.* at 307.

61. The belief that Colgate resurrected resale price maintenance is even more understandable from a reading of the Colgate indictment. The indictment specifically charged Colgate with violating section 1 of the Sherman Act by gaining adherence to its resale price schedules in the following manner:

[D]istribution among dealers of letters, telegrams, circulars and 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, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon “suspended lists”; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusal to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

*Id.* at 303.

If the allegations in the indictment were true — and they must be assumed to be true when, as in Colgate, defendant had demurred — it would be difficult to say that Colgate had not combined and conspired to fix resale prices. Inexplicably, Justice McReynolds stated the belief that the Court was bound to accept the district court’s finding that “the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.” *Id.* at 307. There is an ironic historical footnote to the case. Justice Hughes, the author of the Court’s opinion in *Dr. Miles*, represented Colgate. He had resigned from the Court to run for president of the United States in 1916 and did not
appears innocuous on its face. When, however, that right is coupled with the right to "announce in advance the circumstances under which he will refuse to sell," the distinction between unilateral action and agreement becomes blurred. The distinction may be unimportant when, as in Dr. Miles, the only issue is whether the court may enforce an agreement to fix resale prices. Yet the matter is quite different when the issue is whether the conduct violates the Sherman Act, as in Colgate, and gives rise to possible treble damages, injunctive relief, and even criminal penalties. Basic contract law recognizes that a unilateral contract may arise when the terms of an offer are announced in advance and another accepts by engaging in conduct in reliance on the preannounced conditions. One might question what difference it makes whether such conduct is characterized as unilateral or contractual if such a contract is void and unenforceable under Dr. Miles. The answer must lie in the notion that when such an agreement exists, it may be expected that the parties will carry out their bargain even though it would not be specifically enforceable. On the other hand, if that is the rationale for finding a Sherman Act violation when there is a bilateral agreement and no violation when the refusal to deal is unilateral, it would appear to be a distinction without a difference. The threat of termination would be the most effective means to keep price cutters in line whether there was a legally unenforceable agreement or merely a unilateral refusal to deal based on a preannounced policy.

B. Combinations and Implied Conspiracies

Orthodox antitrust thinking treats the Sherman Act's alliterative "contract, combination . . ., or conspiracy" as jurisdictional equivalents — each requiring proof of an agreement of two or more parties acting in concert. It was the absence of any claim of agreement that led the Court to uphold the dismissal in Colgate. Colgate did not, however, open the door to the implementation of resale price maintenance programs through preannounced policies of refusals to deal with price cutters. The Court prevented that result by relaxing the standard for proving a

return until 1930 when President Hoover appointed him Chief Justice. 62. 250 U.S. at 307.
combination or conspiracy under section 1. This was accomplished through the development of two separate, but complementary, concepts: the implied conspiracy doctrine and combination without agreement. The possibility of finding a combination without an express or implied agreement first was suggested by language in the Court's 1922 decision in FTC v. Beech-Nut Packing Co. The defendant manufacturer was held to have "secure[d] the cooperation of its distributors and customers" in its resale price maintenance program by methods "which [were] quite as effectual as agreements express or implied intended to accomplish the same purpose." In its 1960 landmark decision in United States v. Parke, Davis & Co. the Court reviewed Beech-Nut and other intervening decisions eroding the Colgate doctrine and concluded that "an unlawful combination is not just such as arises from a price maintenance agreement, express or implied." According to the Court, an unlawful combination also arises "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy."

What is required to establish an illegal combination, without any express or implied agreement? In Parke, Davis Justice Brennan's majority opinion recognized the application of the Colgate doctrine in the preannounced policy of refusing to deal with price cutters. The Court concluded, however, that Parke, Davis went too far in its preannounced policy of refusing to deal with any wholesaler who dealt with price-cutting retailers. Ac-

64. 257 U.S. 441 (1922).
65. Id. at 455.
66. Id. According to the Court: [I]t is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the [Sherman] Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.
68. Id. at 43 (emphasis in original).
69. Id.
cording to Justice Brennan, Parke, Davis had created a combination with wholesalers and retailers by enlisting the aid of wholesalers to keep its products from price-cutting retailers, "thereby inducing retailers' adherence to its suggested retail prices."\(^\text{70}\)

In his dissenting opinion, Justice Harlan was joined by Justices Frankfurter and Whittaker in the view that "[s]crutiny of the [majority] opinion will reveal that the Court has done no less than send to its demise the Colgate doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919."\(^\text{71}\) As Justice Harlan later acknowledged, however, this was not the end of the Colgate doctrine.

Under the implied conspiracy doctrine, a conspiracy may be inferred from circumstantial evidence. As Justice Stone stated in *Interstate Circuit v. United States*,\(^\text{72}\) "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators."\(^\text{73}\) The Court's reliance on evidence of consciously parallel conduct suggested to some that a conspiracy — like that found in a Parke, Davis combination — could be inferred from circumstantial evidence of consciously parallel behavior alone, without proof of an agreement. Justice Stone, however, merely applied commonly accepted rules of evidence and unilateral contract law when he announced that "[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."\(^\text{74}\) As Justice Clark subsequently explained in *Theatre Enterprises v. Paramount Film Distributing Corp.*,\(^\text{75}\) "The crucial question is whether [distributors' refusals to deal with plaintiff theater] stemmed from independent decision or from an agreement, tacit or express."\(^\text{76}\) While recognizing that behavior may be admissible circumstantial evidence of an agreement, Justice Clark emphasized that "this Court has

\(^{70}\) Id. at 45.

\(^{71}\) Id. at 49.

