ANTITRUST VERTICAL MYOPIA: THE ALLURE OF HIGH PRICES

Barak Y. Orbach*

Low prices are one of antitrust law's traditional promises to society. Resale price maintenance ("RPM"), the practice whereby a manufacturer sets pricing rules for retailers, artificially inflates prices and, thus, allegedly runs afoul of antitrust laws. The practice emerged in the last quarter of the nineteenth century with the rise of advertising and has been one of the most controversial antitrust topics ever since. At the heart of the controversy lies the question of why would manufacturers ever be interested in high retail prices that seem to protect retailers' profits and hurt manufacturers. One of the oldest answers that manufacturers provide is that, for certain branded goods, high prices improve sales, while discounts harm the appeal of brands and adversely affect sales. Courts and scholars have always been aware of this argument, yet kept focusing on other explanations for the practice. This Article examines popular RPM theories, explains why manufacturers frequently use RPM to protect the appeal of their products as status goods, and argues that no per se rule for RPM is warranted.

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* Associate Professor of Law, University of Arizona James E. Rogers College of Law. I am grateful for comments and criticism from Jean Braucher, Eric Claeys, Lloyd Cohen, David Gantz, Josh Gray, Tom Hazlett, Herbert Hovenkamp, Bruce Johnsen, Sivan Korn, John Lott, Dave Marcus, Marc Miller, Toni Massaro, Richard Posner, Carol Rose, Mark Schankerman, and Roy Spece. The research for this Article greatly benefited from the assistance of Maureen Garmon, Leah Sandwell-Weiss, and Deborah Beaumont. Additional materials related to this Article are available at http://www.orbachweb.net/rpm.

INTRODUCTION

Low prices are one of antitrust law's traditional promises to society. This Article explores the practice of manufacturers' resale price maintenance ("RPM") and contrasts the low-price promise with the allure of high prices in markets for premium-brand goods. It concludes that the promise of low prices is not always consistent with consumer preferences and, thus, its promotion through a per se ban on RPM is undesirable. This conclusion supplements other traditional arguments against per se illegality of RPM.

The Article follows an old debate. The legality of resale price maintenance has been one of the most controversial topics in antitrust law and economics for more than a century.[1] The practice became popular in the United States and Europe in the late nineteenth century, with the rise of branding and advertising that facilitated product differentiation.[2] As observed in a 1906

1. For discussions of the early days of the RPM controversy, see EDWIN R. A. SELIGMAN & ROBERT A. LOVE, PRICE CUTTING AND PRICE MAINTENANCE: A STUDY IN ECONOMICS 19–89 (1932); Ward S. Bowman, Jr., *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825, 834 (1955); Andrew N. Kleit, *Efficiencies without Economists: The Early Years of Resale Price Maintenance*, 59 S. ECON. J. 597 (1993); H.R. Tosdal, *Price Maintenance*, 8 AM. ECON. REV. 28 (1918) [hereinafter Tosdal, *Price Maintenance* (Part I)]; H.R. Tosdal, *Price Maintenance*, 8 AM. ECON. REV. 283 (1918) [hereinafter Tosdal, *Price Maintenance* (Part II)].

2. For a discussion of the rise of advertising in the United States, *see generally* JAMES D. NORRIS, ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY, 1865–1920 (1990); FRANK PRESBREY, THE HISTORY AND DEVELOPMENT OF ADVERTISING 113–445 (1929). For the link between advertising and resale price maintenance, see generally Rudolph J.R. Peritz, "*Nervine and Knavery: The Life and Times of* Dr. Miles Medical Company, *in* ANTITRUST STORIES 61 (Eleanor M. Fox & Daniel A. Crane eds., Foundation Press 2007); Tosdal, *Price Maintenance* (Part I), *supra* note 1, at 31 ("Price maintenance has developed in part as a concomitant of national advertising."); Louis D. Brandeis, *Cutthroat Competition: The Competition that Kills,* HARPER'S WEEKLY, Nov. 15, 1913, at 10 (discussing the law of "the practice of retailing nationally advertised goods at a uniform price throughout the country").

influential article of *The Times*,[3] "[w]here the manufactures involved are piece-goods without trade-mark . . . or goods sold loose from bulk, . . . it has been recognized as hopeless to expect that producers will stir in [price maintenance]. . . . [T]he demand for protection [from price competition] . . . comes in . . . where the public can and does identify the product[]."[4]

In the United States, the emergence of RPM in the medicine industry of the nineteenth century and, to a lesser extent, in other industries has shaped the law of RPM and sparked the RPM controversy. The medicine industry was one of the first industries to make extensive use of advertising and branding.[5] Marketing through advertising promises was particularly important because in the late nineteenth century the industry still offered mostly products of questionable curing power with water, alcohol, and cocaine as common ingredients.[6] This transformation of medicine marketing corresponded to the emergence of RPM.[7]

Anecdotal evidence shows that medicine distribution contracts already contained RPM clauses in the first half of the nineteenth century.[8] Industry-wide adoption of RPM, however, appeared only in 1876, when the Western Wholesale

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3. *Manufacturers and Retail Prices* (pts. 1 & 2), 116 TIMES: FIN. & COM. SUPPLEMENT 334 (1906); 117 TIMES: FIN. & COM. SUPPLEMENT 341 (1906) [hereinafter *Manufacturers and Retail Prices*].

4. *Id.* at 341; *see also* Bowman, *supra* note 1, at 834–36; Tosdal, *Price Maintenance* (Part I), *supra* note 1, at 29 ("Since price maintenance refers solely to the class of identified goods, the policy does not affect the great bulk of commodities entering into commerce.").

5. *See* PRESBREY, *supra* note 2, at 289–90; Peritz, *supra* note 2, at 63–73.

6. *See, e.g.*, SAMUEL HOPKINS ADAMS, THE GREAT AMERICAN FRAUD 4 (1906); STEWART H. HOLBROOK, THE GOLDEN AGE OF QUACKERY (1959); JAMES HARVEY YOUNG, THE TOADSTOOL MILLIONAIRES: A SOCIAL HISTORY OF PATENT MEDICINES IN AMERICA BEFORE FEDERAL REGULATION (1961); JAMES HARVEY YOUNG, THE MEDICAL MESSIAHS: A SOCIAL HISTORY OF HEALTH QUACKERY IN TWENTIETH-CENTURY AMERICA (1967); *see also* WILLIAM RADAM, MICROBES AND THE MICROBE KILLER 56 (1890) (glorifying Radam's Microbe Killer and noting that "it is quite immaterial to know the peculiarity of the microbe that we find in any particular instance. . . . A microbe is a microbe"); George M. Sternberg, *Science and Pseudo-Science in Medicine*, 5 SCI. 199, 201 (1897). Sternberg stated:

> Hand in hand with the progress of medical science we see an army of pseudo-scientific quacks who trade upon the imperfect knowledge of the masses, and by plausibly written advertisements convince many, even of the educated classes, that their particular method of treatment is based upon the latest scientific discoveries. . . . The pseudo-scientific quack writes, or has written, advertisements in which fact and fiction are so commingled that even educated persons may be deceived.

Sternberg, *supra*, at 202.

7. Two legal developments in the first decade of the twentieth century affected the quack medicine industry. The Trademark Act of 1905 strengthened the protection for branded goods. The Pure Food and Drugs Act of 1906 introduced the first mandatory disclosure rules for medicines, requiring manufacturers to disclose the ingredients of their remedies. *See generally* JAMES HARVEY YOUNG, PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906 (1989); Peritz, *supra* note 2, at 70–73.

8. *See, e.g.*, Fowle v. Park, 131 U.S. 88, 93 (1889).

Druggists' Association was formed to deal with the problem of "excessive [competition]" by persuading manufacturers to endorse RPM policies.[9]

In the subsequent years, the medicine industry fought relentlessly against discounters and, prominently, against John D. Park & Sons, a "firm [that] arrogate[d] to itself the right to buy and sell proprietary articles as it please[d]."[10] John D. Park & Sons was a defendant in several suits related to its discounting practices and consistently argued that contractual RPM provisions were unreasonable restraints of trade and thus invalid. The first reported case in this series was *Fowle v. Park*,[11] decided by the Supreme Court in 1889, a year before Congress passed the Sherman Act. The case involved a set of agreements for the distribution of Wistar's Balsam of Wild Cherry, a quack medicine that the case headnotes describe as a medicine of "great and substantial value, for certain complaints and diseases."[12] The Court dismissed John D. Park & Sons' defense argument, because it was "unable to perceive how [such agreements] could be regarded as so unreasonable [restraints of trade] as to justify the court in declining to enforce them."[13]

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9. NAT'L WHOLESALE DRUGGISTS' ASS'N, A HISTORY OF THE NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION 29–31 (1924). Thomas Alva Edison began engaging in RPM for his phonographs at least since 1900 and his competitors followed him. *See, e.g.*, Edison Phonograph Co. v. Kaufmann, 105 F. 960 (C.C.W.D. Pa. 1901). In 1900, the practice also emerged in the publishing industry. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); Bobbs-Merrill Co. v. Straus, 139 F. 155 (C.C.S.D.N.Y. 1905). Quite a few court decisions address RPM agreements from the last decade of the nineteenth century. The rise of branding and advertising, as well as the enactment of the Sherman Act, could explain this trend. *See, e.g.*, E. Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70 (1902) (harrows); Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co., 66 F. 637 (2d Cir. 1895) (watches); *In re* Corning, 51 F. 205 (N.D. Ohio 1892) (alcohol); Weiboldt v. Standard Fashion Co., 80 Ill. App. 67 (1898) (fabrics).

