POST-AND-HOLD: HOW TWO CIRCUITS MISAPPLIED ANTITRUST STATE ACTION DOCTRINE AND CURTAILED STATE LIQUOR REGULATORS

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States regulate their liquor markets in a number of ways. One method is "post-and-hold" in which wholesalers post monthly price lists that the state shares with competitors, who may then match lower prices, after which all wholesalers must hold their prices for the next month. Two Circuit Courts of Appeal found that this system violates the antitrust laws, while one, the Second Circuit, found otherwise. In striking down post-and-hold, the Circuits found that it was a hybrid restraint, one in which the state grants a degree of regulatory power to private parties. However, in doing so, they relied on a line of cases which found that state liquor regulations with resale price maintenance provisions were hybrid restraints. Such laws do indeed confer a degree of private regulatory power, they enable a distributor to set the minimum price that a retailer can legally charge. In this way, the state gives the distributor a "club" which it may use against retailers. However, post-and-hold involves no such club. While post-and-hold is similar to the struck-down resale price maintenance provisions in that distributors set their own prices, those prices are not binding on any other party and as such the state does not confer private regulatory power on distributors. The Second Circuit was correct that post-and-hold does not violate the antitrust laws.

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INTRODUCTION

Does a firm's decision to set its own price constitute an exercise of private regulatory power? The Fourth and Ninth Circuit Courts of Appeals appear to say yes, in the context of liquor wholesalers. In doing so, they applied the Supreme Court's logic from cases involving resale price maintenance (RPM) laws which enabled wholesalers to set the minimum prices retailers could charge. A firm setting its own price can be private regulatory power

if it has a legally binding impact on other parties, but outside of this context, private price setting has no such effect. The Circuits applied this reasoning in a scheme of liquor regulation known as "post-and-hold," in which a firm sets its own price which only binds the firm itself, not other firms. This misapplication barred post-and-hold in two Circuits and created a split with the Second Circuit, which allows post-and-hold laws.

States organize their liquor markets in several ways. Some retain state monopolies on the sale of liquor, some bar the sale of alcohol on certain days, and some have fairly few restrictions.[1] New York, Connecticut, and others use a system called "post-and-hold," in which wholesalers post a price list for all available products in the state, the state shares each price list with all other wholesalers who then have the option to match a lower price submitted by a competitor, after which all wholesalers must hold their price for the next month.[2] Wholesalers are also prohibited from any form of price discrimination, even volume or delivery discounts.[3] States often justify post-and-hold on the grounds that it promotes orderly market conditions and avoids large price cuts that would incentivize overconsumption.[4] An astute reader may note that this sounds like an antitrust problem. Courts routinely reject the rationale that firms must restrict competition due to its ruinous consequences.[5] However, when the actor is a state rather than a private firm, the picture is murkier. The Courts of Appeals are at odds as to whether post-and-hold is protected by state action doctrine (or other immunity) or is an impermissible antitrust violation. The Second

[1] Michael Siegel et. al., *Differences in Liquor Prices Between Control State-Operated and License-State Retail Outlets in the United States*, 108 ADDICTION 339, 339–40 (2012).

[2] Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 24 (2d Cir. 2019).

[3] *Id.* at 26; *see also* ASLIHAN ASIL, CAN ROBINSON-PATMAN ENFORCEMENT BE PRO-CONSUMER? 7–8, 32–36 (2024), https://aslihanasil.com/sources/rpa_mac.pdf (discussing various models of liquor regulation, including post-and-hold, and the differing restrictions on volume discounts to retailers).

[4] *Conn. Fine Wine*, 932 F.3d at 26.

[5] *See, e.g.*, U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

Circuit found that post-and-hold provisions are allowed, while the Fourth and Ninth Circuits disagreed.[6]

This Note argues that the Second Circuit reached the correct conclusion, but that all three Courts of Appeals that considered the issue misunderstood key elements of the test for immunity. That is, the question of private regulatory power only refers to a firm's decision that has a legally coercive effect on other parties. It does not include a firm setting its own prices unless those prices would legally force other private parties to take certain action, such as an RPM scheme. Furthermore, antitrust scrutiny fails to capture critical elements of why and how states regulate alcohol markets. Part I covers the legal framework, including state action doctrine and *Parker* immunity. Part II contrasts the approach of the Second Circuit with those of the Fourth and Ninth Circuits. Part III argues in favor of the Second Circuit's approach, critiques those of the Fourth and Ninth Circuits, and suggests where all three circuits misunderstood private regulatory power, a key element of the *Fisher* unilateral/hybrid distinction. Part IV argues for additional reasons to immunize post-and-hold. Finally, Part V covers additional reasons to allow post-and-hold.