\(^{72}\) 306 U.S. 208 (1939).

\(^{73}\) Id. at 227.

\(^{74}\) Id.

\(^{75}\) 346 U.S. 537 (1954).

\(^{76}\) Id. at 540.
never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.\textsuperscript{77}

The difficulty presented by the application of the implied conspiracy doctrine to a refusal to deal is in distinguishing between acceptance, "without previous agreement of an invitation to participate"\textsuperscript{78} in an unlawful plan, such as resale price maintenance and unilateral acquiescence in the same plan announced "in advance"\textsuperscript{79} as a condition for dealing. For example, what if a distributor terminates a discounting dealer following complaints from one or more competing dealers? Inevitably, the proper application and reconciliation of these two doctrines led to a conflict in the circuit courts.\textsuperscript{80}

\textsuperscript{77} Id. at 541. Clark also added, "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."\textsuperscript{79} (footnote omitted).

\textsuperscript{78} See Interstate Circuit, 306 U.S. at 227.


Dr. Miles' rationale, condemning the horizontal impact of a series of vertical resale price maintenance agreements between a supplier and competing dealers, was extended by the Third Circuit in Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979), to condemn a manufacturer's termination of a discounting distributor at the insistence of a single competing distributor:

[If the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.]

\textit{Id.} at 168.

By contrast, some circuits intimated that even a showing of causation might be insufficient to permit a jury to infer the requisite vertical conspiracy between the supplier
In dealer termination cases, the Supreme Court has not always made clear whether it was applying an expanded theory of combination without requiring an agreement or merely was inferring a conspiracy from circumstantial evidence under the implied conspiracy doctrine. In Albrecht v. Herald Co., the Court found an illegal combination between the defendant newspaper publisher and its agents. In an effort to enforce its maximum resale price policy, the publisher hired the agents on a temporary basis to solicit sales and deliver papers to the plaintiff carrier’s customers. Many antitrust lawyers were surprised that the Court concluded that agents acting on behalf of a principal should be treated differently from employees for purposes of finding a combination or conspiracy between the corporation and third parties. But even more controversy was generated over a footnote in which Justice White, writing for the majority, gratuitously suggested three additional theories for finding a combination or conspiracy.

Justice White’s first theory suggested the possibility of “a combination between [defendant and plaintiff], at least as of the day [plaintiff] unwillingly complied with [defendant’s] advertised price.” Paradoxically, under this theory, violation hinges on the plaintiff’s compliance with defendant’s suggested resale prices, while injury is based on plaintiff’s termination for failure to comply. In addition, the anomalous result of this theory is


83. As noted by Justice Harlan in his dissent, “It is not the the momentary acquisitiveness but the punishment for refusing to acquiesce that does the damage on which recovery is based.” 390 U.S. at 162. According to Justice Harlan, this causation paradox
that it makes the guilt or innocence of a supplier depend upon the state of mind of the terminated dealer. A combination exists if the plaintiff complied willingly, but not if he complied unwillingly. In truth, the plaintiff may comply "willingly" in order to lay the basis for an antitrust treble-damage claim should he later be terminated for ceasing to comply.

A similar problem was raised in Justice Brennan's earlier decision in Parke, Davis. In that case, the Court held that an illegal combination resulted when dealers conformed with a supplier's preannounced resale price policy "to avoid . . . price competition,"84 but not when the dealer followed the supplier's resale price policy through "free choice prompted alone by the desirability of the product."85 In both instances the dealer is induced, or coerced, to comply with its supplier's preannounced policy to avoid termination or to continue receiving the supplier's product.

Such attempted distinctions in the dealer's subjective motivations for complying with a distributor's preannounced policy creates both proof and compliance problems. Looking to the

resulted from the majority's "unwillingness to face the ultimate conclusion at which it has actually arrived": the coercion of compliance is unlawful. Id. As Justice Harlan concluded, however, "The reason for the Court's reluctance to state this conclusion bluntly is transparent: this statement of the matter takes no account of the absence of a combination or conspiracy." Id. See Greenberg, Unilateral Refusals to Deal, 42 Antitrust L.J. 305, 311-12 (1973) ("[N]o amount of talk about anticompetitive 'purposes' or 'effects' can furnish the jurisdictional prerequisite of contract, combination or conspiracy in the challenged act, namely, the refusal to deal.") (emphasis in original); see also Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) overruled in part on other grounds, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (leaving undisturbed Perma Life holdings rejecting in pari delicto defense).

84. 362 U.S. at 47.
85. Id. The Court added:
It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping — a valuable feature in itself — by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.

Id. at 46-47.
supplier's actions does not solve the problem. In fact, that approach raises several questions as well. May a supplier avoid liability by making clear in its preannounced policy that, although it will refuse to deal with anyone not following its resale price policy, it does not wish to coerce anyone to comply unwillingly? Would the supplier be absolved by sworn statements from complying dealers to the effect that they complied willingly, without any coercion, and only because of the desirability of the product? Might not the desirability of the product alone be coercive? Would not willing compliance amount to unlawful agreement?

The second theory for inferring a conspiracy suggested by the Albrecht footnote was a combination between the supplier and its other dealers "because the firmly enforced price policy applied to all [dealers], most of whom acquiesced in it." Again, the effect of such a standard would be to make liability depend upon the subjective motivation of the dealers, rather than the supplier. The qualifier that the price policy be firmly enforced is of little assistance. This raises more questions: Does a preannounced policy of refusing to deal amount to firm enforcement? Does the carrying out of that policy by terminating a price cutter amount to firm enforcement? Must the supplier terminate more than one price cutter or all price cutters to meet the firm enforcement criterion? Must a supplier make it clear that it really does not mean what it says when it announces a policy of refusing to sell to price cutters? Is the Colgate doctrine to be limited to initial customer selection only?