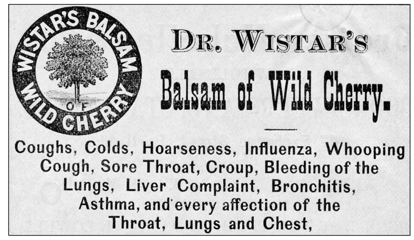
10. *Patent Medicine Trade: Efforts to Secure a New Plan for Distributing Articles. "Cutters" Still Defy Wholesalers*, N.Y. TIMES, Nov. 29, 1895, at 8.

11. 131 U.S. 88 (1889). The first reported RPM case in the United States that I am aware of is *Clark v. Frank*, 17 Mo. App. 602 (1885).

12. *Fowle*, 131 U.S. at 88. The manufacturer described the balsam as "a valuable family medicine for consumption of the lungs, coughs, colds, asthmas, bronchitis, croup, whooping-cough, difficulty of breathing, pains in the side or breast, liver complaints, etc." and occasionally also added that it treated "influenza, hoarseness, pains or soreness of the chest." Fowle v. Spear, 9 F. Cas. 611, 612 (C.C.E.D. Pa. 1847); *see also The Age of Improvement*, SATURDAY EVENING POST, Dec. 9, 1848, at 3 (a placed article that praised the medicine). In a trademark dispute over this medicine, the court refused to issue an injunction against a trademark infringer because the dispute was "between vendors of a quack medicine, the elements and action of which [were] not disclosed in evidence." *Fowle*, 9 F. Cas. at 612.

13. *Fowle*, 131 U.S. at 97. A few months later, a district court in Connecticut declined defendants' argument that the manufacturer's setting of minimum retail prices was "void because it [was] in restraint of trade, was unreasonable and oppressive, and attempted to create a monopoly." Bowling v. Taylor, 40 F. 404, 407 (C.C.D. Conn. 1889). In this case, the court believed that the plaintiff's patent rights allowed him to set prices for retailers. *Id.* For many years, courts continued to enforce RPM agreements between patent holders and retailers.

A trade card advertising the Wistar's Balsam of Wild Cherry (circa 1890).



An 1878 advertisement for the Wistar's Balsam of Wild Cherry.

John D. Park & Sons, however, continued operating as a discounter and kept arguing against the validity of RPM clauses both as a defendant and a plaintiff.[14] Its persistence paid off and had far reaching implications. In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the Supreme Court delivered a victory to John D. Park & Sons, condemned the practice of RPM, and held it per se illegal.[15] Over the years, this prohibition evolved into a per se rule against agreements that set *minimum* resale prices or fix retail prices.[16]

After nearly a century on the books,[17] in June 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Supreme Court overruled the per se illegality rule, holding that RPM should be reviewed under the rule of reason.[18]

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14. *See, e.g.*, John D. Park & Sons Co. v. Hartman, 153 F. 24 (6th Cir. 1907); John D. Park & Sons Co. v. Nat'l Wholesale Druggists' Ass'n, 67 N.E. 136 (N.Y. 1903); John D. Park & Sons Co. v. Nat'l Wholesale Druggists' Ass'n, 50 N.Y.S. 1064 (Sup. Ct. 1906); *see also John D. Park & Sons Co. Again Beaten*, 37 AM. DRUGGIST & PHARMACEUTICAL REC. 305, 305 (1900); *Victory for the N.W.D.A.: Decision in the Park Appeal*, 37 AM. DRUGGIST & PHARMACEUTICAL REC. 327 (1900).

15. 220 U.S. 373 (1911). Due to conflicting court decisions, the legal status of RPM was uncertain between 1908 and 1917. For a discussion of the uncertainty era, see SELIGMAN & LOVE, *supra* note 1, at 23–29 (discussing landmarks of the era).

16. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984).

17. Since 1919, manufacturers can legally circumvent the per se prohibition by refusing to deal with retailers that do not adhere to their suggested retail prices. United States v. Colgate & Co., 250 U.S. 300 (1919). In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693 (1937), to exempt RPM agreements that were legal under state fair trade acts from the scope of the Sherman and Federal Trade Commission Acts. In 1975, Congress passed the Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975), which repealed the Miller-Tydings Act.

18. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007). Under the rule of reason, the fact finder weighs all the circumstances of a case in deciding whether a practice is an unreasonable restraint of trade and should be prohibited. *Id.* at 2712.

An advertisement of one of Dr. Miles' most popular medicines. Dr. Miles used this advertisement that announced a uniform price for the drug years before the 1911 decision and many years thereafter.

The RPM controversy is more than one-hundred years old, but despite its age, few developments have been made in its understanding. Split decisions of five-to-four justices shaped the pillar landmarks, *Dr. Miles* and *Leegin*, demonstrating the persistence of the controversy at least among lawyers and judges.

Proponents and opponents of the prohibition on RPM have developed several theories regarding the goals and welfare implications of vertical price controls. *Leegin* has re-popularized these theories. This Article reviews these theories and studies another explanation that is one of the most typical justifications that manufacturers offer for RPM: discounts harm brand image and demand for certain premium-brand goods.

The prevalence of RPM in markets for premium-brand goods has never drawn serious attention in the RPM literature.[19] Thus, the interesting question that the RPM controversy poses is why both sides of the controversy have downplayed or ignored one of the most frequently heard justifications for RPM. *Leegin* emphasizes this puzzle: the case involved a manufacturer of high-end women's accessories that wished to maintain the retail prices of its goods, among other reasons, to preserve their image. The primary contribution of this Article is in explaining this conceptual semi-myopia and focusing the antitrust lenses on premium-brand goods.

The Article continues as follows. Part I briefly explains why manufacturers' endorsement of RPM is somewhat puzzling. It then reviews four lines of explanations that proponents and opponents of RPM traditionally use in support of their arguments: conspiracy, free-riding, demand uncertainty, and contract-enforcement-mechanism explanations. Examining the characteristics of

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19. In 1916, Frank Taussig, one of the most influential economists of the time, addressed the case of manufacturers that set RPM for "identified articles" and specifically "articles of prestige." He suggested that one of the possible explanations for RPM is the "psychology of demand" for which low prices for "articles of prestige" do not always lead to increased demand. Frank W. Taussig, *Price Maintenance*, 6 AM. ECON. REV. 170, 172 (Supp. 1916). The only direct discussion of RPM illegality and luxury goods that I am aware of is a 1995 student note. George R. Ackert, Note, *An Argument for Exempting Prestige Goods from the Per Se Ban on Resale Price Maintenance*, 73 TEX. L. REV. 1185 (1995). Mr. Ackert argued that high prices are necessary for luxury goods and, thus, they warrant an exemption from the ban on RPM. *Id.* at 1205. Since Mr. Ackert did not cite Professor Taussig, he might have been unaware of his work, although both referred to luxury goods as prestige goods. This Article explains why RPM is necessary for premium-brand goods.

industries in which RPM has appeared, Part I shows that all traditional explanations can apply in reality and may intertwine. The common applicability of pro- and anti-competitive explanations for RPM suggests that per se rules are undesirable—either per se illegality or per se legality rules.[20]

Part II argues that high prices may function as a product feature of luxury and other premium-brand goods, and RPM could serve as device to sustain such product features. The analysis suggests that the maintenance of high prices with limited price variation occasionally supports certain social preferences and its prohibition may be socially undesirable.

I. TRADITIONAL VOICES IN THE RPM CONTROVERSY

A. The RPM Puzzle

RPM is a seemingly puzzling business practice. Because the practice controls only *resale* transactions, as opposed to *consignment* transactions,[21] low retail prices entail a meager markup for retailers and potentially high sales volume that benefit manufacturers. By contrast, artificial maintenance of high retail prices protects retailers' markup and is likely to result in revenue losses for manufacturers.[22]

The RPM controversy, therefore, is all about the motivations behind the manufacturers' willingness to protect retailers' markup.

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20. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103–04 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 19–20 (1979) ("[I]n characterizing . . . conduct under the per se rule, our inquiry must focus on whether the effect and . . . the purpose of the practice . . . would always or almost always tend to restrict competition . . . ." (footnotes and citations omitted)).

21. United States v. Gen. Elect. Co., 272 U.S. 476 (1926) (holding that manufacturers may fix retail prices on goods delivered to the retailers on consignment or sold by agents).

22. Economists emphasized this puzzling nature of RPM from the very early days of the controversy. For example, in his 1916 article, Professor Taussig noted:

> This endeavor [of manufacturers] to prevent retailers from pushing their sales is anomalous. It seems to run counter to general propositions which are universally accepted in economic theorizing. If there is one thing which is laid down in all the books, it is that a decline in price leads to an increase in the quantity demanded and sold. . . . [T]he endeavor to keep up retail prices would seem to be based on a contrary supposition. . . . [T]he manufacturer's immediate interest, and indeed his only interest, would seem to be in his own receipts. So long as he settles the price which comes to him, why should he concern himself with the terms of further sale by jobber or retailer? Nay, his interest would seem to be that these middlemen, and especially the retailers, should sell as cheaply as possible, and advertise as much as possible their cheap sales. The decline in retail price leads to increase in the quantity sold.