I. THE LEGAL FRAMEWORK

A. *A Brief Introduction to Antitrust, and the Per Se Standard.*

American antitrust law generally focuses on protecting competition and the competitive process, which courts generally interpret as harm to consumers in the form of higher prices, or harm to suppliers in the form of prices lower than they would be in a perfectly competitive market.[7] Section 1 of the Sherman Act, which governs antitrust violations other than monopolization (potentially including post-and-hold), is fairly straightforward. It reads "[e]very

[6] *Contrast Conn. Fine Wine*, 932 F.3d at 24, *with* Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 901 (9th Cir. 2008), *and* TFWS, Inc. v. Schaefer, 242 F.3d 198, 210 (4th Cir. 2001).

[7] *See, e.g.*, Nynex Corp. v. Discon, 525 U.S. 128, 136 (1998); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001); Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023); Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 90 (2021).

contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[8] On its face, this language appears to bar almost every contract, since my agreement to sell ten widgets to buyer *A* inherently forecloses trade in those ten widgets between me and potential buyer *B*. Courts have long recognized the breadth of the statutory language and have acted to limit it.[9] Future Chief Justice Taft, in *Addyston Pipe & Steel Co. v. United States*, noted the Sherman Act adopted a long history of competition-related causes of action, and generally, only unreasonable restraints of trade were barred.[10] This distinction would eventually give rise to the two primary standards of review in contemporary antitrust law: the rule of reason and the per se standard. The rule of reason covers restraints that are not clearly anticompetitive on their face.[11] Under the rule of reason, a plaintiff must show anticompetitive effects, and defendants can raise procompetitive justifications for the challenged restriction.[12] However, some restraints are governed under the per se standard. As the Supreme Court articulated in *Northern Pacific Railway*, the per se standard covers "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[13]

The Supreme Court in *United States v. Trenton Potteries Co.* held that agreements among competitors to fix prices are per se illegal, regardless of the reasonableness of the price.[14] Later in *United States v. Socony-Vacuum Oil Co.*, the Court confirmed this per se standard for agreements between horizontal competitors regarding price or quantity.[15] That is, a mere agreement to fix prices or restrict output

[8] 15 U.S.C. § 1.

[9] *See, e.g.,* United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898); Standard Oil Co. v. United States, 221 U.S. 1, 95 (1911).

[10] *Addyston Pipe & Steel Co.*, 85 F. at 279.

[11] United States v. Joint Traffic Assn., 171 U.S. 505, 560 (1898).

[12] Ohio v. Am. Express Co., 585 U.S. 529, 542 (2018).

[13] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[14] United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927).

[15] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940).

is inherently an antitrust violation, regardless of market power or anticompetitive effects.[16] Later decisions expanded the per se standard to cover certain vertical restraints, even those that relate to price such as retail price maintenance, as well as vertical nonprice restraints.[17] However by the 1970s, the Court began to limit the application of the per se standard, particularly for vertical restraints.[18] In 2007, the Supreme Court cabined the use of the per se standard in *Leegin Creative Leather Products v. PSKS, Inc.*, holding that even vertical price restraints should be subject to the rule of reason.[19] The *Leegin* court noted the per se standard should apply "only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason[.]"[20] It noted that courts are reluctant to apply the per se standard to restraints where the economic impact is not immediately obvious.[21]

In some instances, courts have analyzed what otherwise appeared to be a per se violation under the rule of reason. In *NCAA v. Regents*, the Supreme Court opted to analyze a horizontal agreement by the NCAA to restrict output under the rule of reason.[22] It defended this decision on the grounds that college sports are an "industry in which horizontal restraints on competition are essential if the product is to be available at all."[23] The Supreme Court affirmed this in 2021 in its *NCAA v. Alston* decision.[24] Similarly, in *BMI v. CBS,* the Supreme Court held an all-or-nothing music catalogue might be horizontal price fixing in the literal sense, but the

[16] *Id.* at 224 n.59.

[17] *See, e.g.,* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967); Albrecht v. Herald Co., 390 U.S. 145, 153 (1968); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911).

[18] *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977); State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).

[19] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007).

[20] *Id.* at 886 (internal citations omitted).

[21] *Id.* at 887.

[22] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984).

[23] *Id.* at 101.

[24] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 88–89 (2021).

court's experience did not warrant the per se standard.[25] The gradual narrowing of the per se standard, and the application of the rule of reason to even some horizontal price restraints, suggest caution would be warranted in assessing whether a court would treat a restraint as per se, unless it clearly has before.

1. *The Need for an Agreement*

Critically, section 1 of the Sherman Act requires there to be an actual agreement between multiple actors.[26] There must be a contract, combination, or conspiracy for there to be a violation.[27] Unilateral action could still violate section 2 of the Sherman Act, but such action requires monopoly power.[28] Courts can allow factfinders to infer an agreement exists without direct evidence of it.[29] However, an actual agreement, whether directly observed or merely inferred, is still necessary.[30] Mere parallel conduct (firms behaving similarly, perhaps as they would had there been an agreement) is insufficient on its own to establish an agreement.[31] In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that even intentional, *conscious* parallelism–that is, firms modeling their pricing behavior on the observed behavior of their competitors–was insufficient to constitute an agreement within the meaning of section 1.[32] Under *Twombly*, firms may act in the same manner as if there was an agreement with the exact same impact on competition, with full knowledge that their competitors are doing the same without violating the antitrust laws as long as they do not actually agree.[33] Under *Twombly,* a plaintiff must show some "plus factors" in addition to conscious parallelism, such as evidence of actual

[25] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9–10 (1979).