The Albrecht footnote's third theory suggests that the supplier combined with customers who switched to the supplier in order to receive the supplier's lower price offer. This theory represents the ultimate attempt to bring a supplier's unilateral efforts to maintain maximum prices within section 1 of the Sherman Act. Consumers would be surprised to learn that their own self-interest in securing the lowest possible price might make them participants in an illegal price-fixing combination or conspiracy.

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86. 390 U.S. at 150 n.6. See also Black Gold, Ltd. v. Rockwool Indus., 729 F.2d 676 (10th Cir.), cert. denied, 469 U.S. 854 (1984); Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980).
87. See 390 U.S. at 150 n.6.
88. The coincidence of the publisher's and consumers' interests in maintaining a
In view of these far-reaching theories of combination and implied conspiracy, it is no wonder that conflict arose in the circuits over the probative significance of dealer terminations, especially when the termination followed, or was in response to, a complaint from one or more competing dealers.

III. A CONVERGENCE AND RECONCILIATION

The conflict among the circuits was addressed, if not resolved, in the Court's 1984 decision in *Monsanto Co. v. Spray-Rite Service Corp.* 89 Ironically, as in *Sylvania*, Justice Powell wrote the opinion in substantial conformity with Professor Bork's views. In deciding whether proof of agreement, express or implied, is required by section 1 of the Sherman Act, Justice Powell made no mention of the questionable *Parke, Davis* distinction between combination, which it suggested does not require agreement, and conspiracy, which clearly does. Instead, he reached back to the holding in *American Tobacco Co. v. United States* 90 that "[c]ircumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " 91 Ignoring the far-reaching implied conspiracy and combination theories of *Albrecht* and its progeny, Justice Powell emphasized the need to prove a requested and communicated "acquiescence or agreement" to fix prices. 92

Justice Powell emphasized the continued vitality of the *Colgate* doctrine, distinguishing between unilateral and concerted refusals to deal. 93 He then referred to "the second important dis-

lower "maximum" price in *Albrecht* would present a classic example of the Bork theory that such vertical price fixing should be upheld on consumer welfare grounds. See R. Bork, *supra* note 2, at 281, 439.

90. 328 U.S. 781 (1946).
92. See id. at 764 n.9. Justice Powell added:
The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

*Id.*

93. Powell stated:
This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction
tinction in distributor-termination cases" as being "between concerted action to set prices and concerted action on nonprice restrictions."94 While concerted price fixing has been per se illegal since Dr. Miles, under Sylvania nonprice vertical restraints are judged under the rule of reason, "which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition."95 Justice Powell concluded that the preservation of both the Colgate and Sylvania doctrines required that the standard of proof for inferring a concerted refusal to deal will vary according to whether the alleged vertical restraint is per se illegal price fixing or a nonprice vertical restraint to be judged by the rule of reason.96 According to Justice Powell, permitting an inference of a price-fixing conspiracy merely from dealer terminations following, or in response to, dealer complaints "would create an irrational dislocation in the market."97 Therefore,

between concerted and independent action — a distinction not always clearly drawn by parties and courts. . . . 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.

Id. at 760-61.
94. Id. at 761. Justice Powell also added:
The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been per se illegal since the early years of national antitrust enforcement. . . . The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.

Id. (citation omitted).
95. Id.
96. See id. at 763. The Court added:
[I]t is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded.

Id.
97. Id. at 764. The Court also stated:
Permitting an agreement to be inferred merely from the existence of complaints [from other distributors], or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate
"something more" is needed than dealer complaints. What is that "something more"? As stated by Justice Powell, "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." Specifically, he was concerned that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct."

Unsurprisingly, the interpretation and application of Monsanto has not been uniform in the lower courts. The decided trend, however, has been to dismiss cases having disputed evidence of the reasons for termination. When defendants have asserted "plausible" nonprice motives, the per se claim has been taken from the jury.

The Fourth Circuit has applied Monsanto in several cases. In Terry's Floor Fashions v. Burlington Industries the court held that under Monsanto, termination of a distributor "following, or even in response to, complaints by other distributors is

98. See id. at 764.
99. Id. The majority also stated, "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Id. The Court further stated that this "common scheme," at least in distributor-termination cases, "includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." Id. at 764 n.9. The Court ultimately affirmed the jury verdict that the plaintiff distributor was terminated pursuant to a resale price maintenance conspiracy between Monsanto and its distributors on the basis of "substantial direct evidence of agreements to maintain prices." Id. at 765 (emphasis in original).

More recently, in its 1986 decision in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court held that "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. at 588.

The Court apparently is wary of "permit[ting] factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." Id. at 593.

101. 763 F.2d 604 (4th Cir. 1985).
not sufficient evidence from which to infer a conspiracy.” 102 In *Garment District v. Belk Stores Services* 103 the Fourth Circuit affirmed a directed verdict for the defendant manufacturer on the ground that it acted unilaterally in terminating the plaintiff price-cutting dealer, despite finding that the plaintiff dealer had been terminated because of coercive acts of a full-price dealer and that the defendant’s assertions about its distribution policy were "pretextual." In *National Marine Electronic Distributors, Inc. v. Raytheon Co.* 104 the Fourth Circuit rejected the plaintiff’s attempt to avoid *Monsanto* by arguing that its proof of termination following price complaints from other dealers was sufficient for the jury to find a concerted horizontal restraint of price competition. According to the Court, "The issues in these cases are similar, and the same principles govern. . . . [W]hether one chooses to allocate that the restraint is vertical or horizontal, the lack of a conspiracy to restrain prices leads to the same result." 105

Other circuits also have virtually eliminated the implied conspiracy doctrine as a jury question in vertical price fixing cases when there is disputed evidence of motivation for dealer terminations. 106 One critic of this post-*Monsanto* trend argues...