Taussig, *supra* note 19, at 171; *see also* T.H. Silcock, *Some Problems of Price Maintenance*, 48 ECON. J. 42 (1938) (discussing the puzzle of price maintenance).

This Part examines the four traditional lines of motivations behind manufacturers' willingness to protect retailers' markup through RPM: conspiracy, free-riding, demand uncertainty, and contract-enforcement mechanisms. Each line of explanations is discussed separately, although in reality they may intertwine.

B. Conspiracy Theories

Conspiracy theories view RPM as a means to facilitate a retailers' or manufacturers' cartel.[23] Conspiracy theorists, therefore, argue that RPM should be per se illegal.

The original conspiracy theory provides that RPM is a product of retailers' organized pressures on manufacturers to enforce a retailer cartel, thereby functioning like a horizontal price-fixing.[24] In such cases, RPM serves the interest of retailers, not those of the manufacturer or consumers.[25] In *Dr. Miles*, the Supreme Court endorsed this conspiracy theory.[26] *Dr. Miles* involved "over four hundred jobbers and wholesalers and twenty-five thousand retail dealers"[27] nationwide, figures that rarely support collusion hypotheses. Nevertheless, the record before the Court, additional judicial decisions,[28] and industry publications[29]

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23. *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725–26 (1988) ("[V]ertical price restraints reduce *inter* brand price competition because they 'facilitate cartelizing.'" (citation omitted)).

24. *See, e.g.*, Bowman, *supra* note 1, at 826–32; B. S. Yamey, *The Origins of Resale Price Maintenance: A Study of Three Branches of Retail Trade*, 62 ECON. J. 522, 527–28 (1952) (studying the origins of the practice in the United Kingdom).

25. *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1490 (1983) ("Indeed, experience shows that the manufacturer is often induced to act as an organizer of the dealer's cartel by dealer threats or enticements.").

26. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 407 (1911) ("[T]he advantage of established retail prices primarily concerns the dealers. The enlarged profits . . . would go to them, and not to the [manufacturer].").

27. *Id.* at 381.

28. *See, e.g.*, Fowle v. Park, 131 U.S. 88 (1889); John D. Park & Sons v. Hartman, 153 F. 24 (6th Cir. 1907); Jayne v. Loder, 149 F. 21 (3d Cir. 1906); Wells & Richardson Co. v. Abraham, 146 F. 190 (C.C.E.D.N.Y. 1906); Dr. Miles Med. Co. v. Platt, 142 F. 606 (C.C.N.D. Ill. 1906); Dr. Miles Med. Co. v. Goldthwaite, 133 F. 794 (C.C. Mass. 1904); John D. Park & Sons Co. v. Nat'l Wholesale Druggists' Ass'n, 67 N.E. 136 (N.Y. 1903).

29. *See, e.g.*, *Let Druggists Work Together*, 22 AM. DRUGGIST 81, 81–82 (1892); George Cutts, *Prize Competition: A Uniform Price Scale for Prescriptions*, 22 AM. DRUGGIST & PHARMACEUTICAL REC. 385, 385 (1893); *Cutting Still the Topic*, 31 AM. DRUGGIST & PHARMACEUTICAL REC. 240, 240 (1897). According to the 1924 self-published history of the National Wholesale Druggists Association, the long economic depression that started in 1873 led to bitter competition that resulted in low revenues. NAT'L WHOLESALE DRUGGISTS' ASS'N, *supra* note 9, at 26–27. The industry's trade association was formed "to create a permanent social feeling between the wholesale druggists . . . to obliterate the feeling of distrust and jealousy . . . [and] to correct excessive and unmercantile competition . . . ." *Id.* at 19; *see also Patent Medicine Trade*, *supra* note 10.

suggest that the wholesale druggists indeed colluded to use manufacturers, such as Dr. Miles, as cartel enforcers through RPM.[30]

This form of conspiracy apparently was not uncommon in the late nineteenth century and early twentieth century. For example, the 1906 *Times*' article on price maintenance observed:

> [O]wing to the competition of large multiple shopowners the business of small shopkeepers in many trades has . . . suffered severe reduction; and . . . as a means of retrieving their misfortunes, efforts are being made by them to compel manufacturers to restrict competition artificially. The method suggested is that manufacturers when selling to shopkeepers should require all retailers to sell only at a profit fixed high enough to satisfy the small retailer . . . . [T]his could only mean either increase of retail price (and consequent diminution of sales) or reduction of wholesale price . . . . The argument addressed to manufacturers takes two forms: . . . (1) You ought to protect prices because the retailer is your best friend and the intermediary by which you reach the public; and (2) if you do not act as we desire we can injure your trade through our influence upon the consumer.
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> . . . .
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> It is evident that coercion could only be applied to manufacturers by organized bodies . . . . Two weapons were at hand. Either the goods of the recalcitrant manufacturer could be boycotted altogether, or else individual shopkeepers could, acting in concert, systematically cry down the merits of the incriminated products and recommend some substitute.[31]

A second line of conspiracy theories presents RPM as a device to facilitate cartels among manufacturers. Under this theory, RPM eliminates manufacturers' incentives to cut prices to retailers, because such price cutting results in greater profits for retailers and lower profits for the price-cutting manufacturer.[32] This theory explains RPM only in markets with limited product differentiation in which price competition is particularly meaningful. For example, the markets for enameled ironware in the early twentieth century possibly support this theory: the Association of Sanitary Enameled Ware Manufacturers, which consisted of approximately eighty-five percent of American manufacturers of enameled ironware, set retail prices for generic products.[33]

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30. For details of the "Rebate Plan" devised by the industry's trade association, see NAT'L WHOLESALE DRUGGISTS' ASS'N, *supra* note 9, at 30–41; *see also* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 186–87 (2005); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836–1937, at 340–47 (1991).

31. *Manufacturers and Retail Prices*, *supra* note 3, at 341–42.

32. *See* Bowman, *supra* note 1, at 838–39; Pitofsky, *supra* note 25, at 1490–91; *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2716 (2007); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725–26 (1988).

33. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 46–47(1912).

In markets for nondifferentiated goods, manufacturers of identifiable products may collude to establish a market norm of uniform or minimum prices. For example, the 1901 founding agreement of the American Publishers' Association provided that:

> [M]embers of the association agree that . . . copyrighted books, and all other[] . . . books, shall be sold . . . to those booksellers only who will maintain the retail price . . . for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices . . . .[34]

A third line of conspiracy theories warns that powerful retailers may unilaterally squeeze RPM from manufacturers to forestall innovation in distribution channels or simply to protect profits. For example, a brick-and-mortar retailer may demand RPM to prevent efficient online retailers from price competition.[35] In their definitive antitrust treatise, Phillip Areeda and Herbert Hovenkamp argue that "manufacturers have often restrained intrabrand competition . . . through resale price maintenance . . . to appease dealer interests in excess profits or the quiet life."[36] They dismiss the argument that dealer power is rare in reality and assert that the exercise of dealer power to coerce manufacturers to endorse RPM policies explains many observed RPM practices.[37]

This line of conspiracy theories can take more complex forms. For example, in *Interstate Circuit, Inc. v. United States*, the joint manager of two large Texas movie theater chains threatened the eight largest film distributors in the country that he would cease playing their films in his first-run theaters if the distributors did not impose minimum admission prices in Texas.[38] The economic rationale for this demand was to make competitors less attractive by raising their rates. The demand letter "named on its face as addressees the eight . . . distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others."[39] The underlying threat was not credible because the exhibitor's business depended on supply of films from the eight distributors that at the time controlled the industry.[40] Moreover, each distributor "was aware that . . . without . . . unanimous action with respect to the restrictions . . . there was risk of a substantial loss of the business and good

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34. Scribner v. Straus, 210 U.S. 352, 353 (1908); *see also* Straus v. Am. Publishers' Ass'n, 231 U.S. 222 (1913); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908). For a discussion of the emergence of RPM in the book industry, see *infra* notes 70–72 and accompanying text.

35. *See, e.g.*, Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

36. 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 35 (2004).

37. *Id.* at 35–68.

38. 306 U.S. 208, 217–18 (1939).

39. *Id.* at 222.

40. *See* BARAK Y. ORBACH, REEL LAW: A LEGAL HISTORY OF THE AMERICAN MOTION PICTURE INDUSTRY (forthcoming 2009) (manuscript at chs. 6–10, on file with author); Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE. J. ON REG. 317, 335–46 (2004).

will . . . ."[41] In light of these circumstances and additional factors, the Court inferred that the distributors had agreed among themselves to comply with the demand to engage in RPM.[42]

The fourth line of conspiracy theories suggests that manufacturers use RPM as a means to exclude competitors from the market. Under this theory, RPM offers retailers high markup as a "payment" for their willingness not to deal with competing manufacturers.[43]

Proponents of conspiracy theories point out that, in addition to the standard social costs associated with price fixing, RPM could stimulate wasteful non-price competition in which redundant ancillary services and benefits substitute for low prices.[44]

The universe of RPM case law provides many examples in support of RPM conspiracy theories. However, while many cases from the early twentieth century support the RPM conspiracy hypothesis, empirical studies from the late twentieth century find that conspiracy theories are not capable of explaining the vast majority of cases.[45] Moreover, ample evidence shows that, throughout the history of the practice in the United States, manufacturers sponsored the practice of RPM with no collusions in the background.[46] Thus, although RPM conspiracies may exist, their low frequency does not justify a per se prohibition against RPM.