[26] *See* 15 U.S.C. § 1.

[27] *Id.*

[28] 15 U.S.C. § 2.

[29] Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946).

[30] *See, e.g.,* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954).

[31] *Id.*

[32] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007).

[33] *Id.* at 554.

agreement, simultaneous unexplained price changes, or acts that would be contrary to self interest in the absence of a conspiracy.[34]

2. *Information Exchange*

In some instances, the exchange of information between competitors can be an antitrust violation. The theory behind this is intuitively appealing: if competitors share information about their costs, pricing, profitability and product strategy, it is easier for them to form a cartel. If cartel members can see their competitors' prices and costs, they can determine if a competitor is "cheating" by charging lower prices. In some cases, the mere exchange of key information (usually relating to prices, marginal costs, production and future production, and profitability) alone constituted an antitrust violation.[35] In *American Column & Lumber*, the Supreme Court held the exchange of price lists, production data, and shipping data to be an antitrust violation, although it noted the firms' conduct showed they were acting with one goal, potentially showing the Court inferred actual agreement.[36] In *Container Corp*, the Supreme Court held the mere exchange of individual transaction-level prices charged to customers itself was a section 1 violation, regardless of any agreement.[37] However, in a much-cited concurrence, Justice Fortas noted that the opinion did not consider information exchange to be a per se violation, which holds true today.[38] Not all information sharing violates the antitrust laws. In *Maple Flooring,* the Supreme Court found sharing data about freight pricing, average costs, and anonymized price and quantity data was not a violation.[39]

[34] *Id.* at 569.

[35] *See* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 410 (1921); Interstate Cir. v. United States, 306 U.S. 208, 232 (1939); United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969); *see also* United States v. Agri Stats, Inc., No. 23-3009, 2024 U.S. Dist. LEXIS 94142, at *16 (D. Minn. May 28, 2024) (modern district court example of information sharing alone being sufficient to survive motion to dismiss, despite lack of other factors indicating an actual agreement or conspiracy).

[36] *Am. Column & Lumber Co.*, 257 U.S. at 410.

[37] *Container Corp. of Am.*, 393 U.S. at 337.

[38] *Id.* at 340 (Fortas, J., concurring); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

[39] Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 586 (1925).

As such, whether information sharing violates section 1 depends on context and thus is judged under the rule of reason.[40]

The Supreme Court considered a New York liquor law that required wholesalers file monthly price schedules and agree not to charge more in NY than in other states in *Seagram v. Hostetter*.[41] The court found that, under *Maple Flooring* and *American Column & Lumber*, "bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act."[42] It further noted the law would not place irresistible economic pressure on private parties to violate the antitrust laws, and that section 1 indeed requires an actual conspiracy to raise prices.[43] The court also noted while the law might compel parties to violate the Robinson-Patman act, another antitrust law, the possibility was speculative, and so the law was not preempted.[44]

B. *State Action Doctrine and the Intersection of Antitrust and State Liquor Regulation*

1. Parker *Immunity and its Narrowing in* Midcal

Many state laws and regulatory schemes, including those regulating alcohol such as state-operated monopolies, facially appear to violate antitrust laws. However, in 1943, the Supreme Court considered a state plan to restrict competition and raise the price of raisins in *Parker v. Brown*.[45] This facially appeared to be a per se violation, but the Court held that states are immune from the Sherman Act.[46] The unanimous opinion stated "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was

[40] For a contemporary example, algorithmic collusion is a form of information sharing in which technology assists firm's collusion. For example, the DOJ and private plaintiffs allege a company, RealPage, facilitated price-fixing between landlords via algorithmic collusion. *See, e.g.,* In Re RealPage, 709 F.Supp. 3d 478, 492 (M.D. Tenn. 2023).

[41] Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 38 (1966).

[42] *Id.* at 45 (citing *Maple Flooring*, 268 U.S. at 582–86).

[43] *Id.*

[44] *Id.* at 46.

[45] Parker v. Brown, 317 U.S. 341, 346 (1943).

[46] *Id.* at 351.

intended to restrain state action or official action directed by a state."[47] However, the opinion also held states are not free to authorize individuals to violate the antitrust laws.[48] Thus, *Parker's* grant of immunity appeared broad, but also left a large undefined exception: what does it mean for a state to authorize individuals to violate antitrust laws?

