

CONCERTED ACTION AND THE PREEMPTION OF STATE FAIR TRADE PROVISIONS AFTER *LEEGIN*

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I. INTRODUCTION

Few doctrines present more challenging issues, or create more inconsistent and incoherent results, than the doctrine of state action immunity. Situated as it is at the intersection of antitrust law, with its emphasis on vigorous protection of competition, and constitutional law, which demands due deference to considerations of state sovereignty, the issue of whether state fair trade regulations should be preempted by the Supremacy Clause of the United States Constitution¹ due to a violation of the Sherman Antitrust Act² has bedeviled courts ever since the Supreme Court decided *Parker v. Brown*³ more than sixty-five years ago. Over the years, few questions have proved more difficult than the issues of what Section 1's requirement that there be a conspiracy or "concerted action" means in the context of challenges to state statutes, which may mandate some form of uniform pricing conduct, and what proof of concerted action is required for a successful challenge to a state statute. This article analyzes

¹ U.S. CONST. art. VI, cl. 2.

² 15 U.S.C. § 1 (2004).

³ 317 U.S. 341 (1943).

these questions, among others, in light of the Court's recent decision in *Leegin Creative Leather Products v. PSKS, Inc.*⁴

The Court has long held that proving unregulated concerted action (or a "meeting of the minds") between private parties subject to state fair trade regulations⁵ is an essential first step for litigants seeking to challenge them.⁶ Courts considering whether such statutes are preempted routinely go through a two-step process; first, they consider whether a given statute or regulation creates an unlawful per se restraint of trade and then they ask whether the restraint is to be immune from preemption, even though it is otherwise unlawful. If the answer to the first inquiry is that there is no unlawful restraint created, the regulation is upheld without further inquiry. Thus, the second question, whether the restraint meets the requirements for immunity, is to be considered only if a court first determines that an unlawful combination or conspiracy involving the state has been shown.

⁴ 551 U.S. 877 (2007).

⁵ Throughout this article, I use the terms "fair trade statutes" or "fair trade regulations" to refer to various types of state laws designed to protect wholesalers or retailers. Such fair trade regulations can take many forms, such as minimum markup provisions, bans on discount sales, bans on credit sales, price-posting regulations, price "hold" regulations, licensing of distributors or wholesalers, bans on central warehousing by retailers, locality restrictions, unfair competition statutes, required marketing plans, or governing boards. I focus most attention, of course, on fair trade regulations that purport to govern retail or wholesale pricing.

⁶ In this article, I use the terms "conspiracy" or "concerted action" interchangeably to refer to any contract, combination, or conspiracy between market actors, whether vertical or horizontal, that is unregulated by the state. "Concerted action" was the term selected by the Supreme Court in *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), to describe this situation. The choice is considered, but hardly non-controversial. As will be further detailed herein, the *Parker* Court and others suggested that state fair trade statutes or regulations are more likely to be struck down if a state is a "participant" in a conspiracy. But, the later decisions hold that the state's active participation in what is otherwise a per se restraint makes it *more likely* that such a restraint will be upheld. Therefore, it appears that the best reading of the term "concerted action" is conspiracies, contracts, or combinations involving market participants with insufficient or no participation by the state.

This requirement that litigants must prove some form of concerted action is, therefore, an important check on the federal courts' power to review and preempt state statutes that otherwise violate prevailing federal antitrust doctrine. The level of deference accorded to state fair trade provisions has changed drastically over time. *Parker*, the first case to recognize the state action doctrine, was decided by a post-*Lochner*,⁷ post-New Deal Court that gave a wide berth to state regulatory schemes. The case involved a state statute that allowed competing agricultural producers to set up joint marketing plans, including pricing mechanisms.⁸ If the *Parker* Court had simply applied antitrust doctrine to the restraints in that case, they would surely have been preempted. But, the Court upheld the state scheme in question there, precisely because it found that there was no conspiracy or concerted action involving the state, and that the Sherman Act was not intended to apply to the states.⁹

At the time *Parker* was decided, of course, vertical resale price maintenance (the kind of restriction mandated by some state fair trade acts) was a per se violation of Section 1 of the Sherman Act.¹⁰ State schemes that required vertical price agreements between manufacturers, distributors, or retailers would have required what the courts then regarded as potentially unregulated vertical conspiracies and would have been subject to preemption. But, also at that time, the Miller-Tydings Act of 1937 permitted states to authorize resale price maintenance to protect small retail establishments.¹¹

Miller-Tydings remained the law until the mid-1970s. After its repeal, courts were free to apply *Dr. Miles* and its per se ban on resale price maintenance to state statutes. They were far less deferential. In a series of decisions beginning with *California Retail Liquor Dealers Ass'n v.*

⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

⁸ *Parker v. Brown*, 317 U.S. 341 (1943).

⁹ *Id.* at 352, 368.

¹⁰ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-09 (1911).

¹¹ Pub. L. No. 75-314, 50 Stat. 693 (repealed 1975).

Midcal Aluminum, Inc.,¹² the courts began to presume the necessary conspiracy either from evidence of vertical price restraints mandated by state regulations or by speculating as to the likely horizontal effects of such regulations. *Midcal* and its progeny had little difficulty finding the necessary per se violation before moving on to the issue of whether the restraint was otherwise immune. These cases developed a two-part test to determine whether a state statute that otherwise creates a per se restraint of trade should still be immune from preemption. The focus shifted away from whether or not there was a violation of Section 1 created by a state scheme to whether the state either actively supervised the restraint or left too much authority in the hands of private actors.

The requirement of proving concerted action to establish a violation remained, however, and was reaffirmed by the Court in *Fisher v. City of Berkeley*, which held that it must be proven to successfully challenge a state fair trade act or regulation.¹³ *Fisher* articulated a distinction between “unilateral” and “hybrid” restraints created by state laws, holding that “unilateral” restraints do not involve a contract, combination, or conspiracy and should be upheld, while those that are “hybrid” should be invalidated. As will be further explained herein, after *Fisher*, courts were left with two lines of case law that were in tension with one another. However, they remained free to presume “concerted action” from evidence of vertical price restraints.

In 2007, the Court decided *Leegin Creative Leather Products v. PSKS, Inc.*,¹⁴ which overruled *Dr. Miles* and made vertical price restraints subject to the rule of reason. In this article, I assert that the *Leegin* decision, along with the Court’s recent decisions regarding the standards for pleading and proof of horizontal conduct, may profoundly alter the landscape for litigants challenging state fair trade acts. If courts are consistent, and apply *Leegin* to state fair

¹² 445 U.S. 97 (1980).

¹³ 475 U.S. 260 (1986).

¹⁴ 551 U.S. 877 (2007).

trade acts, unlawful concerted action can no longer be presumed from mere vertical restraints and such restraints, without some evidence of horizontal conduct between competitors, should rarely be subject to facial challenges, regardless of whether they meet the Court's tests for immunity. It should no longer matter whether statutes that create such vertical restraints have anticompetitive effects or are adequately supervised. Rather, the main evil courts should seek to prevent is unsupervised concerted action between competitors. Given that the Supreme Court has been relentlessly raising the standards of pleading and proof necessary to show conspiracy among private parties, even in highly concentrated industries, a serious issue is presented regarding whether the same rigorous standards should be applied in cases involving challenges to state laws, lest the courts be accused of inconsistency or selective activism. If those standards are applied, horizontal conduct will be far more difficult to prove and more state regulations will be upheld.

Further, this article postulates that applying *Leegin* in this context, and limiting facial challenges to horizontal conduct, may obviate the need for courts to consider whether restraints are "unilateral" or "hybrid." It also suggests that, consistent with existing precedent, courts can choose from a range of alternatives regarding how to clarify the state action doctrine post-*Leegin* and outlines a couple possibilities. What alternatives the courts pursue will depend on the choice they make between vigorous protection of state sovereignty, on the one hand, and aggressive protection of competition, on the other. Given the recent economic downturn, states might well be inclined to pass more legislation extending greater protection to local retail businesses and courts may be under increasing pressure to uphold such legislation, particularly if the legislation can be said to create only vertical restraints, even if doing so provides less protection in the short-term for competition. If the courts choose to continue with more aggressive protection of interbrand competition against state statutes, they may raise some uncomfortable questions and

inconsistencies with existing pleading and proof requirements that need to be addressed.

In Part II of this article, I examine the Court's development of the state action doctrine from *Parker* to the present, with a focus on the requirement that litigants challenging state statutes or regulations prove some form of conspiracy or concerted action involving the state and private parties. This part will show that, due to strong considerations of state sovereignty, a showing of concerted action was a requirement for preemption of state statutes at the outset. Over time, however, the Court, relying on *Dr. Miles*, which arguably made any vertical price restraint imposed by the state per se illegal, deemphasized the concerted action inquiry. The Court focused instead on creating and applying a test to determine which statutes or regulations could be immunized despite creating per se restraints. The concerted action requirement never went away, however, and as further explained in Part II, while *Fisher* and its progeny reaffirmed the need to prove concerted action to challenge a state restraint, they created a distinction between "unilateral" and "hybrid" restraints that has proven to be quite vexing in practice, often leading to inconsistent and confusing analyses and outcomes.

Part III provides two recent examples of the state action doctrine in practice in the lower courts. It shows that these courts, attempting to follow existing precedent, sometimes reach inconsistent results, and tend to give inadequate consideration to the need for proof of conspiracy or concerted action by litigants challenging statutes. Notably, both of the cases examined were decided after *Leegin* and could no longer rely on any presumption of concerted action arising from state statutes or regulations creating vertical price restraints, yet neither seems to have applied *Leegin* to its fullest extent, and both arguably give excessive scrutiny to statutes or regulations that, at most, create vertical price restraints.

Part IV details the potential impacts on the state action doctrine from the *Leegin* decision and the increasingly strict pleading and proof requirements in horizontal conspiracy

cases. This part argues that *Leegin* should make challenges to price restraints in state fair trade acts much more difficult because facial challenges require a showing of per se illegality, vertical restraints are no longer per se illegal, and proof of horizontal conduct is often sorely lacking in cases challenging fair trade acts. This part also suggests that, assuming “as applied” challenges to state statutes creating vertical price restraints are still possible, litigants must now prove anticompetitive effects from such restraints and states (or litigants attempting to argue that state restraints should be upheld) should be able to introduce procompetitive justifications for those restraints. Furthermore, this part argues that applying *Leegin* in such cases, thereby removing vertical restraints from the per se category, may obviate the need for courts to engage in the often vexing and inconsistent analysis of whether a given restraint is “unilateral” or “hybrid.”