C. Free-Riding Theories

The non-price competition that "conspiracy theorists" perceive as socially wasteful is the very justification for RPM for "free-riding theorists."[47] Popularized

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41. *Id.*

42. *Interstate Circuit*, 306 U.S. at 232. For criticism of this application of the conspiracy theory, see David A. Butz & Andrew N. Kleit, *Are Vertical Restraints Pro- or Anticompetitive? Lessons from* Interstate Circuit, 44 J.L. & ECON. 131, 135–36 (2001).

43. Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & ECON. 363, 366–68 (1985); *see also* ALFRED S. EICHNER, THE EMERGENCE OF OLIGOPOLY: SUGAR REFINING AS A CASE STUDY 190–95 (1969); *See* B. S. YAMEY, THE ECONOMICS OF RESALE PRICE MAINTENANCE 20 (1954); Richard Zerbe, *The American Sugar Refinery Company, 1887–1914: The Story of a Monopoly*, 12 J.L. & ECON. 339, 368 (1969).

44. *See, e.g.*, William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 999–1000 (1985).

45. *See* Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263, 267, 292 (1991) (studying 203 cases of private litigation between 1976 and 1982 and concluding that conspiracy theories are not capable of explaining at least 85 percent of the cases); Stanley I. Ornstein, *Resale Price Maintenance and Cartels*, 30 ANTITRUST BULL. 401, 415–27 (1985).

46. *See, e.g.*, Bowman, *supra* note 1, at 832–43; ROY W. JOHNSON ET AL., THE CONTROL OF RESALE PRICES: MERCHANDISING AND LEGAL PHASES OF PRICE-CUTTING, PRICE-MAINTENANCE AND QUANTITY DISCOUNTS (1936).

47. Conspiracy theorists often argue that there is little empirical support for the prevalence of the anti-free-riding motivation. *See, e.g.*, F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 544 (3d ed. 1990); Walter Adams & James W. Brock, *The Political Economy of Antitrust Exemptions*, 29 WASHBURN L.J. 215, 227 (1990) ("[T]he 'free rider' menace on which resale price maintenance

by Lester Telser,[48] free-riding theories argue that a manufacturer may engage in RPM only in circumstances where non-price competition among retailers serves his interests better than price competition.[49]

The starting point of free-riding theories is that ancillary services, such as in-store services, delivery, store credit, repair, advertising, and other promotional activities enhance the demand for certain goods.[50] Such ancillary services, however, are costly and retailers have no guarantee that they would result in sales. A retailer, who advertises a product, displays it at his showroom, and employs knowledgeable staff to educate shoppers about the product, cannot prevent shoppers who use these services from purchasing the product for a lower price from a retailer who does not provide similar services. This inability to tie ancillary services to the point of sale is a form of positive externality that motivates at least some retailers to cut costs by free riding on other retailers' ancillary services and use the cost savings to lower prices. In other words, the concern is that "[a]bsent vertical price restraints, the retail services that enhance interbrand competition might be underprovided,"[51] because retailers that furnish desirable ancillary services would lose businesses to discounters.

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defenders rely to rationalize vertical price fixing turns out, on sober examination, to be more a figment of imagination than an empirical reality."); Pitofsky, *supra* note 25; Robert Pitofsky, *Why* Dr. Miles *Was Right*, 8 REGULATION 27, 29–30 (1984). As discussed in this Section, this criticism is inconsistent with reality.

48. Lester Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. &. ECON. 86, 87–92 (1960); Lester Telser, *Why Should Manufacturers Want Fair Trade II?*, 33 J.L. & ECON. 409, 409–10 (1990). Many authors mistakenly credit Telser for introducing the free-riding problem as a justification for RPM. The argument, however, was frequently used before 1960. *See, e.g.*, Bowman, *supra* note 1, at 837 ("[T]he argument [is] . . . that sales are . . . more responsive to convenience and service than to price."); Silcock, *supra* note 22, at 45–46; Comment, *Resale Price Maintenance and the Anti-trust Laws*, 18 U. CHI. L. REV. 369, 377 (1951).

49. Bowman, *supra* note 1, at 848. Bowman stated:

> Insofar as resale price maintenance is successful in eliminating price competition among dealers, competition in non-price areas, such as service and convenience, is increased, and the entry of new dealers is made more attractive. Low-cost, non-service dealers whose merchandising policies involve high turnover and low mark-ups are prevented from selling price-maintained merchandise at low margins.

Id.

50. The literature often uses preferred shelf-space as an example for a promotional service that RPM encourages. *See, e.g.*, George Bittlingmayer, *Resale Price Maintenance in the Book Trade with an Application to Germany*, 144 J. INSTITUTIONAL & THEORETICAL ECON. 789 (1988); Victor P. Goldberg, *The Free Riding Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736, 738–44 (1984); Greg Shaffer, *Slotting Allowances and Resale Price Maintenance: A Comparison of Facilitating Practices*, 22 RAND J. ECON. 120, 120 (1991). Another promotional service that RPM arguably promotes is reduction of the time it takes to purchase a good. *See, e.g.*, Ralph A. Winter, *Vertical Control and Price versus Nonprice Competition*, 108 Q. J. ECON. 61, 63 (1993).

51. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007); *see also* Monsanto Co. v. Spray-Rite Serv. Corp, 465 U.S. 752 (1984); Cont'l T.V.,

Free-riding theories, therefore, argue that manufacturers engage in RPM to assure the provision of ancillary services that enhance the demand for their products. The prevalence of RPM in the book industry in the early twentieth century supports this free-riding theory: publishers wanted to motivate booksellers to promote their books by placing them in storefronts and on desirable shelves and by encouraging shoppers to consider them.[52] As noted above, the publishers' collusion facilitated the endorsement of RPM,[53] although the free-riding problem was apparently a driving force. Another example of this triangle of RPM, collusion, and promotion of point-of-sale services is the medicine industry of the late nineteenth century and early twentieth century.[54]

Point-of-sale services in the book and medicine industry at the turn of the century played a critical role because sellers possessed superior information about the products and consumers used to rely on sellers' recommendations.[55] The collusions in the book and medicine industries illustrate that, in reality, the conspiracy and free-riding theories may apply simultaneously.

Manufacturers, however, may employ RPM to assure quality services without any collusion on the retail or manufacturing side. A manufacturer of new or complex products may unilaterally employ RPM to induce retailers to invest in promoting the product to consumers who are unfamiliar with the brand or the product.[56] Again, cases from the early twentieth century illustrate this point. Ford Motor Company engaged in RPM arguably to promote prompt and loyal service among dealers, when cars were still a technological wonder.[57] Similarly, early

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Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977); Martin K. Perry & Robert H. Porter, *Can Resale Price Maintenance and Franchise Fees Correct Sub-Optimal Levels of Retail Services?*, 8 INT'L J. INDUS. ORG. 115, 115 (1990) (analyzing the circumstances in which certain RPM schemes may correct the retail free-riding problem).

52. *See, e.g.*, Straus v. Am. Publisher's Ass'n, 231 U.S. 222 (1913); Scribner v. Straus, 210 U.S. 352 (1908); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); Bittlingmayer, *supra* note 50.

53. *See supra* note 34 and accompanying text.

54. A substantial percentage of RPM cases of the era involved over-the counter medicines. *See* Bauer & Cie v. O'Donnell, 229 U.S. 1 (1913); John D. Park & Sons Co. v. Hartman, 153 F. 24 (6th Cir. 1907); Jayne v. Loder, 149 F. 21 (3d Cir. 1906); Dr. Miles Med. Co. v. Jaynes Drug Co., 149 F. 838 (C.C. Mass. 1906); Wells & Richardson Co. v. Abraham, 146 F. 190 (C.C.E.D.N.Y. 1906); Dr. Miles Med. Co. v. Platt, 142 F. 606 (C.C.N.D. Ill. 1906); *In re* Park, 138 F. 421 (C.C.S.D. Ohio 1905); Dr. Miles Med. Co. v. Goldthwaite, 133 F. 794 (C.C. Mass. 1904); *supra* notes 26–30 and accompanying text.

55. Until the early twentieth century, drugs were sold over the counter. *See* Sam Peltzman, *The Health Effects of Mandatory Prescriptions*, 30 J.L. & ECON. 207 (1987); Peter Temin, *The Origins of Compulsory Drug Prescriptions*, 22 J.L. & ECON. 91, 91 (1979); sources cited *supra* note 6.

56. *GTE Sylvania*, 433 U.S. at 55; *see also* Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346, 346 (1984).