102. Id. at 615. As noted by Judge Sneeden, prior to *Monsanto* the Fourth Circuit "had held that evidence showing that a manufacturer terminated a price-cutting distributor following complaints by competing distributors was sufficient evidence from which to infer a conspiracy." Id. at 611 n.12. See also Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1307 (4th Cir.), cert. denied, 464 U.S. 894 (1983).

Chief Judge Winter concurred specially. He felt that the evidence would support a jury finding of concerted action, but concluded that even if the jury found a conspiracy to refuse to deal, it was to preserve nonprice territorial restrictions, which "is conduct judged under the rule of reason." 763 F.2d at 617. Applying the *Sylvania* distinction between horizontal interbrand restraints and vertical intrabrand restraints, Chief Judge Winter noted that vertical nonprice restraints "may limit *inter* brand competition, but at the same time promote *inter* brand competition "by allowing a manufacturer to achieve certain efficiencies in the distribution of its products."") Id. at 618 (emphasis in original) (quoting Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978) (en banc)). Chief Judge Winter also distinguished vertical price from nonprice restraints on the ground that resale price maintenance "may inhibit *inter* brand competition by facilitating interbrand price collusion and conscious parallelism." Id. at 618 n.5 (citation omitted) (emphasis in original).


104. 778 F.2d 190 (4th Cir. 1985).

105. Id. at 193.

106. Following *Monsanto*, lower courts have granted summary judgments or directed verdicts to defendants in several cases requiring "something more" to prove concerted action than termination in response to a price complaint. See, e.g., *Garment Dist.,*
that even under *Monsanto* and *Sharp*, "plaintiffs should still have the opportunity to persuade the jury that keeping prices 'at some level' was a necessary part of a quid pro quo that permitted the manufacturer and its high priced retailers to continue doing business with each other."\(^{107}\) Such criticism points up the paradox in vertical price and nonprice cases. To reopen the door to an expanded implied conspiracy doctrine carries the risk that allowing "implausible" inferences of vertical price fixing conspiracies might "deter procompetitive conduct." The obvious solution to the paradox would be to judge all vertical restraints, price as well as nonprice, under the rule of reason. If this were done, an expanded implied conspiracy doctrine could safely be reinstated since proof of an agreement, or "conspiracy," would

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no longer be the determinative issue of legality, and reasonably ancillary "procompetitive conduct" would not be deterred. In addition to the usual arguments against vertical price fixing agreements, critics of the post-Monsanto trend no doubt would oppose this solution for the reason that it would eliminate the most effective weapon against dealer terminations.

IV. RULE OF REASON EXTENDED — AGREEMENT TO TERMINATE DISCOUNTER WITHOUT RESALE PRICE MAINTENANCE AGREEMENT

As noted above, in Business Electronics Corp. v. Sharp Electronics Corp. the Supreme Court held that an agreement between a supplier and one of its dealers to terminate a price-cutting dealer was not illegal per se, absent a resale price maintenance agreement with the surviving dealer. Justice Scalia, for the 6-2 majority, reaffirmed the rule of reason as the basic standard for all restraints of trade, limiting the application of the per se illegal standard to conduct that is "'manifestly anticompetitive,' that is, conduct 'that would always or almost always tend to restrict competition and decrease output.'" Citing Monsanto, he noted that the Court had been "solicitous to assure that the market-freeing effect of . . . Sylvania is not frustrated by related legal rules," concluding:

Our approach to the question presented in the present case is guided by the premises of GTE Sylvania and Monsanto: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and

110. Id.
111. Id. at 1520.
that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.\(^{112}\)

In addition to the *Dr. Miles* theory that vertical resale price maintenance agreements may have the same purpose and effect as horizontal price fixing at the dealer level, some commentators have argued that it also facilitates horizontal price fixing at the manufacturers' level.\(^{113}\) Because dealers could not pass on lower prices to consumers, the argument goes, there would be little incentive to cheat on a manufacturer's cartel. *Sylvania* noted arguments that vertical price restraints, unlike vertical nonprice restraints, may reduce both interbrand and intrabrand price competition because they "facilitate cartelizing."\(^{114}\) Absent an agreement on prices, however, Justice Scalia could see no more assistance to cartelizing in a vertical agreement to terminate a price-cutting dealer than the "minimal assistance" provided by the exclusive territorial agreements upheld in *Sylvania*.\(^{115}\) Observing that "[c]artels are neither easy to form nor easy to maintain,"\(^{116}\) he concluded that, absent a price fixing agreement with the surviving dealer, "the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organize and hold together a retailer-level cartel."\(^{117}\)

In his dissent, Justice Stevens argued that the sole function of the agreement to terminate BEC was to eliminate price competition and resulted from the surviving dealer's *coercion* of Sharp. He concluded, therefore, that "the conflict with antitrust policy is manifest."\(^{118}\) Commenting on what he viewed as the dissent's "principal fear" of coercion by Hartwell through assertion of "dominant retail power,"\(^{119}\) Justice Scalia stated that this would not justify a per se rule. According to Scalia, such power at the retail level is "rare, because of the usual presence of inter-

\(^{112}\) *Id.* at 1520-21.