Finally, Part V suggests that an upshot of more rigorous application of the concerted action requirement following *Leegin* could be a needed clarification of the state action doctrine and the courts’ approach to the preemption issue. I discuss two possible alternatives for applying *Leegin* in this context. Both approaches recognize that less scrutiny of state statutes and regulations is probably warranted in light of *Leegin*’s holding, and that the main concern for courts going forward should be to prevent unsupervised concerted action between competitors. The first alternative reads existing precedent literally and gives the most deference to state sovereignty. It would uphold any restraints created by state law unless there was actual proof of unregulated concerted action between competitors. The second seems more in line with current understandings of the concerted action requirement, which seem to analyze the likely behavior of competitors in response to a restraint rather than looking for actual evidence of horizontal conspiracy or parallel conduct. Expressly adopting and maintaining such an approach may well give more vigorous protection to competition, but as Part V explains, it raises some very uncomfortable questions in light of current precedent on

proof of conspiracy and conscious parallelism in the context of private litigation that the courts will need to confront.

II. THE DEFINITION OF "CONCERTED ACTION" IN THE DEVELOPMENT OF THE STATE ACTION IMMUNITY DOCTRINE

A. The Origins of State Action Immunity

The doctrine of state action immunity originated in the Supreme Court's decision in *Parker*. At issue was California's Agricultural Prorate Act, which directly involved competitors in price setting and marketing decisions by calling for the establishment of marketing plans for agricultural products so as to restrict competition and maintain certain prices. At least ten competing producers within a defined "production zone" were to petition for these plans.¹⁵ Once that petition was given to the Agricultural Prorate Advisory Commission, the Director of Agriculture was then required to select a program committee from among nominees chosen by qualified competing producers within the production zone.¹⁶ Any proposed programs had to be approved by the Commission and consented to by 65% of the producers in the zone owning at least 51% of the acreage devoted to production of a regulated crop.¹⁷ Nevertheless, as will be explained, because the state "created the machinery for establishing the pro-rate program," the Court deemed its actions immune from antitrust scrutiny.¹⁸

In upholding the statute, the Court observed that "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state,"¹⁹ and said it found "nothing in the language of the Sherman Act or in its history

¹⁵ *Parker v. Brown*, 317 U.S. 341, 346 (1943).

¹⁶ *Id.*

¹⁷ *Id.* at 347.

¹⁸ *Id.* at 352.

¹⁹ *Id.* at 351.

which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”²⁰ The Court later emphasized that point saying, “[t]he state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.”²¹ The Court, thus, based its holding on state sovereignty and on the absence of a “conspiracy,” not on any analysis of whether the restraint did or did not run afoul of then-prevailing antitrust doctrine.²² And, out of apparent concern for federalism, it adopted a highly deferential approach to California’s statutory scheme and chose not to substitute its judgment for that of the California state legislature, even though the statutory scheme in question created what could only be described as a state-facilitated cartel.

The only limits on the state’s power in this area that the *Parker* Court alluded to were to suggest that “a state does not give immunity to those who violate[d] the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.”²³ While the first point seems difficult to dispute, the second seems difficult to reconcile with the facts in *Parker*. After all, members of a program committee chosen by competing producers developed the marketing plans, and they had to be approved by a majority of competing producers as well as the Commission. Thus, the state plainly “participated” in the marketing plans developed by the committee and the producers.

²⁰ *Id.* at 350–51.

²¹ *Id.* at 352 (citations omitted).

²² As a later Court noted, “[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States’ ability to regulate their domestic commerce.” *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56 (1985).

²³ *Parker*, 317 U.S. at 351–52 (citations omitted).

In any event, at the time *Parker* was decided, states were expressly authorized to permit resale price maintenance under the Miller-Tydings Act of 1937.²⁴ The purpose of that statute was to allow states to protect small establishments that would otherwise have been driven from the marketplace by large volume discounters.²⁵ Miller-Tydings was the law until 1975, when the Consumer Goods Pricing Act of 1975 repealed it.²⁶ While it is possible that the Supreme Court in *Parker* was not considering the implications of the Prorate Act on competition for raisins between different producers, the Prorate Act itself called for participation by competing growers in formulating marketing plans,²⁷ so Miller-Tydings would not have provided any immunity.

During the ensuing thirty-odd years before the repeal of Miller-Tydings, the Supreme Court had relatively few decisions dealing with the state action doctrine in the context of fair trade acts imposing vertical restraints. One decision was, however, of great importance. In *Schwegmann Bros. v. Seagram Distillers Corp.*, the Court, purportedly relying on *Parker*, struck down a Louisiana statute that not only authorized a distributor and a retailer to make a contract fixing a resale price (which would likely have been permissible under Miller-Tydings), but also authorized the parties to these price maintenance agreements to enforce the relevant statute against non-signing competitors through unfair competition actions.²⁸ The Court held that, although Miller-Tydings made vertical price fixing permissible, "horizontal" price fixing still violated the Sherman Act, and "when a state compels retailers to follow a parallel price

²⁴ Pub. L. No. 75-314, 50 Stat. 693 (1937) (repealed 1975). While it was in effect, *Miller-Tydings* amended Section 1 of the Sherman Act by adding, *inter alia*, the following: "[n]othing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of [specified commodities] when contracts or agreements of that are lawful as applied to intrastate transactions . . ." *Id.*

²⁵ See H.R. Rep. No. 382, at 1-3 (1937); S. Rep. No. 2053, at 1-2 (1936).

²⁶ Pub. L. No. 94-145, 89 Stat. 801 (1975).

²⁷ *Parker*, 317 U.S. at 346-47.

²⁸ *Schwegmann*, 341 U.S. at 385-87.

policy, it demands private conduct which the Sherman Act forbids."²⁹

What seems to have troubled the *Schwegmann* Court most was that some power to enforce minimum price levels was left to the discretion of distributors, and not to the state. Distributors who entered into resale price maintenance agreements were also empowered to sue nonparties to such agreements for unfair competition if they offered goods for sale in that state at lower than the agreed upon price.³⁰ This, the Court held, exceeded the powers given under Miller-Tydings, and did not allow for state action immunity, because retailers were forced to abandon price competition and, by these lawsuits, were "driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price-fixing."³¹ The Court's later condemnation of "hybrid" restraints in *Fisher* is directly rooted in the concerns expressed by Justice Douglas in *Schwegmann*.³²

B. The *Midcal* Decision and the Presumption of "Concerted Action"

Scrutiny of state fair trade acts by the courts increased after the repeal of Miller-Tydings. A remarkable aspect of the line of cases beginning with *Midcal* in 1980 is that the focus was primarily on whether or not the fair trade act in question was entitled to state action immunity. Seemingly lost in the analysis in many of these cases were the questions of whether a state's regulation of its domestic commerce was truly subject to the Sherman Act or whether there was evidence of an actual conspiracy, even though these appear to have been central questions in *Parker*. Rather, based on

²⁹ *Id.* at 389 (citing *Parker*, 317 U.S. at 350). Of course, this concept is found nowhere in *Parker*, and has caused some tension with later precedent. As will be explained below, state compulsion is one of the required elements a party or state must show to be entitled to immunity under *Midcal* and *Fisher*.

³⁰ *Id.* at 387-88.

³¹ *Id.*

³² *Fisher v. City of Berkeley*, 475 U.S. 260, 268 (1986) (discussing *Schwegmann*, 341 U.S. at 389).

Dr. Miles' condemnation of resale price maintenance, the cases had no trouble finding the requisite concerted action and violation before considering the issue of immunity.

The California statute at issue in *Midcal* required each wine producer to post a schedule of selling prices of wine to retailers or consumers, to make and file a fair trade contract, and to file a schedule of resale prices (if the producer owned or controlled a brand of wine resold).³³ A single fair trade contract or schedule for each brand of wine set the terms for all wholesale transactions within a given trading area, and state regulations provided that wine prices posted by a single wholesaler within a trading area were to bind all wholesalers in that area.³⁴

The Court condemned this scheme as follows: "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act," because the wine producer "holds the power to prevent price competition by dictating the prices charged by wholesalers."³⁵ The reason for this conclusion was a straightforward reading of *Dr. Miles*: "such vertical control destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'"³⁶

Having found a *per se* violation, the Court next considered the issue of immunity. It framed the issue as one of whether California's "involvement in the price-setting program is sufficient to establish antitrust immunity" under *Parker*.³⁷ Relying on *Goldfarb v. Virginia State Bar*,³⁸ which

³³ Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 99-100 & n.1 (1980).

³⁴ *Id.*

³⁵ *Id.* at 103.

³⁶ *Id.* (quoting *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)). Notably, the *Midcal* court did not find that the California statute in question created horizontal price fixing, even though the wholesalers were required to adhere to a single fair trade contract in a particular geographical area.

³⁷ *Id.* at 103.

³⁸ 421 U.S. 773, 791 (1975).

struck down attorney fee schedules published by a county bar association and enforced by a state bar association but not mandated by the state supreme court, the Court held that anticompetitive conduct must not merely be “prompted” by state action, but must be “compelled by direction of the state acting as a sovereign” for there to be immunity.³⁹ In a sense, this takes *Schwegmann*’s statement regarding “demanding private conduct which the Sherman Act forbids” and stands it on its head.⁴⁰ The only way to harmonize these two conclusions is to read *Schwegmann* as saying that the “private conduct which the Sherman Act forbids” is insufficiently supervised action by private actors.⁴¹

The Court held that for there to be antitrust immunity under *Parker*, a challenged restraint must be “clearly articulated and affirmatively expressed as state policy,” and must be “actively supervised by the state itself.”⁴² Because California did not monitor market conditions or engage in any pointed reexamination of the program, its statute failed the second part of this two-part test and was ruled to be preempted.⁴³

Similarly, in *324 Liquor Corp. v. Duffy*, the Court found that New York’s alcoholic beverage control law, which mandated sales of liquor at 112% of the “posted bottle price” violated Section 1 of the Sherman Act.⁴⁴ Again, the Court does not appear to have closely examined the evidence of whether there was truly a contract, combination, or conspiracy in restraint of trade, and it did not concern itself with whether the state participated in a conspiracy. Moreover, the Court suggested that, while the facts of *Midcal* may have involved horizontal as well as vertical price fixing (although *Midcal* made no reference to horizontal price fixing), the *Midcal* Court rested its decision on the

³⁹ *Midcal*, 445 U.S. at 104 (quoting *Goldfarb*, 421 U.S. at 791).

⁴⁰ *Schwegmann Bros. v. Seagram Distillers Corp.*, 341 U.S. 384, 389 (1951).

⁴¹ *Id.*

⁴² *Midcal*, 445 U.S. at 105.

⁴³ *Id.* at 105–06.

⁴⁴ 479 U.S. 335, 341–45 (1987).