57. *Trust Legislation: Hearings Before the H. Comm. on the Judiciary*, 63d Cong. 767–87 (1914) (testimony of Alfred Lucking, General Counsel, Ford Motor Company); *see also* Ford Motor Co. v. Benjamin E. Boon, Inc., 244 F. 335 (9th Cir. 1917); Ford Motor Co. v. Union Motor Sales Co., 225 F. 373 (S.D. Ohio 1917).

phonograph companies regularly engaged in RPM to encourage retailers to explain about another "wonder" of the era—talking machines.[58]

Some variants of free-riding theories justify certain agreements between manufacturers and retailers to exclude competition—agreements that conspiracy theorists condemn. These free-riding theories suggest that sometimes consumers learn about high-quality products from the reputation of retailers that carry such products. Discounters may free ride on the reputation of such retailers, attracting to their stores consumers by selling high-quality products as loss leaders[59] or just at bargain prices. Alternatively, low-quality sellers may carry high-quality branded products to lure shoppers to their stores and then convince them to buy low-quality unbranded products.[60] RPM is the antidote for such free-riding problems.[61]

Lastly, courts and scholars often reduce free-riding theories to a misleadingly short statement that "resale price maintenance can stimulate interbrand competition . . . by reducing intrabrand competition."[62] This statement is somewhat over-simplistic because, as opposed to territorial vertical restraints, RPM does not eliminate intrabrand competition; rather, it substitutes intrabrand price competition with intrabrand non-price competition.[63] Such non-price competition serves consumer welfare only in certain circumstances and, even when it does, it may not serve the welfare of all consumers. Consumers are not homogeneous and they do not always need promotional and informational services.

D. The Demand-Uncertainty Theory

To justify RPM, free-riding theories rely on the assumption that certain services may enhance demand among *consumers*. Manufacturers of new products, however, first have to persuade *retailers* that there will be demand for their goods. This task may be tricky because uncertainty about commercial success often characterizes the introduction of new products and new models (or editions) of

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58. *See, e.g.*, Boston Store of Chi. v. Am. Graphophone Co., 246 U.S. 8 (1918); Straus v. Victor Talking Mach. Co., 243 U.S. 490 (1917); N.J. Patent Co. v. Schaefer, 178 F. 276 (3d Cir. 1909); Nat'l Phonograph Co. v. Schlegel, 128 F. 733 (8th Cir. 1904); Victor Talking Mach. Co. v. Fair, 123 F. 424 (7th Cir. 1903); Thomas A. Edison, Inc. v. Ira M. Smith Mercantile Co., 188 F. 925 (C.C.W.D. Mich 1911); Edison Phonograph Co. v. Pike, 116 F. 863 (C.C. Mass. 1902); Edison Phonograph Co. v. Kaufmann, 105 F. 960 (C.C.W.D. Pa. 1901).

59. "Loss leader pricing" is a marketing strategy, whereby a seller prices some attractive products below cost to attract customers to his store.

60. This practice is known as the "misleader problem." *See* Bowman, *supra* note 1, at 836–38.

61. *See* Marvel & McCafferty, *supra* note 56, at 346; Robert F. Springer & H. E. Frech III, *Deterring Fraud: The Role of Resale Price Maintenance*, 59 J. BUS. 433 (1986).

62. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2708 (2007); *see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

63. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW 172 (2d ed. 2001) ("[T]he manufacturer may want to increase the amount of non-price competition among the dealers in order to stimulate the provision of point-of-sale services.").

established products.[64] Acknowledging this uncertainty, in *Monsanto v. Spray-Rite Service*, the Supreme Court noted that manufacturers and retailers "have legitimate reasons to exchange information about the prices and the reception of their products in the market."[65] The problem that the *Monsanto* Court overlooked is that before manufacturers and retailers exchange information, the new product must be on the market.

Because the demand for new products is uncertain, manufacturers of such product face a serious challenge—convincing retailers to carry inventories of their products. The failure of a new product on the market results in losses for the retailer, unless the manufacturer is willing to buy back unsellable inventories.[66] These losses are particularly deep when competing retailers try to get rid of the inventories through aggressive discounts. This set of concerns explains why manufacturers of new products often engage in RPM.[67] This analysis holds also for successful products for which the demand cannot be estimated accurately and thus the ordering of large stocks is risky for retailers.

The demand-uncertainty theory simply states that RPM encourages retailers to order large stocks of products the demand for which is uncertain.[68]

Demand-uncertainty theorists popularized this theory in the 1990s.[69] The theory, however, is almost as old as RPM, as the story of the first book to be sold with resale price restrictions illustrates. In 1887, Alfred Marshall, the greatest economist of that time, approached Macmillan & Co., proposing the publisher to publish the "central work of [his] life:"[70] *Principles of Economics*, which is still regarded as one of the most important texts in economics. Macmillan convinced Marshall to agree to fix the retail price of his masterpiece with the argument that price competition among booksellers often brings them to the point that "there is not enough profit in the business to enable booksellers to carry good stocks or to give their attention to bookselling."[71] The marketing success of *Principles of Economics* probably had little to do with RPM, yet it convinced publishers to

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64. One of the most famous examples for uncertainty about the commercial success of a "new model" is the colossal failure of "New Coke" that The Coca-Cola Company introduced in 1985 to replace its flagship soda. *See* CONSTANCE L. HAYS, THE REAL THING: TRUTH AND POWER AT THE COCA-COLA COMPANY 105–21 (2004).

65. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984).

66. This practice and equivalent ones are common in various industries in which the demand is uncertain. *See* Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985).

67. *See generally* David A. Butz, *Vertical Price Controls with Uncertain Demand*, 40 J.L. & ECON. 433 (1997); Raymond Deneckere et al., *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 AM. ECON. REV. 619 (1997); Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59 (1994).

68. Justice Breyer mentioned this theory in passing in his *Leegin* dissent. 127 S. Ct. 2705, 2728 (2007) (Breyer, J., dissenting).

69. *See, e.g.*, Butz, *supra* note 67, at 433; Deneckere et al., *supra* note 67; Marvel, *supra* note 67, at 60–61.

70. C. W. Guillebaud, *The Marshall-Macmillan Correspondence Over the Net Book System*, 75 ECON. J. 518, 519 (1965).

71. *Id.* at 522.

adopt the practice.[72] The correspondence between Alfred Marshall and Fredrick Macmillan shows that concerns regarding free-riding and demand uncertainty motivated Macmillan, without the advice of modern economists.[73]

E. Theories of Contract-Enforcement Mechanisms

Free-riding theories assume that retailers use the high markup that RPM protects to provide consumers with valuable services. This assumption, however, is too strong when the competition among retailers is imperfect, as is typically the case. Under imperfect competition, retailers have incentives to furnish fewer valuable services and keep a larger share of the markup.

Motivated by this criticism, Benjamin Klein, Keith Leffler, and Kevin Murphy developed a fourth line of theories that shows how vertical restraints, including RPM, may function as contract-enforcement mechanisms.[74] Under this line of theories, RPM offers retailers a payment for actions that serve the manufacturer's interests. Unlike conspiracy, free-riding, and demand-uncertainty theories that attribute normative implications to vertical restraints, contract-enforcement theories are relatively neutral and may be consistent with other explanations for RPM.

To illustrate, the RPM increased markup that contract-enforcement theories interpret as the manufacturer's payment to retailers may serve as: (1) a payment for a willingness not to deal with competitors;[75] (2) a payment to furnish valuable ancillary services;[76] or (3) an assurance against the risks associated with ordering stocks of new products.[77]

Thus, although scholars often mention contract-enforcement theories in support of one side or another in the RPM controversy, these theories provide insights into the functioning of RPM, but no normative implications.[78]

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72. SIR FREDERICK ORRIDGE MACMILLAN, KT. THE NET BOOK AGREEMENT 1899 AND THE BOOK WAR 1906–1908, at 15–17 (1924).

73. Guillebaud, supra note 70.

74. Benjamin Klein & Keith Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J.L. & ECON. 265 (1988).

75. For example, the early RPM medicine cases involved drug manufacturers that cooperated with the National Wholesale Druggists' Association and insisted that, in return for policing RPM, the wholesalers would promote their products and not deal with their competitors. NAT'L WHOLESALE DRUGGISTS' ASS'N, *supra* note 9, at 33–34.

76. For example, the early phonograph and automoblile cases concerned the sales of new and relatively sophisticated equipment, for which point-of-sale service was rather important. *See supra* notes 57–58 and accompanying text.

77. *See supra* notes 70–72 and accompanying text.

78. In *Leegin*, the Court was persuaded that theories of contract-enforcement mechanisms support the free-riding theories exclusively. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2716 (2007). As noted, these theories can support all theories of RPM.

II. THE ALLURE OF HIGH PRICES AND CONSUMER EXPERIENCES

A. Paying Less or Paying More?

The underlying premise of antitrust laws is that, for any given product, consumer welfare is inverse to the product's cost to the consumer, which includes its nominal price, search costs, and other costs.[79] This assumption is also one of the most fundamental working tools of standard economic analyses.[80] Its intuitive logic provides that, in any transaction, the seller and the buyer split the difference between the cost of the traded good to the seller and the value of that good for the buyer, so that the buyer's welfare increases when she pays less.[81] Put simply, the premise states that paying less is better for consumers as long as quality is not adversely affected and other costs do not go up.[82]

While the premise that "paying less is better" seems rather straightforward, contradicting market phenomena are widespread and their causes are equally straightforward: many people are willing to pay a premium for a brand, irrespective of quality and other tangible benefits. They may be willing to pay such premium to keep up with the Joneses, to signal their wealth in ways others cannot, and for other reasons.[83] Such individuals perceive the status and happiness that are associated with the possession of branded goods as certain types of benefits, for which they pay the premium above the value of the product's tangible benefits.