Nearly four decades after *Parker*, the Supreme Court addressed the question of the scope of *Parker* immunity in *California Retail Liquor Dealers Association v. Midcal Aluminum*.[49] The Court considered a California RPM scheme that allowed producers to set the prices at which wholesalers and retailers would sell their wine.[50] This vertical price restraint was a per se violation at the time, decades before *Leegin*. In determining if the scheme received immunity as a state law, the *Midcal* court limited *Parker* immunity to instances where state regulation is "clearly articulated and affirmatively expressed as state policy" and is "actively supervised by the state itself."[51] The law in question was clearly articulated state policy, but failed the second prong as the state merely authorized and enforced prices set by private parties but did not review the prices' reasonableness or monitor market conditions.[52] Thus, for a state law to receive *Parker* and *Midcal* immunity, it cannot just license private parties to violate the antitrust laws.

2. Rice *and the Per Se Requirement*

Two years after *Midcal*, the Supreme Court addressed a challenge to a California law that allowed alcohol producers to legally bar importers from importing their product in *Rice v. Norman Williams Co.*[53] In its preemption analysis, the Court stated that the key question is whether "there exists an irreconcilable conflict between the federal and state regulatory schemes."[54] That is, a

[47] *Id.*

[48] *Id.* at 350.

[49] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980).

[50] *Id.* at 99.

[51] *Id.* at 105.

[52] *Id.*

[53] Rice v. Norman Williams Co., 458 U.S. 654 (1982).

[54] *Id.* at 659.

statute is not preempted when a party's compliance could hypothetically cause them to violate the antitrust laws or because the law may have an anticompetitive effect.[55] In *Midcal,* the statute was preempted because it mandated RPM, a per se violation at the time.[56]

The Court contrasted *Midcal* with *Joseph E. Seagram & Sons, Inc. v. Hostetter*, where it granted immunity to a speculative, non-per se violation.[57] The Court explained that a state statute will be preempted "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."[58] The Court clarified that per se violations can thus be condemned, but a violation falling under the rule of reason always receives immunity as is not facially inconsistent with the antitrust laws.[59] The restraint in question was a vertical restraint and unrelated to price because it let producers control which importers could import their product.[60] As this restraint, unlike RPM, fell under the rule of reason, the court held the law was not preempted.[61]

Notably, the court did not reach the question of *Parker* immunity, so it is unknown if this restraint would have survived *Midcal*'s two-part test.[62] This indicates that when analyzing if a state statute is preempted under the antitrust laws, a statute could be immune under *Parker*/*Midcal* or alternatively because it would not be a per se violation under *Rice*.

3. *Hybrid Restraints:* Rice*,* Fisher*, and Applications*

While *Rice* was a unanimous judgment, Justice Stevens authored a concurrence, joined by Justice White, that suggested an alternative framework for antitrust preemption.[63] The opinion introduced the concept of hybrid restraints, where an actor makes a

[55] *Id.*
[56] *Id.*
[57] *Id.* at 660.
[58] *Id.* at 661.
[59] *Id.*
[60] *Id.* at 662.
[61] *Id.*
[62] *Id.* at 662 n.9.
[63] *Id.* at 665 (Stevens, J., concurring).

"private market decision but [the statute] provides a nonmarket mechanism for enforcing the decision."[64] Stevens noted two examples of hybrid restraints, *Midcal* and *Schwegmann Brothers v. Calvert Distillers Corp*.[65] The restraint in *Schwegmann*, similar to that in *Midcal*, involved a state giving wholesalers the ability to enforce RPM against wholesalers by law.[66] That is, the state conferred market power (a firm's ability to enforce its private decisions on other parties) to firms. In Justice Stevens' view, these restraints were hybrid restraints because they enabled private actors to use the law as a "club" against other parties at a different level of the distribution chain.[67] Therefore, a restraint may be condemned (unless saved under *Midcal* or *Rice*) if it gives a party a *de jure* ability to police other market participants, such as a distributor setting prices in the retail market.

Applying this framework to the restraint in *Rice*, Justice Stevens notes that it is not as clear a case as *Midcal* or *Schwegmann*.[68] The restraint in *Rice* appears to grant producers a degree of regulatory power to determine which importers may import their products. That is, the statute lets producers determine which importers can import their goods, thus legally barring other importers from importing their goods. Justice Stevens would therefore have remanded to determine if the statute gave producers an "additional club over California importers afford[ing] distillers an unreasonable degree of unsupervised power to regulate their distribution practices."[69]

Four years later, the majority in *Fisher v. Berkeley* adopted the concept of hybrid and unilateral restraints.[70] The case concerned a law capping rents, which, as price fixing, would have been a per se violation of the Sherman Act. However, an agreement is necessary to find a violation of section 1. The court held a rental cap is unilateral action by the state, and thus protected, not by *Rice, Parker*,

[64] *Id.*
[65] *Id.* at 666.
[66] *Id.*
[67] *Id.* at 667.
[68] *Id.* at 668.
[69] *Id.* at 669.
[70] Fisher v. Berkeley, 475 U.S. 260 (1986).

or *Midcal*, but because there was no contract, combination, or conspiracy.[71]