“vertical control” by wine producers over wholesalers.⁴⁵ Likewise, the 324 *Liquor* Court deemed New York’s mandatory markup system unlawful because it was a vertical restraint imposed by the state that was not “actively supervised.”⁴⁶ The 324 *Liquor* Court also suggested that meeting the two-part *Midcal* test was the exclusive way for a state to establish *Parker* immunity.⁴⁷

At least some lower courts have read 324 *Liquor* to mean that an actual “contract, combination or conspiracy” need not be shown for a state statute to be preempted by the Sherman Act.⁴⁸ 324 *Liquor* itself made no such holding, however, and those readings cannot be squared with the Court’s decision in *Parker* or, as will be discussed next, the decision in *Fisher v. City of Berkeley*.⁴⁹

C. *Fisher v. City of Berkeley* and the Reaffirmation of the Need to Prove Concerted Action

Two decisions in the mid-1980’s, *Hoover v. Ronwin*⁵⁰ and *Fisher*, breathed new life into *Parker*’s emphasis on state

⁴⁵ *Id.* at 342 (quoting *Midcal*, 445 U.S. at 103).

⁴⁶ *Id.* at 343–45. Subsequent decisions of the Court have added even more specificity to the “active supervision” inquiry and, arguably, made it more intrusive. In *Patrick v. Burget*, 486 U.S. 94, 100–101 (1988), the Court held that the active supervision analysis “requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy” so that there is a “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” Subsequently, in *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992), the Court went even further, holding that the party claiming immunity must show that state officials “have undertaken the necessary steps to determine the specifics of price-fixing or rate-setting schemes.” The “mere potential for state supervision” is not enough. *Id.*

⁴⁷ 479 U.S. at 343–44.

⁴⁸ See, e.g., *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 894 n.16 (9th Cir. 2008); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223–24 n.17 (2d Cir. 2004).

⁴⁹ 475 U.S. 260, *passim* (1986).

⁵⁰ 466 U.S. 558 (1984).

sovereignty. Both cases upheld restraints imposed by state or local entities on the ground that such “unilateral” actions by the sovereign body lacked the element of concerted action necessary before they could be characterized as per se violations of Section 1. In *Hoover*, Justice Powell, writing for a closely divided Court, rejected an unsuccessful applicant’s antitrust suit against the attorney members of the Arizona Supreme Court’s Committee on Examinations and Admissions because the conduct being challenged (compiling and grading the state’s bar exam) was deemed to be that of the Arizona Supreme Court acting as sovereign.⁵¹ Because of this, the Court held, it did not matter whether the state supreme court was actually aware of or approved a formula for grading the bar exam developed by the committee members that the plaintiff claimed was meant to restrict competition by limiting the number of lawyers in the state.⁵² In other words, *Midcal* did not apply.

The decision in *Fisher*, which also placed great weight on state sovereignty, attempted to harmonize that concern with the *Midcal* decision. *Fisher* is most instructive for present purposes because it involved a government-imposed price restraint, the City of Berkeley’s rent control ordinance, and because it developed an alternative standard that continues to guide courts in analyzing fair trade provisions.

The Berkeley ordinance at issue in *Fisher* established a base rent ceiling, reflecting the rents in effect on a given date, and only permitted landlords to raise their rents from the levels in effect on that date pursuant either to an annual

⁵¹ *Id.* at 572–73.

⁵² *Id.* at 574. Justice Stevens, joined by Justices White and Blackmun, sharply dissented, noting that the only criteria for admission was competence, that there was no showing that the Arizona Supreme Court played any part in establishing the grading standards for the bar examination, and that, accordingly, “no decision of the sovereign, the Arizona Supreme Court, is attacked; only a conspiracy of petitioners which was neither compelled nor directed by the sovereign is at stake.” He concluded: “[s]ince there is no claim that the court directed petitioners to artificially reduce the number of lawyers in Arizona, petitioners cannot utilize the sovereign’s antitrust immunity.” *Id.* at 591–592 (Stevens, J., dissenting).

general adjustment of rent ceilings by a Rent Stabilization Board of appointed commissioners, or after the landlord successfully petitioned the Board for an individual adjustment. Landlords who failed to comply with the ordinance by registering with the Board faced fines, tenant lawsuits, withholding of rent, or even criminal penalties.⁵³

In upholding the ordinance, the *Fisher* Court recognized that “the function of government may often be to tamper with free markets, correcting their failures and aiding their victims”⁵⁴ It found that “[t]he distinction between unilateral and concerted action is critical here”⁵⁵ and it went on to hold that the restraint created by the ordinance was unilateral, because control over the maximum rent levels of any affected residential unit was removed from the owners of those properties and given entirely to the Rent Stabilization Board. “A restraint imposed unilaterally by government does not become concerted-action within the meaning of [Section 1] simply because it has a coercive effect upon parties who must obey the law.”⁵⁶ Thus, the Court found “no meeting of the minds” between owners of residential property in Berkeley, who had “no more freedom to resist the city’s rent controls than they do to violate any other local ordinance enforced by substantial sanctions.”⁵⁷

The *Fisher* Court attempted to distinguish the restraints in that case from those condemned in *Schwegmann* and *Midcal*, holding that the latter should be characterized as “hybrid” restraints, because “non-market mechanisms merely enforce private marketing decisions.”⁵⁸ The Court explained that where private actors are granted a degree of private regulatory power, the scheme can be challenged as a hybrid restraint under Section 1.⁵⁹ The restraints in

⁵³ *Id.* at 262–63.

⁵⁴ *Id.* at 264.

⁵⁵ *Id.* at 266.

⁵⁶ *Id.* at 267.

⁵⁷ *Id.*

⁵⁸ *Id.* at 267–68 (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 665 (1982) (Stevens, J., concurring in judgment)).

⁵⁹ *Id.* at 268.

Schwegmann and *Midcal* mandated resale price maintenance, at the time a per se offense, and placed control over the prices to be charged in the hands of private parties rather than allowing the state direct control or the exclusive power to enforce price levels.⁶⁰ Thus, they were condemned. The rent control ordinance in *Fisher*, by contrast, ostensibly allowed no private control over pricing, so it was upheld.

The Court's decision in *Fisher* can, in most ways, be seen as a reaffirmation of *Parker*'s notion of state sovereignty⁶¹ and of the need for those challenging restraints to prove concerted action involving the state.⁶² But *Fisher* also further complicated what had already been a complex analysis. As Justice Brennan, the sole dissenter in the case, noted, the Berkeley ordinance mandated price fixing with the force of law and utterly eliminated price competition more effectively than any private agreement could.⁶³ Thus, he argued, it plainly "demand[ed] private conduct which the Sherman Act forbids,"⁶⁴ which means it should have been preempted if the Court followed that holding from *Schwegmann*.⁶⁵ Moreover, Justice Brennan noted that the Court's prior decisions did not draw any distinction between "unilateral" and "hybrid" government restraints, and the

⁶⁰ *Id.* at 268–69.

⁶¹ Indeed, Justice Powell, in his concurrence, asserted that so long as the State of California expressly delegated to Berkeley regulatory power that would foreseeably lead to the anticompetitive effects challenged, the ordinance could be exempt under the state action doctrine. *Id.* at 270–71 (Powell, J., concurring). Consistent with his opinion in *Hoover*, he, apparently, would have ignored *Midcal*'s "active supervision" requirement altogether.

⁶² While there was a "meeting of the minds" between the City of Berkeley's government and those subject to the ordinance, there was no such concerted action between competing property owners themselves, and the *Fisher* Court required such concerted action. Justice Brennan, in his dissent, explicitly objected to this requirement, stating, "I do not read our decisions necessarily to require proof of such concerted action as a prerequisite to a finding of preemption." *Id.* at 275.

⁶³ *Id.* at 276–78.

⁶⁴ *Id.* at 276.

⁶⁵ *Id.* at 277 n.2.

question of state supervision was relevant only to whether the challenged statutes were immune from antitrust scrutiny under *Parker*.⁶⁶ And, most intriguing for present purposes, Justice Brennan observed that had the ordinance allowed the individual landlords to set their own rental prices, he might understand the Court's conclusion that the resulting price restraints did not result from collective action. But, because the ordinance did not permit this but instead compelled adherence to rent schedules, it did amount to concerted action and compelled price fixing in violation of Section 1.⁶⁷ This view seems more in line with *Schwegmann*, but it would plainly be in tension with *Midcal* and its progeny. Furthermore, it points to fundamental tensions at the heart of the "unilateral" versus "hybrid" analysis when applied to price restraints. As demonstrated below, these tensions have never been adequately resolved.

D. The Doctrinal Tension in Current Law on State Action Immunity

At least since the Court's decision in *Fisher* added a distinction between "unilateral" and "hybrid" restraints, the law on state action immunity has been, as one court explained, "doctrinally confusing" and "extraordinarily elusive."⁶⁸ On the one hand, there are the *Midcal* and *324 Liquor* precedents and their progeny. They seem to suggest that proof of conspiracy/concerted action may not be required for a state statute to be successfully challenged. In addition, they explicitly require a party seeking to rely on state action immunity or a state seeking to uphold a fair trade provision to meet the two part *Midcal* test for the provision to be entitled to antitrust immunity under *Parker*. On the other hand, we have *Fisher*, which explicitly requires a finding of concerted action for a statute to be challenged. *Fisher* also seems to hold that if a statute can be characterized as

⁶⁶ *Id.*

⁶⁷ *Id.* at 278.

⁶⁸ *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 888 (9th Cir. 2008).

creating a “unilateral” as opposed to a “hybrid” restraint, there is no “concerted action” and the statute will be immune from scrutiny, even if it compels price fixing. Further complicating matters is *Parker v. Brown* itself, which upheld a restraint that might not pass muster under current understanding of either standard.⁶⁹

Lower courts have struggled with the question of whether a restraint is “unilateral” and therefore likely to be upheld, or a product of concerted action, “hybrid,” and therefore subject to the *Midcal* two part test. This has led to some inconsistent results and a serious conflict between the circuits, even when analyzing the exact same agreement. For example, both the Second⁷⁰ and Third Circuits⁷¹ found that the Master Settlement Agreement (MSA) entered into between the nation’s largest tobacco companies and the Attorneys General of forty-six states created an illegal cigarette price fixing cartel. The Sixth and Ninth Circuits held otherwise, however, ruling that the MSA was a unilateral action by the states and entitled to immunity.⁷²

In *Costco*, the Ninth Circuit recognized the ambiguities in current law, and attempted to harmonize it as follows:

[O]nce we determined that a restraint is unilaterally imposed by the state as sovereign, *Parker* immunity applies without further inquiry. If the restraint is not unilaterally imposed, but rather involves “a

⁶⁹ The prorate marketing plans contemplated in the California Agricultural Prorate Act would only be established upon the petition of ten competing producers, and the program would only be instituted if consented to by a super majority of those competing producers in a particular geographical zone. *Parker v. Brown*, 317 U.S. 341, 346–47 (1943). Thus, nonmarket mechanisms were enforcing private marketing decisions, and the Prorate Act created “hybrid” restraints. Given that the producers were given the final say on the marketing plans, the “supervision” of those plans may not have been seen as adequate by later courts.