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79. *See, e.g.*, Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla. 468 U.S. 85, 107 (1984) ("[Low prices and large output that] are unresponsive to consumer preference . . . [are] perhaps the most significant, since 'Congress designed the Sherman Act as a "consumer welfare prescription."'" (citation omitted)).

80. *See, e.g.*, GEORGE J. STIGLER, THE THEORY OF PRICE 22–23 (1966) ("The oldest and most basic rule of demand theory is that people will not buy less, and usually buy more, of a commodity when its price falls.").

81. Any simple presentation of the consumer's surplus and seller's surplus on a two-dimensional graph of supply and demand curves illustrates this point. For a classic explanation, see PAUL A. SAMUELSON, ECONOMICS 550–51 (13th ed. 1989).

82. *See, e.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 360 (1982) ("Normally consumers search for high quality at low prices.").

83. Another type of goods for which the demand falls when prices decline is Giffen goods, first described by Alfred Marshall in 1895. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 109–10 (8th ed. 1920) (1895). Economists have remained skeptical of the existence of Giffen goods. *See, e.g.*, Gerald P. Dwyer & Cotton M. Lindsay, *Robert Giffen and the Irish Potato*, 74 AM. ECON. REV. 188 (1984); George J. Stigler, *Notes on the History of the Giffen Paradox*, 55 J. POL. ECON. 152 (1947); Sherwin Rosen, *Potato Paradoxes*, 107 J. POL. ECON. S294 (1999); *cf.* William R. Dougan, *Giffen Goods and the Law of Demand*, 90 J. POL. ECON. 809 (1982).

For customers of fashion houses like Louis Vuitton, Burberry, or Miu Miu, high prices are part of the product's allure. They confer exclusivity and prestige: only a tiny fraction of society can afford joining this club of consumers.[84]

Tiffany, the jewelry maker, offers another example for a manufacturer that maintains exclusivity through prices. In the 1990s, Tiffany experimented with an inexpensive silver jewelry line but, despite the financial success of the line, Tiffany's management decided to aggressively raise its prices fearing that middle-class shoppers would alienate Tiffany's lucrative clientele of wealthy customers.[85] The increased affordability of Tiffany's products threatened the status of the brand as a wealth symbol.

Charles Revson, Revlon's founder, entered the cosmetics business during the Great Depression, when Hoovervilles were springing up across the country.[86] Revson used high prices and limited distribution channels to create the perception that Revlon cosmetics were luxuries, thereby attracting American women to his goods.[87]

Examples of the allure of high prices are not exclusive to the fashion world. Some colleges discovered that they were losing applicants when the tuition was low and attracting more qualified applicants when tuition was high.[88] The digital cameras of Leica and Panasonic offer another example. Since 2002, Leica and Panasonic have released several identical models of digital cameras that differ only in the logos and price tags they carry. The cameras that carry the fancy Leica logo are approximately forty to seventy percent more expensive than their Panasonic identical twins. In addition, the prices of Leica cameras are uniform, while the prices of their Panasonic twins vary substantially across retailers.

Prices sometimes even influence perceptions of quality: scientific evidence shows that increases in wine prices tend to affect positively the perceived flavor pleasantness of wines.[89] These findings are consistent with other studies that show that information about beer brands affects the pleasure of drinking beer.[90] Some studies indicate that, in certain circumstances, consumers who pay discounted prices may derive less actual benefit from consuming the product than consumers who purchase the same product for a full price.[91] Along these lines, a

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84. *See, e.g.*, Ruth La Ferla, *When High Price is the Allure*, N.Y. TIMES, Aug. 9, 2007, at G1. *See generally* Georg Simmel, *Fashion*, 10 INT'L Q. 130, 133 (1904).

85. Ellen Byron, *Fashion Victim: To Refurbish Its Image, Tiffany Risks Profits*, WALL ST. J., Jan. 10, 2007, at A1.

86. For a discussion of the rise of Revlon, see RICHARD S. TEDLOW, GIANTS OF ENTERPRISE: SEVEN BUSINESS INNOVATORS AND THE EMPIRES THEY BUILT 247–307 (2001).

87. *Id.* at 260–65.

88. Jonathan D. Glater & Alan Finder, *In New Twist on Tuition Games, Popularity Rises With the Price*, N.Y. TIMES, Dec. 12, 2006, at A1.

89. Hilke Plassmann et al., *Marketing Actions Can Modulate Neural Representations of Experienced Pleasantness*, 105 PROC. NAT'L ACAD. SCI. U.S. AM. 1050, 1050 (2008), *available at* http://www.cns.nyu.edu/events/neuroecon/Plassmann2.pdf.

90. *See, e.g.*, Ralph I. Allison & Kenneth P. Uhl, *Influence of Beer Brand Identification on Taste Perception*, 1 J. MARKETING RES. 36, 39 (1964).

91. Akshay R. Rao, *The Quality of Price as a Quality Cue*, 42 J. MARKETING RES. 401 (2005); Baba Shiv et al., *Placebo Effects of Marketing Actions: Consumers May

recent study shows that placebo effects could be positively related to the price of the placebo medication.[92]

The resentment for loss-leader pricing among many manufacturers of branded goods is yet another reflection of manufacturers' preferences for high prices.[93] They believe that, although in the short term low prices may boost sales and revenues, in the long term low prices would damage their product image and result in decline in demand.[94]

Notwithstanding, as noted at the outset, luxury and other premium-brand goods have not drawn any serious attention in the RPM literature.[95]

This neglect is puzzling. Even prior to *Leegin*, many manufacturers of premium-brand goods used the *Colgate* doctrine[96] and other schemes[97] to engage in RPM to stabilize uniform levels of prices for at least some of their products. Apple, Bose, Leica, Swiss Army, and Tumi offer a few examples for such manufacturers. Leegin, the company that spelled the end of *Dr. Miles*' era is just another example of a manufacturer of premium goods that used high prices to maintain demand and attempted to market its products through fancy stores.

Another simple illustration is the case of Edna Hibel Corporation,[98] a manufacturer of artwork collectibles. Sheltering behind the *Colgate* doctrine, Edna Hibel terminated distribution agreements with retailers that sold its products below suggested retail prices, thereby practically maintaining minimum retail prices. Dismissing a suit of a terminated retailer, the court explained the logic of Edna Hibel's interest in high prices:

> Hibel had a strong interest in maintaining its suggested retail pricing structure. Its products were collectors' items, and those who purchased them did so in part because over time they appreciated in value. Hibel discouraged all of its dealers from price cutting so as not to downgrade the market for its products.[99]

Get What They Pay For, 42 J. MARKETING RES. 383, 383 (2005) (using subject-reported effects for data, not objectively measured results).

92. *See* Rebecca L. Waber et al., *Commercial Features of Placebo and Therapeutic Efficacy*, 299 J. AM. MED. ASS'N 1016 (2008).

93. An example for this argument can be found in a comprehensive study of RPM that the Federal Trade Commission conducted in 1929–1931, which finds loss-leader pricing as the "principal argument" of manufacturers in favor of RPM. FTC, REPORT ON RESALE PRICE MAINTENANCE PART II, at 4, 9–10 (1931).

94. *See, e.g.*, Bowman, *supra* note 1, at 836–38 (discussing the use of RPM as an anti-loss-leader mechanism); Marvel & McCafferty, *supra* note 43, at 374–78 (same).

95. *See supra* note 19 and accompanying text.

96. The *Colgate* doctrine allows manufacturers to refuse to do business dealings with retailers that do not adhere to their suggested retail prices. United States v. Colgate Co., 250 U.S. 300, 307 (1919); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

97. *See* David A. Butz, *Does the Per Se Rule Deter Vertical Price Fixing?*, 34 ECON. INQ. 770, 770 (1996) (studying the ineffectiveness of the per se prohibition on RPM, due to a rich set of strategies that manufacturers employed to control retail prices).

98. Winn v. Edna Hibel Corp., 858 F.2d 1517 (11th Cir. 1988).

99. *Id.* at 1518.

The collusion, free-riding, and demand-uncertainty theories indeed do not apply to many manufacturers of premium-brand goods that engage in RPM. They engage in RPM because they believe that stabilized high prices promote the demand for their goods.

B. Intrinsic Willingness to Pay Above Intrinsic Value

The foregoing discussion illustrates familiar human behavioral patterns that contradict the intuitive robustness of the proposition "paying less is better." In his 1899 seminal treatise, *The Theory of the Leisure Class*, Thorstein Veblen addressed the willingness to invest in conspicuous goods and services to signal social status.[100] Veblen observed that, because of the perceived indirect utility that is associated with wealth signaling, individuals often invest in goods and services beyond the point that generates additional direct utility from consumption.[101]

Veblen's *Theory of the Leisure Class* influenced scholars in multiple disciplines almost instantly, but fifty years had passed until economists incorporated his insights into the economics of consumer demand.[102] In his now classic 1950 article, Harvey Leibenstein incorporated Veblen's theory into the theory of consumer demand by focusing on "[t]he desire . . . to be 'in style,' . . . to attain exclusiveness, and the phenomena of 'conspicuous consumption.'"[103]

Leibenstein's analysis relaxed the standard economic assumption that the consumer's choices are independent of others' consumption choices.[104] He

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100. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY IN THE EVOLUTION OF INSTITUTIONS (1899).