\(^{115}\) See 108 S. Ct. at 1521.

\(^{116}\) *Id.*

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 1531 (Stevens, J., dissenting).

\(^{119}\) *Id.* at 1521 n.2.
brand competition and other dealers, and it should therefore not be assumed but rather must be proved."\(^{120}\)

On the issue of motivation, Justice Scalia feared the trial court's per se rule "would threaten to dismantle" the Sylvania doctrine.\(^{121}\) Quoting from Monsanto, he recognized that legitimate motives may justify a manufacturer's refusal to deal with price cutters, specifically "to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and . . . to see that 'free-riders' do not interfere."\(^{122}\) Recognizing the difficulty of proving motivation, he noted that "all vertical restraints, including the exclusive territory agreement held not to be per se illegal in GTE Sylvania, have the potential to allow dealers to increase 'prices' and can be characterized as intended to achieve just that."\(^{123}\) Thus, fear of prosecution and inability to prove motivation might lead manufacturers "to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties."\(^{124}\)

Although Justice Scalia did not feel bound by stare decisis, he recognized that "the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error."\(^{125}\) Viewing precedent as a relevant consideration, he found no inconsistencies in the Court's prior holdings and his holding that a vertical restraint is not illegal per se absent some agreement on price or price levels.

According to Justice Scalia, Dr. Miles' per se treatment of resale price maintenance agreements "was based largely on the perception that such an agreement was categorically impermissi-

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120. Id. (citation omitted).
121. See id. at 1521.
123. 108 S. Ct. at 1521-22.
124. Id. at 1521.
125. Id. at 1524.
ble at common law . . . [as] an unlawful restraint on alienation.”②8 Because there was no resale price agreement here, there was no restraint on alienation, and Dr. Miles “[did] not apply.”②7 The per se illegal group boycotts to eliminate price cutters in General Motors and Klor’s also were distinguished. Those cases, according to Scalia, involved horizontal combinations at the dealer level and at the manufacturer and wholesale levels, respectively; Sharp involved only a vertical agreement.②8

Justice Scalia also rejected the argument that vertical per se illegal price fixing might be found without proof of an agreement on prices on the basis of more recent Sherman Act precedents②9 holding that certain horizontal agreements constituted “price fixing” and, therefore, were per se illegal although they did not set prices or price levels. This idea of equivalence between the scope of horizontal and vertical per se illegality, he stated, was “explicitly rejected” in Sylvania, “as it had to be, since a horizontal agreement to divide territories is per se illegal, while GTE Sylvania held that a vertical agreement to do so is not.”②90

Finally, Justice Scalia disagreed with the argument that in vertical price-fixing cases, Albrecht and Parke, Davis “have already rejected the proposition that per se illegality requires setting a price or a price level.”②9 In Albrecht the combination of the publisher, the solicitors, and delivery agents “involved both an explicit agreement on resale price and an agreement to force another to adhere to the specified price.”②92 In Parke, Davis the manufacturer combined with wholesalers and retailers to gain the “retailers’ adherence to its suggested minimum retail prices”②93 and “brokered an agreement among its retailers not to advertise prices below its suggested retail prices, which agreement was held to be part of the per se illegal combination.”②94

①26. Id. (citation omitted).
①27. Id.
①28. Id. at 1525. See also id. 1525 at n.5 (citation omitted) (“Contrary to the dissent, General Motors does not differ from the present case merely in that it involved a three-party rather than a two-party agreement. The agreement was among competitors in General Motors; it was between noncompetitors here.”).
①30. 108 S. Ct. at 1524 (citation omitted).
①31. Id. at 1525.
①32. Id.
①33. Id. (quoting United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960)).
①34. Id.
Justice Scalia denied that Parke, Davis supported a per se illegal rule against a vertical restraint without a price-fixing agreement, "first, because the agreement not to advertise prices was part and parcel of the combination that contained the price agreement, and second because the agreement among retailers that the manufacturer organized was a horizontal conspiracy among competitors." ¹³⁵

The first decision to apply Sharp, The Jeanery, Inc. v. James Jeans, Inc.,¹³⁶ followed the post-Monsanto trend, granting judgment n.o.v. to the defendant despite evidence of resale price concerns shared by the defendant manufacturer and the plaintiff's major competitors. Taken together, Monsanto and Sharp — particularly as applied in lower courts — appear virtually to have eliminated the easy per se implied-conspiracy case for terminated dealers.

V. CONGRESSIONAL REACTION

Despite protestations to the contrary, when the Senate majority rejected Judge Bork, it clearly did not want a replacement in the mold of Justice Powell, the author of both Sylvania and Monsanto. It really wanted to change the direction the Court had already taken and apparently hoped that Justice Powell's replacement would be more in sync with the dissenters in Schwinn, Justices Brennan and Marshall. Whatever position Justice Kennedy might take, the Court is not likely to retreat to pre-Sylvania thinking in the near future. Ironically, even Justices Brennan and Marshall joined the majority in Sharp.¹³⁷ This leaves legislation as the only effective means for Congress to change the present Court's new direction. This has been done many times before, and efforts are already underway to try again.