⁷⁰ See *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

⁷¹ *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001).

⁷² See *Tritent Int’l Corp. v. Kentucky*, 467 F.3d 547 (6th Cir. 2006); *Sanders v. Brown*, 504 F.3d 903, 918–19 (9th Cir. 2007).

state's decision to let producers dictate market conditions to others," it is a hybrid restraint that is "illegal per se under the Sherman Act." *Parker* immunity applies to the hybrid restraint only if it satisfies the two part *Midcal* inquiry.⁷³

While this statement appears to be a reasonably clear articulation of these competing doctrines, the *Costco* court itself recognized a substantial overlap between the active supervision question and the hybrid inquiry. Namely, if a restraint is deemed "hybrid," private actions are not likely to be subject to sufficiently active supervision by the state. More important, as will be explained below, decisions like *Costco* give insufficient consideration to the question of concerted action. In light of the Court's decision in *Leegin*, this is now a far more vexing issue than before.

III. THE DOCTRINE IN PRACTICE: TWO RECENT DECISIONS APPLYING THE DOCTRINE TO STATE FAIR TRADE ACTS

Two recent decisions by lower courts illustrate some of the internal inconsistencies and ongoing tensions in the state action doctrine. They also highlight the continuing practice of the courts to assume concerted action among competitors and inadequately consider the effects of the new rule allowing vertical restraints to be judged under the rule of reason. In the first, the Eastern District of Wisconsin struck down a minimum markup provision, the Motor Vehicle Fuel Provisions of the Wisconsin Unfair Sales Act, as being a per se unlawful "hybrid" restraint that was not adequately supervised.⁷⁴ In the second, the Ninth Circuit upheld, in part, restraints on the sale and distribution of beer and wine in Washington state, including a minimum markup provision, but struck down a "post-and-hold" requirement in that scheme.⁷⁵

⁷³ *Costco*, 522 F.3d at 887 (citation omitted).

⁷⁴ *Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848 (E.D. Wis. 2009).

⁷⁵ *Costco*, 522 F.3d 874.

A. The Wisconsin Unfair Sales Act Invalidated

Recently, Judge Rudolph Randa of the Eastern District of Wisconsin struck down the motor vehicle fuel provisions of the Wisconsin Unfair Sales Act⁷⁶ on the ground that they were preempted by the Supremacy Clause of the United States Constitution⁷⁷ and violated Section 1.⁷⁸ Judge Randa's opinion, which reaches the same result as a different judge of the same court in *Lotus Business Group LLC v. Flying J, Inc.*,⁷⁹ is deceptively straightforward. The court found these provisions of the act amounted to both a per se horizontal restraint and violated the rule of reason. In addition, the court found that they were not saved from preemption under the *Parker* doctrine. In particular, the provisions were held to have failed the two part test set forth in *Midcal*,⁸⁰ because they were not "actively supervised" by the state.⁸¹

The Motor Vehicle Provisions of the Wisconsin Unfair Sales Act prohibited, among other things, retailers of motor fuel from selling fuel below their cost.⁸² The statute explained retailers' cost as follows:

In the case of the retail sale of motor vehicle fuel by a person other than a refiner or a wholesaler of motor vehicle fuel at a retail station, the invoice cost of the motor vehicle fuel to the retailer within ten days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel, *plus a*

⁷⁶ WIS. STAT. § 100.30 (2009).

⁷⁷ U.S. CONST. art. VI.

⁷⁸ *Flying J*, 597 F. Supp. 2d at 855–60.

⁷⁹ 532 F. Supp. 2d 1011 (E.D. Wis. 2007).

⁸⁰ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

⁸¹ *Flying J*, 597 F. Supp. 2d at 856.

⁸² WIS. STAT. § 100.30(3).

*markup of 6% of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.*⁸³

The statute defined “average posted terminal price” as:

The average posted rack price, as published by a petroleum price reporting service, at which motor vehicle fuel is offered for sale at the close of business on the determination date by all refiners and wholesalers of motor vehicle fuel at a terminal plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale, any cost incurred for transportation and any other charges that are not otherwise included in the average posted rack price. In this paragraph, “average” means the arithmetic mean.⁸⁴

Thus, as the *Lotus Business Group* court found, the 9.18% markup, which would apply in most circumstances where the average terminal price exceeded the retailers’ actual costs, was not based on the actual cost to the retailer. Instead, it was based on the “average price” available to the retailer and its competitors.⁸⁵ As a consequence, the average price might be significantly higher than the actual cost to the particular retailer.⁸⁶

The *Lotus* action began as an unfair competition claim under the statute brought by Lotus Business Group, one of Flying J’s competitors. Flying J removed the case to federal

⁸³ *Id.* § 100.30(2)(am)(1m.c.) (emphasis added).

⁸⁴ *Id.* § 100.30(2)(a).

⁸⁵ *Lotus Bus. Group LLC v. Flying J, Inc.*, 532 F. Supp. 2d 1011, 1022 (E.D. Wis. 2007).

⁸⁶ *Id.* The purpose of this statute was to restrain the “practice of selling certain items of merchandise below cost” and to “protect merchants who fail because of the competition of those who used such methods.” WIS. STAT. § 100.30(1). The specific purported purpose of the 9.18% markup above average terminal cost was to “cover a proportionate part of the cost of doing business.” *Id.* § 100.30(2)(1m.c.).

court and raised preemption as an affirmative defense. It is unclear whether Flying J was making a facial or an “as applied” challenge to the statute.

The *Lotus* court granted Flying J’s motion for summary judgment on its preemption defense. The court held that these provisions of the Wisconsin Unfair Sales Act fixed resale prices industry-wide in violation of Section 1 of the Sherman Act and were not immune from antitrust scrutiny under *Parker v. Brown*. In particular, the court determined that the statute failed to meet the *Midcal* test. The court found that the Wisconsin statute met the first *Midcal* requirement since the legislative policy underlying the markup system was “forthrightly stated and clear in its purpose.”⁸⁷ However, the statute failed the second prong, because the state did not actively supervise either the “cost to retailers” or the minimum markup percentage.⁸⁸ As a result, the court granted summary judgment in favor of Flying J. On motion for reconsideration, the court held that even applying the decision of the Supreme Court in *Leegin* would not change the result, both because the statute “facilitate[s] the creation of horizontal price fixing,” and because the plaintiff submitted insufficient procompetitive justification for the markups.⁸⁹

Even after being informed of the ruling in the *Lotus* matter, the State of Wisconsin, nevertheless, continued to require Flying J and other motor fuel retailers to issue pricing reports to the State Department of Agriculture under the statute.⁹⁰ Flying J, therefore, brought a second action to enjoin Wisconsin from enforcing the Unfair Sales Act. Although not specified in the opinion, Flying J’s challenge appears to have been facial, that is, it asserted that the statute mandated or authorized conduct that necessarily violated the Sherman Act, was irreconcilable with the federal scheme, and therefore was preempted.

⁸⁷ *Lotus Bus. Group*, 532 F. Supp. 2d at 1019.

⁸⁸ *Id.* at 1021–25.

⁸⁹ *Id.* at 1027–29.

⁹⁰ *See Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848, 853 (2009).

The *Flying J* court agreed. It held that the act “authorizes and enforces resale price maintenance among competitors, a ‘per se’ violation of Section 1 of the Sherman Act since the early years of national antitrust enforcement.”⁹¹ It reached this conclusion by finding that “the Act allows motor fuel retailers to match (but not undercut) their competitors’ prices.”⁹² The court went on to hold that the “minimum markup percentage creates a range in which competitors may engage in collusive parallel pricing, which is exacerbated as the wholesale price of gasoline fluctuates.”⁹³ Thus, the court concluded, the Act “authorizes and enforces a parallel (or horizontal) pricing policy,”⁹⁴ even though no evidence of actual parallel pricing was presented. It likened the policy to that in *324 Liquor Corp.*, which it quoted as follows: “mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition.”⁹⁵

The State of Wisconsin had argued that the Unfair Sales Act did not violate the Sherman Act because there was no concerted action. Relying on *Fisher*, it characterized the markup provision as a unilateral act of its legislature. But, the court held that the Unfair Sales Act price restraints should be characterized as “hybrid in that nonmarket mechanisms merely enforce private marketing decisions.”⁹⁶ Concluding, the court stated that because the state compelled retailers to follow a parallel price policy, it demanded private conduct forbidden by the Sherman Act.⁹⁷

⁹¹ *Id.* at 856 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987)).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 856–57 (quoting *324 Liquor*, 479 U.S. at 342).

⁹⁶ *Id.* at 856 (discussing *Fisher v. City of Berkeley*, 475 U.S. 260, 267–68 (1986)).

⁹⁷ *Id.* at 857 (quoting *Fisher*, 475 U.S. at 268).

The court also rejected the state's argument that the provisions should be judged under the rule of reason pursuant to *Leegin*, stating that the restraint here is "also horizontal because it effects [sic] competing gasoline retailers in Wisconsin."⁹⁸ But, the court went on to hold that the Unfair Sales Act also violated the rule of reason, basing this conclusion on a Federal Trade Commission study and a report from the Wisconsin Policy Research Institute, both of which concluded that the Unfair Sales Act restricted competition and harmed consumers in the form of higher gas prices.⁹⁹

The court dealt separately with Wisconsin's claim of antitrust immunity. Like the *Lotus* court, it held that the statute met the first part of *Midcal* test; that the challenged restraint be clearly articulated and affirmatively expressed as state policy.¹⁰⁰ The court then turned to the issue of active supervision.

The state had argued that the Unfair Sales Act met the active supervision requirement because it did not delegate any degree of control over the markup percentage to private parties.¹⁰¹ It relied on statements from the Court in *324 Liquor* suggesting that a simple minimum markup statute over wholesale cost may satisfy the "active supervision" requirement.¹⁰² However, the court pointed out that, like the markup in *324 Liquor*, this markup was not based on actual costs. "Instead, it is based on the average posted terminal price without regard to actual costs."¹⁰³ As the court observed, the average posted terminal price may be

⁹⁸ *Id.* (citing *Lotus Bus. Group LLC v. Flying J, Inc.*, 532 F. Supp. 2d 1011, 1028 (E.D. Wis. 2007) ("to the extent the provisions of the Wisconsin statute create vertical price restraints, they also facilitate the creation of horizontal price fixing")).