101. *Id.* at 154–55. Veblen stated:

> Goods are produced and consumed as a means to the fuller unfolding of human life and their utility consists, in the first instance, in their efficiency as a means to this end. . . . But the human proclivity to emulation has seized upon the consumption of goods as a means to an invidious comparison, and has thereby invested consumable goods with a secondary utility as evidence of relative ability to pay.

Id.

102. Prior to 1950, economists' treatment of preferences that could lead to a divergence between the willingness to pay and the product's intrinsic value was mostly restricted to acknowledging their possible existence. For example, Arthur Pigou briefly discussed some aspects of "desire[s] to possess what other people possess" and "desire[s] to possess what other people do not possess." ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 225–28 (4th ed. 1932); *see also* Henry Smith, *Discontinuous Demand Curves and Monopolistic Competition: A Special Case*, 49 Q. J. ECON. 542, 542 (1935) (discussing the case of discontinuous demand curves, in which changes in established prices, even downward, could lead to decline in demand); Taussig, *supra* note 19, at 172 (arguing that the "psychology of demand" is one of the explanations for RPM and noting that "[i]f diamonds were to become very plentiful and very cheap, it is probable that people would buy not more of them than now, but less").

103. Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q. J. ECON. 183, 183 (1950).

104. Leibenstein's work was influenced by the pioneering game-theory studies of Von Neumann and Morgenstern, which were published a few years earlier. *See* JOHN VON NEUMAN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944);

specified two consumption preferences that are related to others' choices and may result in a willingness to pay for a product a price greater than the direct utility of its consumption: (1) the desire to keep up with the Joneses and obey social taboos, which Leibenstein labeled "bandwagon effects,"[105] and (2) the search for exclusiveness, which he labeled "snob effects."[106] In addition, Leibenstein considered the preference for conspicuous consumption, in which "the utility derived from a unit of a commodity . . . depends . . . on [its] inherent qualities [*and*] on the price paid for it."[107] Leibenstein labeled this preference "Veblen effects" as a tribute to Veblen's work.[108]

A consumer with conspicuous consumption preferences considers the real price of a product and its conspicuous price. The real price is money she pays for the product and the conspicuous price is the price other people believe she paid for it. Such a consumer is interested in paying *less* for the product, but wishes others to think that she can afford buying costly goods. Some conspicuous consumers would be willing to purchase a product even when its real price is equal to its conspicuous price, while others would be willing to purchase the product only if they can get "bargains" or some special discounts. Yet, all conspicuous consumers are willing to pay for certain products a price that is higher than their intrinsic value (i.e., the direct utility that is derived from their consumption).

The works of Veblen and Leibenstein have revolutionized the treatment of consumer demand, forcing scholars, businesspersons, and advertisers to think about the implications of the potential difference between the willingness to pay for a product and the product's intrinsic value.[109]

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see also Oskar Morgenstern, *Demand Theory Reconsidered*, 62 Q. J. ECON. 165 (1948) (studying the non-additive nature of demand functions that results from their interrelated characteristics).

105. Leibenstein, *supra* note 103, at 193–99.

106. *Id.* at 199–202.

107. *Id.* at 203.

108. *Id.* at 202–05.

109. *See, e.g.*, ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS (1999); ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349, 349 (1996); Robert L. Basmann et al., *A Note on Measuring Veblen's Theory of Conspicuous Consumption*, 70 REV. ECON. & STAT. 531 (1988); Kaushik Basu, *Monopoly, Quality Uncertainty and 'Status' Goods*, 5 INT'L J. INDUS. ORG. 435, 436 (1987); B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841, 841 (1994); Ottmar L. Braun & Robert A. Wicklund, *Psychological Antecedents of Conspicuous Consumption*, 10 J. ECON. PSYCHOL. 161 (1989); Angela Chao & Juliet B. Schor, *Empirical Tests of Status Consumption: Evidence from Women's Cosmetics*, 19 J. ECON. PSYCHOL. 107, 107 (1998); Giacomo Corneo & Olivier Jeanne, *Snobs, Bandwagons, and the Origins of Social Customs in Consumer Behavior*, 32 J. ECON. BEHAVIOR & ORG. 333, 335 (1997); Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101 (1985) [hereinafter Frank, *Unobservable Goods*]; Peter Jason Kalman, *Theory of Consumer Behavior When Prices Enter the Utility Function*, 36 ECONOMETRICA 497 (1968); Giovanni B. Ramello, *What's in a Sign? Trademark Law and Economic Theory*, 20 J. ECON. SURVEYS 547, 559 (2006).

A parallel line of studies of the willingness to pay high prices examines the tendency to perceive prices as quality signals. These studies suggest that, at least in the short term, consumers may be willing to pay a price above the intrinsic value of a product because the high price in and of itself convinces them of the quality.[110] Publishers and drug manufacturers in the late nineteenth century used RPM for books and quack medicines perhaps also to mislead consumers to believe that their products had qualities they did not have.

Many scholars have recognized potential legal and policy implications of the human tendency to invest in status goods, as expressed by the divergence between the willingness to pay and the product's intrinsic value. Some scholars pointed out that trademark law has an undesirable effect because it allows manufacturers to take advantage of the pursuit of status.[111] Some suggested regulatory schemes to limit investments in status signals.[112] Yet others pointed out that the taxation of luxury goods does not generate deadweight loss and offers revenues for wealth redistribution.[113] Nevertheless, the RPM literature has almost ignored the use of the allure of high prices as an explanation for RPM, although manufacturers have always argued that discounts harm brand image.

C. Why RPM for Status Goods?

Manufacturers argue that high prices promote sales of some goods, but RPM presumably is not the *only* viable business strategy to maintain high prices. The manufacturer can price his product sufficiently high to make low prices unprofitable for retailers. This strategy, however, may not be as good as RPM because retailers can use costly products as loss leaders and because price variation

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110. For the classic study of this point, see Tibor Scitovsky, *Some Consequences of the Habit of Judging Quality by Price*, 12 REV. ECON. STUD. 100 (1945); *see also* Kyle Bagwell & Michael H. Riordan, *High and Declining Prices Signal Product Quality*, 81 AM. ECON. REV. 224 (1991); Yuk-Shee Chan & Hayne Leland, *Prices and Qualities in Markets with Costly Information*, 49 REV. ECON. STUD. 499 (1982); Russell Cooper & Thomas W. Ross, *Prices, Product Qualities and Asymmetric Information: The Competitive Case*, 51 REV. ECON. STUD. 197 (1984); Eitan Gerstner, *Do Higher Prices Signal Higher Quality?*, 22 J. MARKETING RES. 209 (1985); Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 J. POL. ECON. 796 (1986).

111. *See, e.g.*, Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195, 196 (2007); Richard S. Higgins & Paul H. Rubin, *Counterfeit Goods*, 29 J.L. & ECON. 211, 211 (1986); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 962–63 (1993); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1733 (2006). In his seminal work on advertising and trademarks, Ralph Brown did not cite Veblen, but his arguments resonate Veblen's arguments. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE. L.J. 1165 (1948).

112. *See, e.g.*, Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323 (2001); Norman J. Ireland, *On Limiting the Market for Status Signals*, 53 J. PUB. ECON. 91 (1994); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 91–103 (1992).

113. *See, e.g.*, Edward Miller, *Status Goods and Luxury Taxes*, 34 AM. J. ECON. & SOC. 141, 143–44 (1975); Yew-Kwang Ng, *Diamonds Are a Government's Best Friend: Burden-Free Taxes on Goods Valued for their Values*, 77 AM. ECON. REV. 186 (1987).

across retailers may adversely affect sales. Moreover, observed investments in stores' look and appeal suggest that retail markup that is invested in the store's appeal may promote sales of certain goods.

The problem of loss-leader pricing and the use of RPM as an antidote for this free-riding strategy have already been discussed:[114] RPM prevents retailers from attracting shoppers to their stores by offering certain branded goods for bargain prices, thereby diminishing the brand image.

Variations in prices across retailers could hurt sales, if they trigger consumers' questioning of price adequacy and bargain searching. In contrast, uniform prices often maintain consumption habits and discourage aggressive price shopping that pushes prices down.[115] This insight is almost as old as the understanding of the link between prices and status goods. Its origins are in Frank Knight's famous 1921 observation that "[o]ne of our most significant 'wants' is freedom from the bother of calculating things or making close estimates."[116] Several economists have mentioned in passing this insight with a reference to RPM. They argue that fixed, stable prices often sustain consumption by habit.[117] Price variation across retailers, the argument goes, "at least sometimes stimulate questioning of the importance of the impulse or the quality of the product, or possibly even comparison with other products."[118]

Investments in stores' appeal may appear "irrational," since consumers presumably care about the price and service and not the about look of stores.[119] Stores, however, regularly invest in look and manufacturers of branded goods believe that their products could sell better in stores with certain style and appearance. Leegin, for example, preferred stylish stores over less-invested stores.

Thus, high wholesale prices as a means to sustain high retail prices are not a perfect substitute for RPM, when high. First, they cannot prevent the use of premium-brand goods as loss leaders. Second, variation in retail prices may push prices down. And, third, manufacturers may be interested in protecting retailers' markup to allow them to invest in fancy sales environments (which are different from investments in point-of-sale services). For these reasons, manufacturers may prefer to engage in RPM, despite the availability of the high wholesale prices option. They may charge high wholesale prices *and* employ RPM, when the only

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114. *See supra* Part I.C.