¹³⁵. Id. (citation omitted) (emphasis in original).
¹³⁶. 1988-1 Trade Cas. (CCH) ¶ 67, 938 (May 2, 1988).
¹³⁷. Commentators have expressed surprise that Justices Brennan and Marshall joined the majority in Sharp because Justice Scalia's opinion "was so clear in downgrading intrabrand competition." See, e.g., Stewart & Nelson, Upholding Vertical Restraints, A.B.A. J., July, 1988 at 36, 43 (quoting Dean Pitofsky). It should be noted, however, that there were express agreements to assign territories and customers in Sylvania, whereas no agreement to maintain prices was found in Sharp. There is nothing in Sharp to indicate that any of the majority would uphold resale price maintenance agreements.
On November 9, 1987, the House passed the Freedom From Vertical Price Fixing Act of 1987. The bill would change Monsanto's standard of proof of a conspiracy necessary to withstand a motion for summary judgment, or for a directed verdict, and to codify the per se rule against resale price maintenance. The Senate version of this bill — The Retail Competition Enforcement Act of 1987 — was approved by the Senate Judiciary Committee on August 6, 1987.

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The Act reads:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Freedom From Vertical Price Fixing Act of 1987”

**SEC. 2 EVIDENTIARY STANDARDS IN FEDERAL CIVIL ANTITRUST ACTIONS RELATING TO PRICE FIXING.**

(a) In a civil action based on a claim arising under section 1 or 3 of the Sherman Act (15 U.S.C. 1, 3) and alleging a contract, combination, or conspiracy to set, change, or maintain prices, including a minimum or maximum price, evidence that a person who sells a good or service to the claimant for resale—

1. received from a competitor of the claimant a communication regarding price competition by the claimant in the resale of such good or service, and

2. in response to such communication terminated the claimant as a buyer of such good or service for resale, or refused to supply to the claimant some or all of such goods or services requested by the claimant, shall be sufficient to raise the inference that such person and such competitor engaged in concerted action to set, change, or maintain prices, including a minimum or maximum price, for such good or service in violation of such section. For purposes of this subsection, a termination or a refusal to supply is in response to a communication if such communication is a substantial contributing cause of such termination or refusal to supply. Nothing herein shall preclude the court from entering judgment in favor of the defendant, at trial or prior thereto, if the court determines on the basis of all the evidence and pleadings submitted by the parties, in accordance with the Federal Rules of Civil Procedure and the requirements of this subsection, that no such inference of concerted action can reasonably be drawn by a trier of fact.

(b) In a civil action based on a claim arising under section 1 or 3 of the Sherman Act (15 U.S.C. 1, 3) and alleging a contract, combination, or conspiracy to set, change, or maintain prices, the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to establish the resale price of such good or service shall be sufficient to establish that such seller and such purchaser engaged in concerted action to set, change, or maintain the prices of such good or service in violation of such section.

**SEC. 3. APPLICABILITY**

Section 2(a) of this Act shall not apply to suits commenced under the anti-trust laws before the date of the enactment of this Act.

139. The original Senate version of the bill was introduced by Senator Metzenbaum of Ohio in February, 1987. See S. 430, 100th Cong., 1st Sess., 133 Cong. Rec. S1484.
In the meantime, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has publicly stated that if Congress passes this bill, he will advise the President to veto it.\textsuperscript{140} Under the Reagan Administration, the Department of Justice has refrained from challenging vertical restraints, including resale price maintenance, and even filed an \textit{amicus} brief in \textit{Monsanto} asking the Court to reconsider whether resale price maintenance agreements should be per se illegal.\textsuperscript{141} The Government argued that the economic effect of re-

\hspace{1cm}(daily ed. Feb. 2, 1987). The bill approved by the Senate Judiciary Committee made minor changes in the original proposal. It reads as follows:

\textit{Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as “The Retail Competition Enforcement Act of 1987”.

Sec. 2. The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

“Sec. 8.(a) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States, or by a state attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if there is sufficient evidence from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale —

“(1) received from a competitor of the claimant an express or implied suggestion, request, or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition by claimant in the resale of such good or service, and

“(2) because of such suggestion, request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to supply to the claimant some or all of such goods or services requested by the claimant, then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section. A termination or refusal to supply is made because of such suggestion, request, demand, or threat only if such suggestion, request, demand or threat is a major contributing cause of such termination or refusal to supply.

“(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section.”


141. One Congressional reaction was to cut off Justice Department funds to prevent
sale price maintenance differs little from agreements on non-price restraints. It also is argued that the economic objection to resale price maintenance discussed in *Sylvania* — that it facilitates horizontal cartels — easily can be met in the context of rule-of-reason analysis. The Court declined to rule on this issue in *Monsanto* because it had not been raised or argued by either party.

If the proposed bill is enacted into law, the chief effect would be to codify the per se illegal rule against vertical price fixing. Assuming for the moment that vertical price fixing is readily ascertainable conduct, this rule has the merit of absolute simplicity. The courts would not have to anguish over economics, consumer welfare, and social or political values. Once identified as vertical price fixing, the result would be automatic. Advising clients would be equally simple. Two questions, however, remain to be answered. First, is this good economics or good public policy for any other reason? Second, how does one identify vertical price fixing?