⁹⁹ *Id.* The state apparently did not submit any evidence to rebut these two studies, and it failed to explain why the Motor Vehicle Provision of the Unfair Sales Act created a reasonable restraint.

¹⁰⁰ *Id.* at 858 (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

¹⁰¹ *Id.*

¹⁰² *Id.* (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.6 (1987)).

¹⁰³ *Id.*

significantly higher than the actual cost to a particular retailer.¹⁰⁴

Thus, the court required some type of state supervision with regard to both the markup and the average posted terminal price. The state's supervision failed in this instance, the court found, in part because there was no program or effort to determine whether the average posted terminal price "bears a close (or any) relationship to the actual price paid by retailers."¹⁰⁵ It likened Wisconsin's statute to the arrangement condemned in *Midcal*, where the state "simply authorize[d] price setting and enforce[d] the price established by private parties."¹⁰⁶ The court also found that the Unfair Sales Act's markup percentages were not adequately supervised. They were changed only once in their history, and, the court noted, the FTC had said the percentages appeared to be "completely arbitrary" and did not reflect a "proportionate part of the cost of doing business."¹⁰⁷

Finally, the court rejected the state's arguments that its supervision was adequate because it "undertakes enforcement efforts to ensure compliance with the Unfair Sales Act" and "engages in analysis at the administrative and legislative level."¹⁰⁸ Regarding the former, the court pointed out that the enforcement efforts "do nothing to ensure the reasonableness of gas prices in Wisconsin," and that "enforcement matters little when the Act being enforced creates a horizontal pricing mechanism."¹⁰⁹ As for the legislative and administrative debates, the court found, "[m]ere debate or discussion without the undertaking of any action, does not satisfy the active supervision

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 859 (quoting *Lotus Bus. Group LLC v. Flying J, Inc.*, 532 F. Supp. 2d 1011, 1023 (E.D. Wis. 2007)).

¹⁰⁶ *Id.* (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

¹⁰⁷ *Id.* at 859 n.2.

¹⁰⁸ *Id.* at 859.

¹⁰⁹ *Id.*

requirement.”¹¹⁰ Therefore, the court held the motor vehicle fuel provisions of the Act unconstitutional and permanently enjoined the state from enforcing them.¹¹¹

In most respects, the *Flying J* court’s decision seems to be a faithful application of existing precedent. However, two things about it stand out. First, the court took a very active role in scrutinizing the statute. It went so far as to consider whether it actually achieved its stated goal of preventing below-cost sales (which it almost surely did) using what was almost a least-restrictive means test, condemning the markup because it was based on something other (and higher) than actual wholesale cost. It required “active supervision” both of the markup percentage and of the base “posted terminal price,” and condemned the statute for failing in those respects. This type of scrutiny seems to run afoul of *F.T.C. v. Ticor Title Ins. Co.*, which stated that “[t]he question is not how well state regulation works but whether the anticompetitive scheme is the State’s own.”¹¹²

Second, and more important for present purposes, the court seems to have gone out of its way to find a per se restraint, even though there was, apparently, no evidence of horizontal agreements and little evidence of parallel pricing. Such a finding may have been necessary for the court to sustain a facial challenge, but in reading the opinion, one cannot escape the feeling that the court was troubled by the statute and was looking for reasons to invalidate it. To be sure, there may have been ample evidence of anticompetitive effects in the FTC study submitted by the plaintiffs, but mere anticompetitive effect, without more, is not supposed to be enough. These considerations are discussed in more detail in the next section. In short, this decision gives too little attention to the concerted action requirement and the change in the inquiry that *Leegin* presents, and, arguably,

¹¹⁰ *Id.* (quoting *Lotus Bus. Group*, 532 F. Supp. 2d at 1024 and citing 324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.7 (1987) and Patrick v. Burget, 486 U.S. 94, 101 (1988)).

¹¹¹ *Id.* at 860.

¹¹² 504 U.S. 621, 635 (1992).

too little deference to a statutory scheme that had been in place for nearly seventy years.¹¹³

B. Washington State's Restrictions on Sale of Beer and Wine Upheld In Part

In *Costco*, the Ninth Circuit considered a challenge to Washington State's more comprehensive scheme of regulating beer and wine distribution.¹¹⁴ Costco filed suit challenging nine specific restraints found in the Revised Code of Washington and several implementing regulations.¹¹⁵ The restraints included a "uniform pricing" rule (banning price discrimination by requiring every supplier to sell a particular product at the same price to every distributor and requiring every distributor to sell those products to every retailer at the price they post); a price "post-and-hold" requirement (requiring distributors to file price lists showing wholesale prices with the Washington Liquor Control Board, which become publicly available after taking effect, and to hold those prices for 30 days); a minimum markup provision (requiring distributors and suppliers to price products at 10% above acquisition cost); a ban on volume discounts; a ban on sales of beer and wine to retailers on credit; a requirement that distributors sell beer and wine at the same delivered price to all retailers; a ban on central warehousing by retailers, and a ban on selling beer and wine to other retailers.¹¹⁶

The district court invalidated all of these restraints but the last one (the ban on retailer to retailer sales).¹¹⁷ The

¹¹³ The State of Wisconsin decided not to appeal this decision. Recently, however, the Seventh Circuit Court of Appeals held that an association of Wisconsin retail gasoline dealers could intervene in the case on appeal. *Flying J, Inc. v. Van Hollen*, No. 09-1883, 2009 WL 2535712 (7th Cir. Aug. 20, 2009).

¹¹⁴ *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 883–85 (9th Cir. 2008).

¹¹⁵ WASH. REV. CODE §§ 66.28.180, 66.28.185, 66.28.070 (2006).

¹¹⁶ *Costco*, 522 F.3d at 883–85.

¹¹⁷ *Costco Wholesale Corp. v. Hoen*, No. C04-360P, 2006 WL 1075218, at *9–11 (W.D. Wash. Apr. 21, 2006).

Ninth Circuit agreed that the ban on retailer to retailer sales should be upheld, finding that the restraint was unilateral and, even though the statute had a potential anticompetitive effect, it was “not the result of private pricing or marketing decisions, but the logical and intended result of the statute itself.”¹¹⁸ But, it reversed the district court on the central warehousing ban, the uniform pricing and anti-price discrimination requirements, and the minimum markup requirements, upholding each as “unilateral” restraints.¹¹⁹ The court deemed the central warehousing ban to be “akin to a non-price vertical restraint that would be evaluated under the Rule of Reason.”¹²⁰ And, the mere fact that the regulation may have created an anticompetitive effect because it rendered Costco unable to “efficiently” buy in bulk, was, the court found, not the result “of the distributor’s choice or collusion, but of the sovereign’s command.”¹²¹ That restraint was, therefore, deemed “unilateral.”¹²²

By contrast, the *Costco* court held that the uniform pricing provisions, the delivered pricing provisions, the ban on credit sales, the ban on discounts, and the minimum markup provisions were all per se violations.¹²³ It made this finding in the absence of any evidence of actual collusion among competitors, holding, for example, that the minimum markup provision was a per se violation “because if horizontal competitors were to agree amongst themselves to mark up their products at least at a level above acquisition price, it would constitute classic price fixing.”¹²⁴ In other words, the court found concerted action based on what could happen if these terms were the product of private agreement, not on whether there was such an agreement. Moreover, the court did not consider whether the minimum markup

¹¹⁸ *Costco*, 522 F.3d at 890 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 221e4 (3d ed. 2009)).

¹¹⁹ *Id.* at 901.

¹²⁰ *Id.* at 891 n.11.

¹²¹ *Id.* at 891–92.

¹²² *Id.* at 901.

¹²³ *Id.* at 897 n.19.

¹²⁴ *Id.* (emphasis added).

provisions, or the bans on credit sales or discounts, should be treated as vertical restraints not subject to per se treatment, even though *Leegin* would seem to support that result.

Nevertheless, the *Costco* court held that these provisions were “unilateral” restraints imposed by the state, severable from the post-and-hold provisions (which, as will be discussed later, it struck down), because there was no “meeting of the minds” to determine, for example, how substantial the discounts would be, whether territorial variations in price would be allowed, or whether credit would be extended, etc.¹²⁵ While the *Costco* court was almost surely correct that there was, indeed, no meeting of the minds between competitors, this conclusion seems difficult to reconcile with the court’s earlier conclusion, that these restraints were per se unlawful, and it renders this aspect of its opinion incoherent.

Furthermore, unlike the *Flying J* court, the *Costco* court found that the minimum markup provisions and the uniform price requirement were unilateral restraints, even though they granted some discretion on the part of wholesalers (to price above the 10% markup; to set their own “uniform” price), because these were not grants of discretion that allowed private parties to manipulate or control the price decisions of other firms or otherwise facilitate horizontal price collusion.¹²⁶

On the other hand, the court struck down the post-and-hold provisions. It held that they were likewise a per se violation of Section 1 because they are “highly likely to facilitate horizontal collusion among market competitors.”¹²⁷ But, it also held that they were a “hybrid” restraint because they were likely to facilitate horizontal collusion due to their requirement that prices be posted, publicly available to competitors, and adhered to for 30 days.¹²⁸ In that sense, the

¹²⁵ *Id.* at 898.

¹²⁶ *Id.* at 899–900.

¹²⁷ *Id.* at 896 (“State enforcement of adherence to privately-set supra-competitive prices is precisely the danger which the Supreme Court envisioned in crafting the hybrid and active supervision tests.”).

¹²⁸ *Id.* at 895.

court found, they were similar to the Oregon post-and-hold scheme condemned by the Ninth Circuit twenty years earlier in *Miller v. Hedlund*.¹²⁹

Most important for the present purposes, the *Costco* court also expressly disapproved of Judge Friendly's opinion for the Second Circuit in *Battipaglia v. New York State Liquor Authority*,¹³⁰ which more closely examined the evidence in that case of actual concerted action. Judge Friendly had held that such post-and-hold type restraints were not per se violations, but should be judged under the rule of reason because (1) the argument that an agreement among the wholesalers could have been inferred if the wholesalers had voluntarily done what they were compelled to do by statute is "simply too 'iffy'";¹³¹ and (2) such restraints only mandated the exchange of price information, which has never been held by the Supreme Court to necessarily constitute a violation of the antitrust laws in all cases.¹³² Such a price fixing agreement could only be found where defendants, in addition to agreeing to exchange price information, engaged in "conscious parallelism" (i.e., identical or nearly identical pricing), and were in a market that exhibited "plus" factors like inelastic demand, high market concentration, and lack of product differentiation.¹³³

The Ninth Circuit in *Costco* expressly disapproved of the above reasoning, and, as in *Miller*, it suggested an actual contract, combination, or conspiracy need not be shown.¹³⁴

¹²⁹ *Id.* at 901; see also *Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987).