However, the Court continued that not all state laws are unilateral restraints.[72] Following Justice Stevens' *Rice* concurrence, the Court repeatedly emphasized that hybrid restraints are those that grant a degree of private regulatory power, such as the state-enforced RPM of *Midcal* and *Schwegmann*.[73] The court distinguished such restraints from the restraint at bar, noting the latter restraint does not give any private party a club with which it can enforce its private market decisions.[74] As the majority succinctly put it, "Berkeley's landlords have simply been deprived of the power freely to raise their rents . . . [t]hat is why their role in the stabilization program does not alter the restraint's unilateral nature."[75]

From these cases, hybrid restraints are those in which a state allows private parties to enforce their will against other parties using the power of the state in a way it would not have been able to in the market without the state law. That is, the "regulatory power" mentioned is the ability to regulate the behavior or other market participants through use of the state law.[76] In economic terms, hybrid restraints are those in which a state confers market power, or the ability to force buyers or suppliers to behave differently than they would have in a perfectly competitive market, on certain parties.[77] Note, this regulatory power exclusively referred to power

[71] *Id.* at 267.

[72] *Id.*

[73] *Id.* at 268–69 (citing *Rice*, 458 U.S. at 665).

[74] *Id.* at 269.

[75] *Id.* at 269–70.

[76] *See, e.g.*, KT&G Corp v. Att'y Gen. of State of Okla., 535 F.3d 1114, 1130–31 (10th Cir. 2008) (holding a restraint which impacted the competitive dynamics of the tobacco market did not authorize or permit private parties to make anticompetitive decisions that will then be enforced by the state, and that while private decisions were part of the scheme, the connection between those decisions and the outcome were too attenuated to be a delegation of private power).

[77] *See, e.g.*, Sanders v. Brown, 504 F.3d 903, 918 (9th Cir. 2007) (noting a hybrid restraint implicitly involves a state's conferral of market power to a private party, characterizing such restraints as "a state's decision to let producers dictate market conditions to others" as applied to post-and-hold, and finding a master settlement agreement to be a hybrid restraint). *But see* Yakima Valley Mem'l Hosp.

to regulate other market participants, not to the party's ability to regulate its own conduct, which a firm can always do in the absence of a state law. Other restraints are unilateral and thus immune.

The Supreme Court returned to the issue a year after *Fisher* in *324 Liquor Corp. v. Duffy*.[78] It confronted a fairly straightforward RPM scheme in which New York mandated retailers charge at least 112% of the wholesale price.[79] As the law was not protected under *Rice* since it was a per se violation, the Court then found it failed the active supervision prong of *Midcal*.[80] In a footnote, the Court rejected the argument there was no combination under *Fisher,* and the Court decided the restraint was hybrid as it granted wholesalers private regulatory power over the prices retailers may charge.[81] The footnote noted "[o]ur decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior. . . . That principle squarely governs this case."[82]

4. *The Current Framework*

From these cases, there are three ways that a state law, which would otherwise violate the antitrust laws, may be saved. First, if the restraint is not a per se violation, it is immune under *Rice*. Second, it will receive *Parker* immunity so long as it meets the clear articulation and active supervision tests of *Midcal*. Third, it will receive immunity under *Fisher* if there is no concerted action–that is, if it is unilateral. A hybrid restraint where the state grants private regulatory power that a market participant may use against other participants will not be immune under *Fisher*. These three tests appear to be disjunctive: a statute that fails two but passes one will be protected. The circuits are somewhat unclear as to the nature of the inquiry. The Ninth Circuit for example noted that while *Midcal* treated preemption the

v. Wash. State Dept. of Health, 654 F.3d 919, 929 (9th Cir. 2011) (noting that conferring market power alone without regulatory power is not sufficient to make a restraint hybrid).

[78] 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987).

[79] *Id.* at 337.

[80] *Id.* at 342–43.

[81] *Id.* at 345 n.8.

[82] *Id.*

same as immunity, *Fisher* and *Rice* noted the inquiries are separate.[83] While the inquiries appear separate from the latter two cases, and this Note will approach them separately, circuit courts may collapse them into one, as "a determination of whether a restraint is hybrid will largely answer the question of whether the state actively supervises the restraint."[84] While not the subject of this Note, a statute may also be protected under the Twenty-First Amendment, which will be briefly discussed below.

II. THE CIRCUIT SPLIT

A. *The Second Circuit*

1. Battipaglia

In 1984 (after *Midcal* and *Rice*, but before *Fisher*), the Second Circuit upheld New York's post-and-hold system in *Battipaglia v. N.Y. State Liquor Authority*.[85] Judge Friendly, writing for the majority, found no direct conflict between the system and the Sherman Act, and stated that even if it were preempted, the Twenty-First Amendment would protect it.[86] The Second Circuit first suggested the lack of an agreement, in contrast to RPM schemes like *Midcal*, but noted disagreement between the circuits as to what constitutes an agreement.[87] It then turned to *Rice's* holding that only per se violations are preempted and found that, since mere information exchange is not per se, *Rice* is dispositive.[88] The court declined to decide if state action doctrine would protect the scheme, noting the first prong of *Midcal* was easily met, but the second was unclear.[89]