Professor Bork’s answer was clear: vertical price fixing not only should be legal, but encouraged as a means of promoting productive efficiency and consumer welfare. There is, of course, a middle ground — namely, the rule of reason or ancillary restraint doctrine. Under this standard, an ancillary restraint would be permitted when it is reasonably necessary to effectuate a lawful main purpose. For example, assume that a newspaper publisher desires to sell as many newspapers as possible in order to increase advertising revenues, which are based on circulation. Independent exclusive distributors appointed by the publisher in each of its home-delivery territories have an interest in exploiting their territorial “monopolies” by charging a price that is high enough to maximize their profits. The result is a conflict of interest in resale pricing: the publisher wishes to keep prices low to maximize circulation and advertising revenue; the distributor

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wishes to keep prices high to gain his "monopoly" profit. This would be a classic case for the application of the rule of reason to resale price maintenance. The publisher seeks to increase productive efficiency and consumer welfare (a lawful main purpose) by limiting the price (an ancillary restraint) that its exclusive distributor may charge consumers in the resale of its papers. The alternatives to vertical price fixing — such as eliminating closed territories for distributors, raising prices to distributors, or internally integrating the delivery function — may not be as efficient and would injure consumers, as well as the publisher. Therefore, there being no less-restrictive alternative, the ancillary restraint should be upheld as reasonably necessary to effectuate the lawful main purpose. To hold this conduct per se illegal would be against economic common sense as well as consumer welfare. Yet this is precisely what the Court did in Albrecht" by applying the per se rule. To codify such a rule would take away the Court's ability to reexamine economic theory and public policy to make the law grow as it has in the past under the case-by-case application of the rule of reason. For this reason alone, it would be regrettable for this bill to become law.

The second problem that this proposed legislation attempts to address is that of identifying vertical price fixing. This is attempted by altering the Monsanto standard for proving a combination or conspiracy. It would make a dealer's demand followed by termination of a price cutter, as in Sharp, sufficient evidence of concerted price fixing to go to the trier of fact. If the trier of fact finds that the surviving dealer's demand was "a major contributing cause of such termination or refusal to supply" the price cutter, then the conduct amounts to per se illegal vertical price fixing. As interpreted by the Senate Judiciary Committee, "de minimis or insignificant causation would not raise the inference under section 8(a)." On the other hand, "[i]n cases where there were multiple causes for a termination or

142. See supra note 81 and accompanying text. This remains a highly disputed issue. Compare Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984) with USA Petroleum Co. v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988).

143. S. 430, 100th Cong., 2d Sess. § 8(a) (1988) (as reported by the Senate Judiciary Committee). H.R. 585 would require a showing that "such communication is a substantial contributing cause of such termination or refusal to supply." See H.R. 585, 100th Cong., 1st Sess. § 2(a), 133 Cong. Rec. H9796 (daily ed. Nov. 9, 1987).

refusal to supply[,] ... there was general agreement that a court need not find that the price communication was the sole, primary, or even at least 50 percent of the cause of the termination or refusal to supply."\textsuperscript{145} Therefore, the \textit{Monsanto} requirement of additional "plus factors" would still apply, albeit in a watered-down state. A dealer termination merely following one or more complaints alone would be insufficient to support the adverse inference of concerted action.\textsuperscript{146} It should remain open to the defendant to establish that the dealer termination was for independent reasons and, though consciously parallel to the complaining dealers' desires, was unilateral. As stated in \textit{Theatre Enterprise}, "'[C]onscious parallelism' has not yet read conspiracy out of the Sherman Act . . . ."\textsuperscript{147} Therefore, until Congress makes it per se illegal to terminate a distributor, the trier of fact still would have leeway to uphold unilateral terminations of price-cutting distributors. Such discretion even would exist in cases in which other dealers made complaints, as long as such complaints were not a "major contributing cause" in the decision to terminate. The likely effect of shifting the burden to the defendant to come forward with evidence of independent causation is problematic. As in the past, the result may depend upon the attitude of the trier regarding the merits of the case. This approach may lead to nothing more than an application of the rule of reason \textit{sub silentio}.

\textbf{VI. Advising a Client}

In the current state of uncertainty and controversy, what can a lawyer advise a client? As long as \textit{Monsanto} and \textit{Sharp} remain the law, a terminated dealer plaintiff has a heavy burden of proving either a conspiracy to terminate or a price fixing agreement between the supplier and the surviving dealer. This burden, however, is not impossible.

\textit{Sharp} involved a termination on the insistence of a single surviving dealer. This, in effect, was merely a case of a supplier agreeing to appoint an exclusive distributor, a practice upheld by the Court in the past, even before \textit{Sylvania}. Under \textit{Sharp},

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{See supra} note 41.
\textsuperscript{147} \textit{Theatre Enters. v. Paramount Film Distrib. Corp.,} 346 U.S. 537, 541 (1954).
such a two-party vertical agreement would be illegal under Dr. Miles only if it included an agreement to fix resale prices. Viewed in this context, Sharp was not a surprising decision. Monsanto and Sharp together are important for two reasons: (1) an agreement with one dealer to terminate its price-cutting competitor is not per se illegal, absent an agreement with the surviving dealer to fix prices, and (2) evidence that such a termination was in response to complaints from the surviving dealer is not sufficient, standing alone, to support a finding of a combination or conspiracy to fix resale prices.

On the other hand, if the terminated dealer can establish a horizontal agreement by proof beyond mere complaints by one or more competing dealers, a trier of fact may infer an unlawful combination or conspiracy. This was the result in Monsanto. A horizontal-vertical conspiracy also may be found when a distributor is terminated at the insistence of several competitors acting jointly, as in General Motors, and when a distributor is terminated by two or more suppliers at the insistence of even a single competitor, as in Klor's. Again, Monsanto is important for the burden it places on a plaintiff to establish proof of an unlawful agreement beyond competing dealers’ complaints.

Advising a client, of course, not only requires proper interpretation of the law as it stands under present statutes and decisions, but also some ability to anticipate changes that may occur. Predictions being a risky business at best, cautious advisors should take into account the worst, as well as the best, possibilities. In view of the established rule that resale price maintenance agreements are illegal per se, together with potential action by Congress to codify the rule, it is unlikely that the Court will overrule Dr. Miles. If Dr. Miles is overruled, and perhaps even if it is not, Congress still may codify the per se rule against vertical price fixing.