¹³⁰ *Id.* at 893–94 (discussing *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166 (2d Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)).

¹³¹ *Battipaglia*, 745 F.2d at 173.

¹³² *Id.* at 174 (discussing *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982)).

¹³³ *Id.* at 174–175 (citation omitted).

¹³⁴ *Costco*, 522 F.3d at 894 n.16; see also *Miller*, 813 F.2d at 1349 ("While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to publicly posted prices . . . Simply ending the analysis because of the lack of

As discussed above, this conclusion seems to ignore the holdings of *Fisher* and *Parker*, and the decision itself gives no consideration to *Leegin*. Overall, however, the Ninth Circuit's approach does give greater deference to the state's regulatory scheme than was shown in *Flying J*.

In sum, while the opinions in *Flying J* and *Costco* were well-reasoned within the rather confusing parameters of existing state action doctrine, they reach arguably inconsistent results. Furthermore, they give short-shrift to the issue of whether there was any real evidence of concerted action between competitors, and they do not fully consider the impact of *Leegin* on their facts. Such oversights as these lead to some questionable outcomes, and even where the outcomes reached may be appropriate, the analyses are often inconsistent, if not incoherent and needlessly complicated.

IV. THE LEEGIN DECISION AND ITS POTENTIAL IMPACT

The Supreme Court's recent decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹³⁵ coupled with its past decisions on "conscious parallelism" and the requirements for pleading and proving conspiracy culminating in *Bell Atlantic Corp. v. Twombly*,¹³⁶ may fundamentally alter what was already a complex and somewhat inconsistent doctrine. If these decisions are to be applied to fair trade acts, litigants challenging such acts can no longer rely on a presumption of illegality or concerted action arising from evidence of vertical price fixing. Evidence of such vertical restraints alone will not be sufficient to sustain a facial challenge, and mere evidence of parallel conduct among those subject to a statute's regulation may not be enough to support an inference of conspiracy. "As applied" challenges to vertical restraints, to the extent they are permissible, now require proof of actual competitive harm, and states should be

concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.").

¹³⁵ 551 U.S. 877 (2007).

¹³⁶ 550 U.S. 544 (2007).

permitted to defend themselves with evidence of procompetitive benefits.

On the other hand, more rigorous application of the concerted action requirement, in light of existing precedent, could lead to a cleaner and more predictable set of outcomes for litigants (including possibly dispensing with the "unilateral" versus "hybrid" analysis), provided courts are willing to be consistent and embrace the implications of their reasoning in other contexts. Because vertical price restraints are no longer per se unlawful, it should no longer matter whether they can be characterized as unilateral or hybrid or whether they are adequately supervised. The main evil the courts will want to prevent is unsupervised concerted action between competitors.

A. Facial Challenges Should Now Require Proof of Horizontal Conspiracy

The most obvious impact of the *Leegin* decision in this context is that facial challenges to state fair trade acts can no longer be based on claims that such acts mandate vertical price restraints. In *Leegin*, the Supreme Court overruled *Dr. Miles* and held that vertical price restraints were to be judged under the rule of reason.¹³⁷ Thus, litigants are now required to present evidence that vertical price restraints actually harm competition. But evidence of anticompetitive vertical restraints, without more, should not be sufficient to sustain a facial challenge to state fair trade statutes.

While the courts have not yet squarely addressed *Leegin*'s likely impact on facial challenges, the Supreme Court has long held that "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy."¹³⁸ State statutes are "not preempted by the federal antitrust laws

¹³⁷ *Leegin*, 551 U.S. at 907.

¹³⁸ *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (upholding a California statute requiring that importers of distilled spirits be designated as authorized importers by a distiller or its agent, because the statute did not create a per se violation).

simply because the state scheme may have an anticompetitive effect.”¹³⁹ Rather, the *Rice* Court found, preemption is limited to statutes that “mandate[] or authorize[] conduct that necessarily constitutes a violation of the antitrust laws in all cases”¹⁴⁰ State statutes will thus only be condemned if the conduct they mandate “is in all cases a per se violation.”¹⁴¹ A rule of reason analysis, which requires an examination of the circumstances underlying a particular practice, “does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.”¹⁴² It follows that since vertical resale price maintenance is no longer a per se offense, a litigant wishing to challenge a state fair trade act as being facially invalid should now be required to plead and prove the state’s participation in or authorization of an actual horizontal price fixing conspiracy, which is still condemned as a per se violation of Section 1, before a court even considers the issue of immunity.

This may be easier said than done. In the numerous Supreme Court cases discussing vertical restraints imposed by states, there is often little evidence of actual horizontal conspiratorial conduct, and lower courts seem to ignore or finesse this issue. To take one recent but by no means atypical example discussed in the last part, the *Flying J* court held that the minimum markup imposed by the Wisconsin Unfair Sales Act was “horizontal” because it affected competing gasoline retailers in Wisconsin; it made no findings of actual horizontal conduct and appears to have been merely aligning itself with the analyses in *Midcal* and *324 Liquor*.¹⁴³ Dealing with facts closer to those in *324*

¹³⁹ *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986) (quoting *Rice*, 458 U.S. at 659).

¹⁴⁰ *Rice*, 458 U.S. at 661.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848, 856 (E.D. Wis. 2009). *324 Liquor*, for its part, simply assumed that the facts in *Midcal* involved horizontal price fixing, because the state required wholesalers to adhere to a single fair trade contract in a geographical area.

Liquor than *Midcal*, the *Flying J* court seems to have assumed that because the Unfair Sales Act required a markup over “average posted terminal price,” it enforced a horizontal pricing policy, even though no evidence was presented of horizontal agreements, or for that matter, parallel pricing among competitors, or price-posting.¹⁴⁴ Even if there was evidence that retailers were pricing similarly, it could certainly be argued that those retailers were merely making pricing decisions in compliance with requirements imposed unilaterally by state law. A ban on discount sales also creates a “horizontal” pricing policy in the sense that all competitors must follow the same practice, and seems to be analytically indistinguishable from a markup provision, yet such a ban was upheld by the *Costco* court.¹⁴⁵ Indeed, confronted with a similar markup provision as in *Flying J*, the *Costco* court reached the opposite result, upholding a minimum markup provision as “unilateral” even though it held that such provisions were per se violations.¹⁴⁶ Thus, under existing precedent, whether certain conduct is “horizontal” and should be unlawful may depend more on how the issue is framed by the reviewing court than on any coherent principles. It also seems that it might have been easier for both of these courts simply to consider whether there was unsupervised concerted action between competitors subject to the statute.

Moreover, current law requires litigants suing for violations of Section 1 in every other context to allege and prove far more than just some likelihood of parallel conduct. The Court has long held that a mere showing of parallel business behavior falls short of conclusively establishing

See 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987). But, the 324 *Liquor* Court also held that the violation in its case was purely a matter of vertical price fixing. *Id.*

¹⁴⁴ See *Flying J*, 597 F. Supp. 2d at 856.

¹⁴⁵ *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 901 (9th Cir. 2008).

¹⁴⁶ *Id.* at 899.

agreement or itself constituting a Sherman Act offense.¹⁴⁷ Even “conscious parallelism” is not unlawful and does not establish a contract, combination, or conspiracy in violation of the Sherman Act.¹⁴⁸ To escape summary judgment, a plaintiff must include evidence tending to exclude the possibility of independent action,¹⁴⁹ and that evidence must tend to rule out the possibility of independent action among the defendants.¹⁵⁰ In *Twombly*, of course, the Court applied the coup de grace, requiring antitrust plaintiffs to *plead* allegations of conspiracy supported by enough facts “to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” In other words, allegations must be based on facts plausibly suggesting (not merely consistent with) an agreement, rather than mere parallel conduct.¹⁵¹

It hardly seems necessary to point out that the evidence of horizontal conduct discussed by the *Flying J* and *Costco* courts or, for that matter, the evidence of horizontal conspiracy in any of the Court’s decisions on state fair trade acts, does not even come close to meeting those standards. Moreover, one has to wonder whether the claims as pleaded in these cases or others would survive a consistent application of the judicially-created *Twombly/Iqbal* “plausibility” standard.¹⁵² After all, it is certainly plausible that firms subject to state fair trade regulation may be engaging in similar or parallel pricing because of unilateral decisions by each affected firm to follow the sovereign’s

¹⁴⁷ *Theatre Enters. Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 527, 541 (1954).

¹⁴⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

¹⁴⁹ *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

¹⁵⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹⁵¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553, 556 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–51 (2009). (In all cases, federal courts must discount conclusory claims and bare assertions and, after assuming the truth of the remaining allegations, determine whether complaint states a “plausible” claim for relief).

¹⁵² *Twombly*, 550 U.S. at 556; *Iqbal*, 129 S. Ct. at 1950.

command, rather than engaging in horizontal price fixing agreements. Arguably, without specific allegations of actual agreements between competitors or pricing communications among them, challenges to these statutes might fail at the pleading stage.

Nor is it at all clear that challenges to state statutes should somehow be subject to a lesser standard of proof than challenges to private price fixing arrangements. Indeed, given the high level of concern the Court has long shown for state sovereignty in this area, the opposite may be true. Most of the restraints discussed by the *Costco* court and, arguably, the restraint in *Flying J*, are "vertical" in the sense that they do not require or even facilitate horizontal price fixing. If such purely vertical restraints imposed by the state are no longer deemed to create a per se offense, and if the evidence is that individual market actors subject to that restraint are merely making unilateral decisions to follow the law of the state, even if those actions lead to parallel pricing conduct, it seems that this should not be sufficient, in and of itself, to find that the state statute is per se unlawful. Without more, such statutes must be upheld against facial challenges. Otherwise, state fair trade acts, even those that reflect the clear policy of a state, are being held up to more rigorous scrutiny than private arrangements.

B. Challenges to Vertical Restraints Created by Fair Trade Acts Should Require Proof of Anticompetitive Effect and Defendants Should be Permitted to Introduce Justifications

Assuming a statute is challenged as being unconstitutional as applied in a particular case, and a litigant cannot prove horizontal conspiracy, that litigant might be permitted to challenge the vertical restraint created by the statute under the rule of reason. Again, however, that litigant will have to deal with *Rice* and its progeny, which held that mere anticompetitive effect, without more, is not enough for preemption.¹⁵³ But,

¹⁵³ See *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

assuming a litigant can challenge a statute as applied, it should bear the burden of proving that the restraint created by a state fair trade act actually harms competition in a relevant market. Sometimes, this should be easy, as in *Flying J*, where the plaintiff introduced compelling evidence in the form of two studies concluding that the Wisconsin Unfair Sales Act led to higher prices for consumers.¹⁵⁴ In other cases, it may not be as simple.