While *Battipaglia* was decided on per se (*Rice*) grounds, its discussion of whether there was an agreement is notable as it predated the Supreme Court's *Fisher* decision on the issue. The Second Circuit characterized *Midcal* as an instance in which the

[83] Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 887 (9th Cir. 2008).
[84] *Id.* at 888.
[85] Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166 (2d Cir. 1984).
[86] *Id.* at 170.
[87] *Id.* at 173.
[88] *Id.* at 175.
[89] *Id.* at 177.

scheme compelled agreement or created a scenario that destroys competition as effectively as if there had been an agreement.[90] That is, RPM schemes entail agreement because they force distributors to adhere to price restraints set by producers. In contrast, a post-and-hold entails no such compulsion or forced agreement. Wholesalers can file whatever prices they wish, and these prices do not control or compel retail prices.[91] Rather, post-and-hold merely compels wholesalers' individual action (holding prices constant) and compels behavior that might allow a factfinder to infer agreement (information sharing). In dicta, Judge Friendly seemed to support the absence of an agreement noting "state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they have been compelled to do is simply too 'iffy.'"[92] This line of reasoning seems to presage *Fisher's* hybrid/unilateral distinction. A state compelling action is the opposite of agreement, but the state licensing one party to compel another to act in a certain way is an agreement, as the state is allowing one party to compel another to agree with it. While *Fisher* focuses more on the regulatory power aspect of such a scheme, the core of a private party exercising regulatory power is that party's ability to compel agreement.

Battipaglia was not unanimous, as Judge Winter dissented and argued post-and-hold should be analyzed under the per se standard.[93] Judge Winter noted that while the "post" element may not be per se, the "hold" element should be, as agreements between competitors to adhere to prices had long been analyzed under the per se standard.[94] He dismisses the question of actual agreement, noting instead that a state may not compel a private cartel.[95] While *Fisher* seems to have undermined Judge Winter's position regarding actual agreement, subsequent commenters have embraced his view

[90] *Id.* at 171.
[91] *Id.* at 172.
[92] *Id.* at 173.
[93] *Id.* at 180 (Winter, J., dissenting).
[94] *Id.*; *see also* Sugar Inst. v. United States, 297 U.S. 553, 601–02 (1936).
[95] *Battipaglia*, 745 F.2d at 179.

that the hold aspect renders the scheme a per se violation.[96] While he is certainly correct that such a private agreement would be a per se violation, the dissent seems to brush past the fact that this is not a private agreement, but rather a statutory bar on price changes.[97]

2. Connecticut Fine Wine

In 2019, the Second Circuit revisited *Battipaglia* after the Fourth and Ninth Circuits struck down post-and-hold provisions. In *Connecticut Fine Wine v. Seagull*, it declined to overturn *Battipaglia*, affirming that *Rice* afforded protection to post-and-hold.[98] The District Court held post-and-hold to be a hybrid restraint.[99] The Second Circuit did not dispute this holding.[100] However, it noted that post-and-hold does not rise to the level of mandating or authorizing concerted action under *Fisher*.[101] Critically, in distinguishing *324 Liquor*, *Midcal*, and *Schwegmann*, the Second Circuit noted in those instances a retailer and distributor entered into agreements under the backdrop of state law, as distinguished from the lack of such agreement in post-and-hold schemes.[102] This suggests that while the Second Circuit did not want to disturb the District Court's finding of a hybrid restraint, the court either did not see the restraint as hybrid or may have slightly misapplied the

[96] *See* TFWS, Inc. v. Schaefer, 242 F.3d 198, 210 (4th Cir. 2001); Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 894 (9th Cir. 2008); s*ee also* Conn. Fine Wine & Spirits, LLC v. Seagull, 936 F.3d 119, 120 (2d Cir. 2019) (Sullivan, J., dissenting from denial of reh'g en banc); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 217b2 (4th ed. 2013) ("Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with [Supreme Court precedent].").

[97] *Battipaglia*, 745 F.2d at 180 (Winter, J., dissenting).

[98] Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 33 (2d Cir. 2019).

[99] Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 368–69 (D. Conn. 2017), *aff'd* 932 F.3d 22 (2d Cir. 2019) (holding post-and-hold was nearly identical to *324 Liquor*). The court merely concluded that since they both have the same private action, they both are hybrid, but did not consider that what makes a restraint hybrid is the legally coercive effect or lack thereof of that private action, which differs in an RPM scheme and post-and-hold. *Id.*

[100] *Conn. Fine Wine & Spirits*, 932 F.3d at 38.