The safest advice, therefore, is to adhere to the rule of reason as applied in the ancillary restraint doctrine. If a supplier-client is contemplating termination of a dealer, counsel first should ask why it wishes to do so. If the purpose of the termination is maintaining or enforcing a nonprice vertical restraint, then counsel should ask whether the termination is reasonably necessary to accomplish a procompetitive purpose, such as to improve efficiency in distribution, and whether there is a less restrictive alternative that reasonably would be expected to ac-
complish the lawful main purpose. If a less restrictive alternative exists, then take that alternative because the proposed termination may be held unreasonable under the rule of reason.

If the purpose of the termination is to eliminate a price cutter, the only defense, as long as the per se rule continues to apply, is to remain outside the Sherman Act via the Colgate, Monsanto, or Sharp doctrines. Under Colgate, as revitalized by Monsanto, care should be taken to enforce a preannounced policy of not dealing with price cutters by a simple refusal to deal. To be safe, this means, among other things, that all price discussions should be avoided. The policy announcement should be general and not overemphasized or directed specifically to any particular dealer. Complaints of price cutting, submitted by a group of competing dealers or their representative, remain a problem under General Motors’ proscription of concerted horizontal-vertical restraints. Sharp held only that the termination of a price cutter, at the request of a single competing dealer, was not per se illegal absent an agreement with the surviving dealer to fix prices. Coercion by several dealers to terminate a price-cutting competitor is a concerted horizontal restraint and remains within the rule of per se illegality.

Unsolicited complaints should be answered with a letter diplomatically, but firmly, explaining that they are not wanted, will not be acted on, and that the supplier-client exercises sole and exclusive judgment and control over its dealer-termination policy. If a dealer is terminated, the termination should be effected without discussion. A real problem may arise if a terminated dealer seeks reinstatement. Termination followed by reinstatement and acquiescence may be taken as circumstantial evidence of coercion followed by agreement to comply. In short, discretion requires a simple refusal to deal, with no other action that might provide something more from which a jury justifiably might infer a combination or conspiracy to fix prices.

From the terminated dealer’s point of view, an effort should be made to document all coercion by the supplier, cooperation of competing dealers in carrying out the supplier’s plan, price discussions, and any other facts that might provide something more than a mere termination following competitor complaints. If concerted action is found, the crucial question is whether the dealer termination involves a price or nonprice vertical restraint. The terminated dealer will seek to establish that the restraint is
price fixing, while the supplier will attempt to establish a non-price restraint for a legitimate purpose. Considering some earlier broad antitrust definitions of price fixing,\textsuperscript{148} theoretically, almost any restraint will affect prices and, therefore, involve "price fixing." Sylvania, however, makes clear that there is distinction between price and nonprice vertical restraints. The line may be difficult to draw precisely, but it is there nonetheless.

VII. CONCLUSION

Justice Scalia's opinion in \textit{Sharp} carries on the Chicago School theories introduced by Justice Powell in \textit{Sylvania} and \textit{Monsanto}, no doubt to the delight of former Professor and Judge Bork, but much to the chagrin of many in Congress and elsewhere. Although the Court has not yet reversed the per se rule of \textit{Dr. Miles}, and may never do so, it has revitalized the \textit{Colgate} doctrine and diluted some earlier theories of combination without agreement and implied conspiracy. There is now a grey area in which a distributor may be able to eliminate price-cutting dealers, even following complaints of competing dealers.

The main paradox, among many that perplexed Professor Bork, is the ambivalence in prior decisions that attempted to promote consumer welfare through encouraging ancillary restraints which would increase productive efficiency, while preserving inefficient small businesses. The currently proposed antitrust amendments are not likely to promote either desiderata. Not only are they ineffective in preventing dealer terminations when proof of conspiracy may be in doubt, but they also will have a dampening effect on many otherwise beneficial attempts at vertical integration. It would be better for Congress to keep hands off, leaving it to the Court to sort out those problems on a case-by-case basis as it has done in the past. Professor Bork surely was correct in his theory that if Congress leaves it to the Court to determine what restraints are unreasonable, the Court cannot be expected to continue to hold per se illegal that which it finds reasonable, regardless of prior holdings or the current view in Congress.

If Congress really wishes to protect distributors from termi-

\textsuperscript{148} See, \textit{e.g.}, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
nations by their suppliers, then it should do so in no uncertain terms. It would be a simple drafting matter to reverse Colgate by giving any legitimate distributor a statutory right to buy from any supplier. The problem with this approach is the drastic change it would work in long-standing views on economic and civil rights. The only time a supplier may be required to sell under the antitrust laws is when he is in a monopoly position and no other competing products are available. The Colgate doctrine, itself, recognizes this limitation, as have some special legislative provisions, such as environmental protection laws and patent and copyright laws, which provide for compulsory licensing in related situations. If Congress does not like the current direction of the Court's antitrust decisions, it should decide whether it is better to allow the Court to determine how ancillary restraints are to be judged under the rule of reason to promote consumer welfare, in light of its current economic understanding and experience, or to amend the law to protect distributors arbitrarily, regardless of the economic effects.\textsuperscript{149} Congress cannot leave the burden on the Court and expect the Justices to make value judgments contrary to their own beliefs.\textsuperscript{150}


\textsuperscript{150} See R. Bork, supra note 2, at 410 ("Courts that know better ought not accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary. They can accept arbitrary or even pernicious rules from the legislature.").