Equally intriguing is the inverse, where a state seeks to uphold its fair trade statutes or a litigant seeks to rely on them for its defense. Under *Leegin*, the state or a litigant arguing for upholding a fair trade act (or relying on it as a defense) should now be permitted to introduce evidence of procompetitive effects arising from a particular vertical restraint. What kind of evidence they can provide is likewise an interesting question under prevailing doctrine. The justification for the Miller-Tydings Act was, of course, protection of smaller retail establishments that would otherwise be driven from the marketplace by large volume discounters.¹⁵⁵ A similar justification was embraced by the New York Court of Appeals in *J.A.J. Liquor Store, Inc. v. New York State Liquor Authority*,¹⁵⁶ which was reversed by the U.S. Supreme Court in *324 Liquor*.¹⁵⁷ Specifically, the Court of Appeals suggested that New York's liquor pricing system prevents "temporary price reductions . . . threatening to drive small retailers out of business and consolidating control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers"¹⁵⁸ The *324 Liquor* Court rejected that argument.¹⁵⁹ It probably had no choice but to do so, given that *Dr. Miles* was good law at the time. And, the

¹⁵⁴ *Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848, 857 (E.D. Wis. 2009).

¹⁵⁵ *Schwegmann v. Seagram Distillers Corp.*, 341 U.S. 384, 409 (1951) (Frankfurter, J., dissenting).

¹⁵⁶ 479 N.E.2d 779 (N.Y. 1985).

¹⁵⁷ *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987).

¹⁵⁸ *Id.* at 343 n.5 (quoting *J.A.J. Liquor*, 479 N.E.2d at 788).

¹⁵⁹ *Id.*

current incarnation of the Supreme Court has not shown itself to be amenable to arguments for protecting smaller retailers from price cutting measures imposed by larger retailers taking advantage of economies of scale.¹⁶⁰

Nevertheless, it seems that a state, having seen “intrabrand” competition reduced after smaller retailers are driven out of business by “big box” national chains, might be permitted to make a clear statement of its intention to protect such retailers, to disagree with the Supreme Court’s rote “Chicago school”-type analysis in its predatory pricing cases, and to try to offer some proof of longer term “procompetitive” benefits from such protectionist legislation. Some possible benefits of protectionist legislation (from the state’s standpoint) might be maintaining a greater number of competitors at the retail level and avoiding eventual market dominance by large retail entities. The American Bar Association, in urging Congress not to pass a statute to overturn *Leegin*, has expressed precisely this concern for preserving competition at the retail level, stating that “[t]he per se prohibition on minimum resale price maintenance in force for several decades has had the effect of enhancing the market power of very large retailers that carry a wide variety of products,” enabling them to sell certain products at “loss leader prices” that smaller retailers cannot match, which will result in the disappearance of the smaller retailers.¹⁶¹ Whether all economists will agree with such an

¹⁶⁰ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993) (succeeding on a claim for predatory pricing requires the plaintiff to prove both below-cost retail pricing and a “dangerous probability” that the price-cutting retailer will recoup any lost profits once competitors are eliminated); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

¹⁶¹ Letter from James A. Wilson, Chair of the ABA Section of Antitrust Law, to the Honorable Henry C. Johnson, U.S. House of Representatives, Chairman Subcomm. on Courts and Competition Policy, Comm. on the Judiciary, and the Honorable Howard Coble, U.S. House of Representatives, Ranking Member, Subcomm. on Courts and Competition Policy, Comm. on the Judiciary, at 3 (May 5, 2009), http://www.abanet.org/poladv/letters/antitrust/2009may6_leegincaseh_l.pdf; Joseph Angland, American Bar Association, Recommendation (Feb. 12, 2007),

analysis is an open question, but, ultimately, it may be the wrong question.

Furthermore, *Leegin* itself provides other potential procompetitive justifications for resale price maintenance that fit well within the Court's current doctrinal focus on protecting interbrand competition. The *Leegin* Court noted that "[a]bsent vertical price restraints, the retail services that enhance interbrand competition might be underprovided," because of free-riding discount retailers.¹⁶² It also stated that resale price maintenance could increase interbrand competition "by facilitating market entry for new firms and brands."¹⁶³ And, the Court noted that resale price maintenance might "encourag[e] retailer services that would not be provided even absent free-riding."¹⁶⁴ Offering a retailer a guaranteed margin to provide those services "may be the most efficient way to expand the manufacturer's market share."¹⁶⁵ Any state or litigant seeking to uphold fair trade provisions could be well-advised to advance these and similar arguments to justify vertical price restraints imposed by the state's laws.

C. Applying *Leegin* to State Fair Trade Acts May Obviate the Need to Consider Whether a Restraint Is "Unilateral" or "Hybrid"

As the previous two sections suggest, if courts faithfully apply *Leegin* when analyzing state fair trade acts, an inevitable upshot will be to make proof of concerted action much more difficult. Indeed, given the complexity of

http://www.abanet.org/poladv/letters/antitrust/2009may6_leegincaseh_l.pdf (The ABA "recommends that the Sherman Act, 15 U.S.C. § 1, and comparable state and territorial laws should not be interpreted to apply a rule of per se illegality to agreements between a buyer and a seller setting the price at which the buyer may resell goods or services purchased from the seller").

¹⁶² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

¹⁶³ *Id.* at 891.

¹⁶⁴ *Id.* at 891–92.

¹⁶⁵ *Id.*

determining whether an otherwise vertical restraint imposed by state law creates horizontal concerted action and the difficulties inherent in applying a rule of reason analysis to a vertical restraint, courts might be tempted to reverse the inquiry, that is, to consider first whether the given restraint is immune under existing doctrine and then, if not, to ask whether it creates unlawful concerted action. This would be a mistake because while this approach might be simpler in a few cases, it will not be so in all situations, and it may not lead to the correct result in light of *Leegin*. Furthermore, as will be explained herein, it misses the opportunity that *Leegin* presents to cut through the Gordian Knot that is the “unilateral” versus “hybrid” inquiry.

To conclude that an otherwise vertical restraint is immune under *Parker* and *Midcal*, one must first determine whether it is “unilateral” or “hybrid.” As indicated *supra* in Part IID, the distinction between “unilateral” and “hybrid” restraints drawn in current law was beset by some contradictions and in tension with *Midcal* and its progeny even before the *Leegin* decision. After all, the Court had long held that proof of concerted action was required¹⁶⁶ and that where a state compels parties to adhere to a parallel pricing policy, it demanded private conduct which the Sherman Act forbids.¹⁶⁷ Yet, it made the City of Berkeley’s compelling of landlords to charge rent-controlled prices the touchstone of its determination that the restraint imposed by its rent-control ordinances was unilateral and therefore immune from preemption, despite the fact that it clearly led to horizontal price coordination.¹⁶⁸

Courts since *Fisher* have tried to clarify the distinction between “unilateral” and “hybrid” restraints with varying degrees of success.¹⁶⁹ The upshot seems to be that a restraint

¹⁶⁶ *Fisher v. City of Berkeley*, 475 U.S. 260, 260–67 (1986); *Parker v. Brown*, 317 U.S. 341, 351–52 (1943).

¹⁶⁷ *Schwegmann Bros. v. Seagram Distillers Corp.*, 341 U.S. 384, 389 (1951).

¹⁶⁸ *Fisher*, 475 U.S. at 266.

¹⁶⁹ *Compare* *Costco Wholesale Corp. v. Maleng*, 522 F.3d 574, 589 (9th Cir. 2008) (“The rule to be taken from these cases is that state statutes or

will be deemed hybrid if there is some degree of private power left in the hands of private actors that is not supervised and suppresses competition.¹⁷⁰ As the First Circuit explained: “What is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not state directives that by themselves limit or reduce competition.”¹⁷¹ Drawing a clear line between these two types of statutes has, as we have seen, proven exceedingly difficult.

Before *Leegin*, of course, it could be presumed that vertical price restraints suppress competition. Therefore, many courts understandably gave less attention to the question of whether an anticompetitive arrangement between private parties existed, and simply moved on to consider whether the restraint was unilateral or hybrid. Most vertical restraints created by state law are, however, unilateral in the sense that they are commands of the sovereign (e.g., no discounts, no sales on credit, no central warehousing by retailers, application of a minimum markup over wholesale) and do not allow private actors any leeway to dictate market conditions to others except, perhaps, to follow the state’s command in dealing with vertical counterparties in contracts, as where a retailer must charge a certain

local ordinances creating unsupervised private power in derogation of competition are subject to preemption.”), *with Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004) (“Where the anticompetitive effects of a state statute obviate the need for private parties to act on their own to create an anticompetitive scheme, the statute may be attacked as a ‘hybrid’ restraint on trade.”). The *Costco* formulation seems to fall in line with precedent; the *Freedom Holdings* definition of a “hybrid” restraint seems indistinguishable from the restraints upheld as “unilateral” in *Fisher*, *Sanders*, *Costco*, and other cases.

¹⁷⁰ But see *Parker v. Brown*, 317 U.S. 341, 346–47 (1943). Specifically, *Parker* upheld a California law that allowed competing agricultural producers to establish proration marketing programs in particular production zones to restrict competition and maintain prices, even though the program had to be approved by a majority of producers in a particular zone, and, if approved, the State Director of Agriculture was required to institute it.

¹⁷¹ *Massachusetts Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 565 (1st Cir. 1999) (emphasis omitted).

markup percentage over what it paid to a wholesaler. Given that anticompetitive effect can no longer be presumed from such transactions, it should not matter whether they are “adequately supervised” or can somehow be called “hybrid.” Instead, after *Leegin*, the only valid question should be whether they create per se unlawful concerted action, which should now be limited to unsupervised meetings of the minds between competitors. In most cases, they do not and should ordinarily be upheld without any further need to determine whether they are immune.

Skipping the concerted action step, or assuming it, as some courts still do, does not make the analysis any easier, and may lead to the wrong result. While it could be argued that the “post-and-hold” provisions in *Costco* created concerted action or a hybrid restraint,¹⁷² the Wisconsin minimum markup statute condemned in *Flying J* presents a far more difficult question. There was no price-posting scheme required by the Wisconsin statute, nor anything but the court’s speculation that competing retailers were actually coordinating parallel pricing policies.¹⁷³ Rather, the evidence appears to have been that they were following a directive from the state to include a minimum markup over an “average terminal price” published by a price reporting service, and to issue price reports to the state, not to their competitors.¹⁷⁴ The state had authority to enforce those provisions, and to the extent that the state alone was enforcing them, it could certainly be argued that this scheme did not involve an “arrangement between business partners

¹⁷² See *Costco*, 522 F.3d at 895–96. The post-and-hold provisions required beer or wine distributors to file a price posting showing their wholesale prices with the Washington State Liquor Control Board, made those prices publicly available, and required the distributors and manufacturers to hold to those prices for at least 30 days. This assumes, of course, that no separate actual proof of collusion among competitors is required.