115. *See, e.g.*, David A. Butz, *Durable-Good Monopoly and Best-Price Provisions*, 80 AM. ECON. REV. 1062, 1071 (1990); Thomas E. Cooper & Timothy L. Fries, *The Most-Favored-Nation Pricing Policy and Negotiated Prices*, 9 INT'L J. INDUS. ORG. 209 (1991).

116. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 62 n.1 (1921).

117. *See, e.g.*, Silcock, *supra* note 22, at 42; Smith, *supra* note 102, at 549. Some of the studies of most-favored-nation pricing make the same point. *See, e.g.*, Butz, *supra* note 115, at 1071; Cooper & Fries, *supra* note 115.

118. Silcock, *supra* note 22, at 45; *see also* Orbach, *supra* note 40, at 352–54 (discussing the preference of movie exhibitors to maintain uniform pricing at the theater).

119. For certain perishable goods, such as food in restaurants and movies in the theater, the conditions of the "store" affect the consumption experience and, thus, matter.

two relevant considerations are high and uniform prices and the appearance of stores is less important.

D. The Nonexclusive Nature of the Explanation

Like other explanations for RPM, the allure-of-high-prices explanation is not exclusive and may co-exist with other explanations. *Burlington v. Esprit*[120] illustrates such circumstances.

Esprit, a manufacturer of a high-price line of clothing, sold its products to Burlington, a no-frills discounter, and Federated, one of the largest full-price retailing organizations in the country. In July 1983, Esprit informed Burlington that it would no longer do business with it.

A month earlier, in a public speech at a meeting of some 600 major retailers and garment makers, Federated's chairman said that "Federated believed that discounters were taking unfair advantage of the marketing efforts of full-price retailers."[121] Therefore, he stated, Federated would act "[t]o end this free-riding" and "stop dealing with manufacturers who sold current-season fashions to discounters."[122] The chairman also added that:

> [i]t is inconceivable to us . . . how a manufacturer could possibly justify bastardizing a great brand name or designer in whom they have invested millions to build status, credibility and consumer confidence [by selling to discounters]. . . . Doing business with a compromising [manufacturer] may just be too great a risk for the department store to take.[123]

Burlington sued Esprit and Federated for violation of Section 1 of the Sherman Act and lost on motion for summary judgment.[124]

Conspiracy theorists might say that *Burlington* offers another example for a powerful retailer that squeezed RPM from a manufacturer and encouraged other retailers to act in a similar manner.[125] Free-riding theorists would find support for their theories in the chairman's statement. Yet, the case also seems consistent with the allure-of-high-prices explanation. Since the facts of *Burlington* have never been studied, the validity of each explanation remains unknown. Circumstances of such nature to which more than one RPM explanation could apply are not rare in practice.

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120. Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919 (2d Cir. 1985).

121. *Id.* at 921–22.

122. *Id.* at 922.

123. *Id.*

124. Both the district court and the Court of Appeals for the Second Circuit granted defendants' summary judgment motion because Burlington provided no direct or circumstantial evidence of an illegal agreement between Esprit and Federated. *Id.* at 922, 925. Such evidence is necessary under *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

125. Esprit argued that it was unaware of the statement and that, due to its inability to meet the demand for its goods, it dropped discounters and full-price retailers that did not meet its marketing standards. *Burlington*, 769 F.2d at 922.

E. Premium Brands and RPM Law

The remaining question is whether antitrust law should prohibit manufacturers from employing RPM to allure consumers through high prices. This section argues that the use of RPM to allure consumers may be socially desirable and, perhaps more importantly, such uses are beyond the scope of antitrust law.

In *Leegin*, the Consumer Federation of America filed an amicus curiae brief in support of the terminated retailer, admitting that the "brand image justification could plausibly apply . . . to luxury items and the like."[126] Nevertheless, the Federation argued that "[a]dopting a rule of reason would benefit luxury goods manufacturers and dealers at the expense of inflating the prices of groceries to consumers."[127] The Federation further asserted that RPM is an unnecessary means for manufacturers of premium-brand goods, because they can legally maintain prices by refusing to do business with discounters. This argument equally applies to manufacturers of branded groceries and, as such, its logic is rather shaky.

One might argue that the allure-of-high-prices explanation provides another reason to prohibit RPM, because the pursuit of status that RPM preserves is socially wasteful. The pursuit of status may be socially wasteful when it leads consumers to divert funds from important non-status goods (e.g., health and education) to less important status goods.[128] This social waste could be particularly large because a pursuit of status means a race that raises the level of required investments in status when other people make similar investments. Notwithstanding, the alleged social waste associated with the pursuit of status cannot justify bans on RPM for four reasons.

First and foremost, "status" is a product that offers some utility to consumers and its legality is still unquestionable. Second, status goods will exist even without RPM: it is always possible to add features to a product or to alter features to justify high prices that establish the exclusivity characteristic of status goods. RPM possibly offers a relatively inexpensive production technique of status goods because it requires smaller investments in physical product features. As such, RPM may be superior to alternative methods of status-good production.

Third, the pursuit of status can transform itself from the consumption of status goods to the consumption of large quantities of "ordinary goods." For example, during the pre-Antebellum era, before the rise of brands and product images, in some social circles, people signaled wealth through the number of slaves they owned.[129] Accumulation of ordinary goods is likely to be socially

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126. Brief of Amicus Curiae Consumer Federation of America in Support of Respondent at 19, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06–480).

127. *Id.* at 20.

128. *See* Frank, *Unobservable Goods*, *supra* note 109.

129. *See, e.g.*, Jane H. Pease, *A Note on Patterns of Conspicuous Consumption Among Seaboard Planters, 1820–1860*, 35 J. S. HIST. 381, 389 (1969); C. Arden Pope, III & H. L. Goodwin, Jr., *Impacts of Consumptive Demand on Rural Land Values*, 66 AM. J. AGRIC. ECON. 750, 750–51 (1984) (arguing that conspicuous consumption motivates some of the purchases of rural land in the United States).

costlier than the possession of status goods because the former *also* involves higher stocking costs, a waste of a larger volume of resources that are not utilized, and a potential shortage of ordinary goods among unwealthy individuals. From this perspective, given the human tendency to invest in status, the availability of status goods is likely to be less wasteful than the alternative.

Fourth and last, the goal of antitrust laws is to enhance consumer welfare without any interference in consumer's preferences and choices. Antitrust law honors and protects many unwise human desires, such as the demand for tobacco products, high-cholesterol food, alcohol, and other unhealthy products.[130] The willingness to pay for status goods represents another type of ordinary consumer preferences that may or may not be unwise. Thus, even under the hypothetical assumption that status goods are socially undesirable, their supply is not an antitrust concern.

To summarize this discussion, RPM as a production technique of status goods is possibly socially superior to alternative production methods of status goods. Regardless of this advantage, there are no apparent reasons to regulate production of status goods through antitrust laws.

CONCLUSION

The RPM controversy is more than a century old and gravitates around conspiracy, free-riding, and demand-uncertainty theories. Throughout the history of RPM, manufacturers have provided various explanations for RPM, some of which are consistent with free-riding and demand-uncertainty theories. For obvious reasons, manufacturers do not tend to justify the practice with any conspiracy theory.

The possibly most frequent explanation that manufacturers offer for RPM has never received any serious attention in the case law and literature: discounts harm brand image and demand for certain branded goods. Courts and scholars have mentioned this assertion in passing but, to the best of my knowledge, have never discussed what stands behind it. One explanation for this neglect is that the notion of high prices as a desirable product feature somewhat contradicts the convenient antitrust premise that, for *all* consumers, paying less is *always* better.

This Article explores the appeal of high, uniform retail prices for manufacturers and argues that manufacturers' interest in high prices occasionally reflects standard marketing techniques for status goods. As such, high prices may serve as a product feature of certain branded products.

A systematic review of the case law shows that all the theoretical explanations for RPM, including the allure of high prices, are valid and consistent with observed realities. Hence, neither a per se illegality rule nor a per se legality

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130. *See, e.g.*, Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 323–24 (2005).

rule is desirable for RPM.[131] The *Leegin* Court, therefore, was right in reversing *Dr. Miles* and holding that courts should examine RPM under the rule of reason.

This Article further highlights one element that all legitimate explanations for RPM share in common: they apply only to branded goods. Thus, perhaps the most practical guideline that this Article offers for the RPM rule-of-reason era is that any analysis should begin with the distinction between branded and non-branded products. A manufacturer of a branded product may unilaterally choose to engage in RPM to encourage retailers to carry its product, to motivate point-of-sale services, or to build the image of its product as a status good. By contrast, a manufacturer's unilateral choice to engage in RPM is very unlikely in markets for non-branded goods, because such a manufacturer will lose business to competitors. In market of non-branded goods, manufacturer or retailer collusion is the most likely explanation for RPM.

131. Antitrust per se illegality rules intend to address business practices that always or almost always restrict competition. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103–104 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.") (footnote omitted); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 19–20 (1979) ("[I]n characterizing . . . conduct under the *per se* rule . . . our inquiry must focus on whether the effect and . . . the purpose of the practice . . . would always or almost always tend to restrict competition . . . .") (footnote and citation omitted).