[101] *Id.*

[102] *Id.* at 37.

hybrid/unilateral distinction. *Fisher* holds that for concerted action necessary for an agreement to exist, the restraint must by hybrid (or a private price fixing scheme covered by the "gauzy cloak" of state involvement).[103] Thus, while the analysis is murky, it appears the Second Circuit undermines the claim that post-and-hold laws are hybrid restraints, while facially accepting the proposition. The Second Circuit then noted that the "hold" element, the subject of Judge Winter's *Battipaglia* dissent, is a purely negative restraint and does not compel any private agreement.[104] That is, the hold is a bar on individual action, enforced only against each individual firm, rather than a license to form cartels. Finally, the Second Circuit noted that *Twombly* analyzed a regulatory overlay that encouraged conscious parallelism without actual agreements by firms not to compete.[105] The Supreme Court denied certiorari.[106]

3. *Reactions*

There were no dissents to *Connecticut Fine Wine*, but four judges in the Second Circuit would have reheard the case *en banc*.[107] In a dissent from the denial of rehearing *en banc*, Judge Sullivan sided with Judge Winter, arguing the "hold" is a per se violation and noting the other circuits that considered the issue found post-and-hold to be preempted.[108] He stated the prerequisite for an agreement under *Fisher* is not actual agreement, but rather a hybrid restraint, and that *324 Liquor* held an actual contract combination or conspiracy is not necessary for preemption.[109] He then argued that

[103] Fisher v. Berkeley, 475 U.S. 260, 267–68 (1986).

[104] *Conn. Fine Wine & Spirits*, 932 F.3d at 38.

[105] *Id.* at 39.

[106] Conn. Fine Wine & Spirits, LLC v. Seagull, 589 U.S. 1305 (2020).

[107] Conn. Fine Wine & Spirits, LLC v. Seagull, 936 F.3d 119, 120 (2d Cir. 2019).

[108] *Id.* at 121.

[109] *Id.* at 122. This proposition is weak, as *Fisher* appears to have used the hybrid/unilateral distinction as a framework for understanding if there is concerted action, and *324 Liquor* footnote 8 merely confirms that framework, and that hybrid restraints may be attacked. 324 Liquor Corp. v. Duffy, 479 U.S. at 344 n.8. The statement that the guiding principle is to preempt state laws that authorize or compel private parties to violate the antitrust laws does not necessarily mean one should read out the concerted action requirement out of those antitrust laws.

the economic realities of the scheme are anticompetitive and should be condemned as such.[110] All three law review articles discussing the decision and circuit split favor the approaches of the Fourth and Ninth Circuits.[111]

B. *The Fourth and Ninth Circuit Approaches*

1. *The Ninth Circuit*

In 2008, the Ninth Circuit struck down Washington's post-and-hold laws, which also included a RPM provision.[112] The Ninth Circuit had previously ruled that an Oregon post-and-hold law which did not operate in conjunction with an RPM provision was a per se violation and was not protected by state action immunity.[113] In *Miller v. Hedlund*, the 1987 case, the court held post-and-hold to be a hybrid restraint which failed the *Midcal* test, because it allowed parties to set their prices without reviewing their reasonableness.[114] In determining when a restraint is hybrid, the court summarized the standard that statutes "creating unsupervised private power in derogation of competition are subject to preemption."[115] Specifically, the thing that is "centrally forbidden is state licensing of arrangements between private parties that suppress competition–not state directives that by themselves limit or reduce competition."[116] While the challenged law included both a post-and-hold provision and a RPM provisions, the court considered each of these separately, and held post-and-hold failed on its own regardless

[110] Conn. Fine Wine & Spirits, LLC v. Seagull, 936 F.3d at 122.

[111] *See* Brianna Morris, *Tapping Into Post-And-Hold Alcohol Statutes: Are Sherman Act Violations Forcing Retailers to Sell at Artificially High Prices?*, 49 CAP. U.L. REV. 453 (2021); Kathrine Maldonado, *Hold My Beer, Hold My Price: State Post-And-Hold Regulatory Schemes Constitute Price Fixing Preempted by Federal Antitrust Law*, 74 SMU L. REV. 841 (2021); Patrick Donathen, *Post-And-Hold Laws: Has the Second Circuit Authorized Liquor Cartels in the Face of the Sherman Antitrust Act?*, 83 U. PITT. L. REV. 167 (2021).

[112] Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 894 (9th Cir. 2008).

[113] Miller v. Hedlund, 813 F.2d 1344, 1351 (9th Cir. 1987).

[114] *Id.* at 1350–51.

[115] Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 889 (9th Cir. 2008).

[116] *Id.* (citing Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560 (1st Cir. 1999)).

of the RPM provision.[117] It ruled that post-and-hold is a hybrid restraint because the regulation facilitates price information exchange and mandates adherence to posted prices, while the state only polices the procedure but not the actual price levels.[118] The court noted that while wholesalers are not compelled to adhere to each other's practices, it makes the market less competitive; effectively, the statutes "may facilitate tacit collusion, even though they do not explicitly authorize any kind of collusion."[119] The court finally concluded that the "hold" element made the scheme per se illegal and noted the requirement makes a temporary price cut more expensive and thus less likely.[120]

The Ninth Circuit has elsewhere (considering other restraints) taken a slightly different view, especially regarding the hybrid/unilateral distinction. In *Sanders v. Brown* (decided before *Costco*), the court noted that a hybrid restraint "exists when the state passes laws that enforce companies' decisions to collude on prices, to dictate prices by which other companies must abide, or to otherwise violate the Sherman Act" and that such a restraint "necessarily involves a delegation of market power to private parties that is *per se* illegal."[121] That is, findings of hybrid restraints "hinged on a state's decision to let producers dictate market conditions to others—for example, by 'posting' prices that then became legally binding on buyers and other producers."[122] Curiously, the *Sanders* court described *Miller* as holding that post-and-hold "let[s] wholesalers set prices that retailers were legally bound to honor."[123]

[117] *Id.* at 893.