¹⁷³ *Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848, 856–57 (E.D. Wis. 2009).

¹⁷⁴ *Id.* at 851.

to suppress competition” and could be seen as “unilateral.”¹⁷⁵ This seems to be the way the *Costco* court viewed similar restraints, upholding minimum markup provisions, uniform pricing requirements, bans on credit sales and discounts, etc., even though it held these were per se restraints.

Moreover, although it seems to reach the correct result under the law, the *Costco* court’s rather peculiar analysis, holding that a restraint is both per se unlawful (meaning, under current law, it must involve unsupervised horizontal conduct among competitors) and “unilateral” is enough to cause whiplash in the careful reader. The fact that such seemingly contradictory conclusions are by no means unique strongly suggests that it would be simpler if these courts took the concerted action requirement seriously and held that state statutes that do not expressly call for or foster collusive conduct do not meet the concerted action requirement, are not per se unlawful, and should be upheld.

V. HOW MORE RIGOROUS APPLICATION OF THE CONCERTED ACTION REQUIREMENT COULD CLARIFY THE STATE ACTION DOCTRINE: TWO ALTERNATIVES

As the last part demonstrates, what was a problematic and occasionally inconsistent doctrine may now be fundamentally altered by the Court’s recent decision in *Leegin*. But, that very alteration may provide an opportunity for the doctrine to be clarified for the benefit of litigants and legislatures alike. Courts could consider the following alternatives.

¹⁷⁵ The *Flying J* court did not consider the fact that private actors also had authority to enforce the act through a private action for unfair competition, as in *Schwegmann Bros.* See *Flying J*, 597 F. Supp. 2d at 854.

A. First Alternative: Uphold Any Restraint Unless There Is Actual Evidence of Unregulated Concerted Action Among Competitors and If Such Evidence Exists, Consider Whether There Is Adequate Supervision

On its face, this approach seems to represent the most radical shift away from existing antitrust doctrine. Arguably, however, it might be most compatible with the Court's existing precedent, which requires a restraint to be illegal *per se* before being struck down, requires proof of horizontal conduct tending to disprove the possibility of independent action, and now holds that proof of vertical price restraints is not sufficient for *per se* illegality. Unquestionably, such an approach would give the most weight to state sovereignty, which appears to have been the original reason for the state-action immunity doctrine and which remains the animating force behind decisions like *Rice* and *Fisher*. Moreover, a court following this approach might reach the same result as the *Parker* Court did on the same facts.

This alternative would work as follows. First, instead of asking if a given restraint is "unilateral" or "hybrid," a court would simply ask whether the statute mandates concerted action among competitors, or, to use the more aggressive formulation from *Battipaglia*, whether there is evidence of a horizontal conspiracy regarding pricing among competing firms subject to and complying with the statute.¹⁷⁶ If the statute does not create these conditions, or there is no evidence of horizontal conspiracy, it cannot be illegal *per se* under existing law, and a facial challenge to it must fail.¹⁷⁷ If it does, a court can then consider whether such concerted action is clearly articulated and affirmatively expressed as state policy. If it is, a court can consider whether there is

¹⁷⁶ *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 174–75 (2d Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

¹⁷⁷ Although, as discussed *supra* in Part IV.B, an "as applied" challenge might still be possible.

adequate supervision by the state such that section 1's regime is entirely displaced by the regulatory scheme.¹⁷⁸ The thornier question of first trying to define the restraint as "hybrid" or "unilateral" can thus be disregarded.

This approach may have much to commend it. It seems simpler and more consistent with precedent, and it would allow state legislatures great latitude to experiment with fair trade acts that might protect in-state businesses. But, of course, that may also be its chief drawback, because there seems little doubt that many fair trade acts that are viewed as anticompetitive, such as price posting and holding provisions, might be upheld if litigants challenging such acts are forced to prove concerted action with the same level of confidence as those challenging private restraints.

B. Second Alternative: Expressly Permit Concerted Action to Be Inferred from Evidence of Consciously Parallel Conduct or from Statutes that Expressly Create the Conditions for Horizontal Restraints

This is a variation on what appears to be current practice for many courts when analyzing state fair trade acts. But, these courts do not come out and say as much; rather, they rely on assumptions about the likely behavior of and effects on competitors in response to a restraint. Thus, for example, the *Flying J* court assumed that the motor vehicle fuel provisions of the Wisconsin Unfair Sales Act were "also horizontal because [they] effect [sic] competing gasoline retailers in Wisconsin,"¹⁷⁹ while the *Costco* court condemned Washington's "post-and-hold" system as a per se violation because agreements to adhere to posted prices are "highly likely to facilitate horizontal collusion among market

¹⁷⁸ An even more extreme states' rights court could go so far as to adopt Justice Powell's concurrence in *Fisher*, upholding a statute so long as it can be shown that the restraints it creates are clearly intended by the state. See *Fisher v. City of Berkeley*, 475 U.S. 260, 273-74 (1986) (Powell, J., concurring).

¹⁷⁹ *Flying J*, 597 F. Supp. 2d at 857.

participants.”¹⁸⁰ Neither court was presented with evidence of actual agreements or other concerted action, and the statutes they condemned did not expressly mandate horizontal price fixing. Neither court was even presented with direct evidence of consciously parallel conduct. Yet, both cases, and many others, paid lip service to the concerted action requirement while basing their decisions on what they perceived to be the likely anticompetitive effect of the statutes, rather than looking for actual evidence of horizontal agreement or parallel conduct. When competitors learn of each others’ prices and are either required to hold prices or price in a certain range, both courts reasoned, they are highly likely to collude.

To be sure, these courts’ analyses of the likely competitive effects of such provisions might often be correct. Post-and-hold regulations, particularly those that require public posting of prices, may very well make coordination on price and output possible by “limit[ing] the domain of rivalry” thereby “facilitate[ing] tacit collusion, even though they do not explicitly authorize any kind of collusion.”¹⁸¹ And, they may result in mandatory industry-wide resale price fixing, which might also be “virtually certain to reduce interbrand competition as well as intrabrand competition”¹⁸² But, what these courts are condemning is not “concerted action” between competitors that has been proved or mandated, but, at most, the likely effects of consciously parallel behavior by competitors who are acting at the arguably unilateral direction of a sovereign state. As previously discussed, anticompetitive effects, in and of themselves, are not

¹⁸⁰ *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895–96 (9th Cir. 2008).

¹⁸¹ *Id.* at 894–95 (quoting John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 312 (2003)); see, e.g., *United States v. Container Corp. of Am.*, 393 U.S. 333, 336–37 (1969) (result of reciprocal exchange of price information among competitors was to “stabilize prices though at a downward level”). But see, *id.* at 338–39 (Fortas, J., concurring) (price information exchange among sellers not a per se violation of Section 1).

¹⁸² *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987).

supposed to be enough for a state statute to be preempted, and the Supreme Court has previously explained “that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.”¹⁸³

Nonetheless, because courts are already either relying on likely effects from certain types of fair trade acts, like post-and-hold provisions, to infer concerted action among competitors, or they are assuming, despite the language in *Parker*, *Fisher*, and subsequent cases, that an actual contract, combination, or conspiracy need not be shown for a state statute to be preempted, it may be time to modify the doctrine to catch up with this practice. Any modification of the doctrine must, of course, also account for the change in the law wrought by *Leegin* and should focus on statutes or regulations that foster horizontal pricing behavior among competitors. Expressly permitting horizontal “concerted action” to be inferred either from evidence of parallel conduct among competitors, or from state statutes or regulations that require public posting of price information leading to sharing of such information and “likely” collusion among competitors, has the virtues of both intellectual honesty and simplicity. The touchstone question would be: does the statute call for some form of price communication or price sharing between competitors? Statutes that do so, thereby creating conditions where price collusion among competitors is more likely, could be deemed to create per se unlawful concerted action and would be preempted unless the state can meet the *Midcal* test by showing adequate active supervision and that no regulatory power is left in the hands of private actors. On the other hand, statutes that require retailers or distributors to do particular acts (e.g., charge a minimum mark-up) or prohibit them from doing particular acts (e.g., sell on credit) without requiring public sharing of price or price-related information would be deemed not to foster concerted action and would be upheld.

¹⁸³ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992).

Adopting this approach also might obviate the need for the vexing “hybrid” versus “unilateral” inquiry because any statute not expressly creating price collusion among competitors or creating conditions such that tacit collusion is likely to occur would not create concerted action and would be automatically immune from a facial challenge regardless of whether it could be characterized as “unilateral.”

Although this approach would likely curtail challenges to certain statutes that were previously subject to challenge, that seems to be an inevitable consequence of *Leegin*. In any case, it would still allow more robust protection of competition than would be the case if courts demanded stricter pleading and proof of actual concerted action.

Adopting this approach would still beg a very important question: why are state statutes and regulations being subjected to a higher level of scrutiny than private conduct, even private conduct in highly-concentrated industries? Stated differently, why can a litigant not rely primarily on evidence of parallel-pricing behavior when challenging private conduct, but instead be forced to provide evidence of an actual agreement between competitors, while a litigant challenging a state fair trade act often need not even provide evidence of actual parallel conduct, much less of horizontal behavior among those affected by the regulation? One would expect the opposite to be true, given the regard for state sovereignty and the fact that states are entitled to at least qualified immunity.

The only possible answer seems to be that courts are more concerned about the anticompetitive effects of public regulations that may affect an entire industry. If so, they should say as much. But, if so, they probably need to explain why, in this sense at least, the acts of state legislatures and of the private parties relying on them receive less protection from antitrust law than does purely private behavior. If they cannot, they should revisit the stricter proof and pleading requirements they have judicially created in the context of litigation against private parties and extend more robust protection of competition to cases involving purely private actions by private parties. Otherwise, they run the risk of

serious inconsistency and invite accusations of *Lochner*-style judicial activism.

VI. CONCLUSION

Before *Leegin* it was possible for courts to finesse these issues because pure vertical resale price maintenance was a per se offense, and courts could simply find the requisite concerted action from statutes that forced retailers to adhere to high prices or otherwise attempted to govern contracts between suppliers, wholesalers, and retailers. Many courts did just that, skipping past the question of whether particular state statutes or regulations created per se unlawful restraints and subjecting them to scrutiny under the *Midcal* test. Many are still doing so in spite of *Leegin*, and their decisions are often incoherent or erroneous. But concerted action can no longer be presumed from vertical price-related restraints created by state action, and the courts should now adjust the state action immunity doctrine to this new reality.