[118] *Id.* at 894–95.

[119] *Id.* In addition to the reasons discussed below, the Court mistakenly focuses on competitive effects, which it explicitly said was not part of the inquiry. The question is if the state licenses agreements that are per se violations, not actual competitive effects. Yet, the court said, "Although each wholesaler is only required to adhere to its own posted price and is not compelled to follow others' pricing decisions, the logical result of the restraints is a less uncertain market, a market more conducive to collusive and stabilized pricing, and hence a less competitive market." *Id.* at 894. This fails to meet the standard for a hybrid restraint.

[120] *Id.* at 896 (citing PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 217b2 n.48 (3d ed. 2006)).

[121] Sanders v. Brown, 504 F.3d 903, 918 (9th Cir. 2007).

[122] *Id.* (referencing *Schwegmann* and *Midcal*).

[123] *Id.* (citing Miller v. Hedlund, 813 F.2d 1344, 1349–51 (9th Cir. 1987)).

This is an accurate description of the scheme in question, but *Miller*'s holding did not hinge on the RPM element, rather on the post-and-hold element (which included no such legally binding price restraint).[124] It is unclear whether this is an implicit questioning of *Miller's* holding that post-and-hold is a hybrid restraint. Several years later (after *Costco*), the Ninth Circuit found a statutory scheme which capped the number of a certain type of procedure, but that allowed hospitals currently licensed to perform that procedure to increase their output-thus precluding the state from issuing new licenses- to be a unilateral restraint.[125] Much like in a typical post-and-hold design, the state scheme involved private firms setting their own price or quantity, which was not binding on any other firm through an RPM or similar scheme.[126] In both instances a firm's decision to set its price or output may have a significant impact on the competitive landscape because of a state law, but the firm's decision itself is not legally binding on any other party.

Thus, the Ninth Circuit seems to have a split in authority. In *Miller* and *Costco,* it held post-and-hold to be a hybrid restraint as firms set their own prices. In doing so, the circuit did not engage with the fact that what made firms setting their own prices a hybrid restraint in other contexts was the legally binding effect those prices had on other parties. However, in *Sanders*, the Court appears to recognize this, noting the importance of the ability to bind others in determining private regulatory power, reframing *Miller* as an instance of RPM. In *Yakima Valley*, the Court characterized a scheme in which firms had de facto veto power over competitors licenses as unilateral, even though parties there appear to have a greater degree of regulatory power than wholesalers in post-and-hold do.

2. *The Fourth Circuit*

In 2001, the Fourth Circuit considered and struck down a Maryland post-and-hold scheme that was unaccompanied by an RPM provision.[127] In summarizing the hybrid/unilateral distinction,

[124] *Miller*, 813 F.2d at 1349–51.

[125] Yakima Valley Mem'l Hosp. v. Wash. State Dept. of Health, 654 F.3d 919, 924–25 (9th Cir. 2011).

[126] *Id.*

[127] TFWS, Inc. v. Schaefer, 242 F.3d 198, 201–02, 209 (4th Cir. 2001).

it noted in *Schwegmann, Midcal,* and *324 Liquor*, the restraints were hybrid because "the involvement of the distributor in setting retail prices" made it impossible to say the state acted unilaterally.[128] However, the court then summarized the common thread as hybrid restraints that "empowered private parties to set prices, and those prices were enforced by government mechanisms."[129] In stating this, the court appears to rephrase the language of private marketing decisions being enforced by nonmarket means from *Fisher*, shifting the concept of private decisions to private price setting. This omits the fact that the private price setting in the relevant cases set the prices for other parties as well (thus enforcing those prices by government mechanisms), while here, firms set their own prices without coercive effects on others.[130] Applying this definition to Maryland's scheme, the court found it hybrid as "the State requires wholesalers to set prices and stick to them, but it does not review those privately set prices for reasonableness; the wholesalers are thus granted a significant degree of private regulatory power."[131] The court then concluded the statute is a per se violation as an agreement to adhere to prices is per se illegal (similar to the views of Judge Winter and the Ninth Circuit).[132] It continued that the "post" element is also a per se violation, as it is "essentially" a form of horizontal price fixing.[133] Finally, the court ruled the scheme failed the active supervision prong of *Midcal*.[134] In 2009, the Fourth Circuit declined to reconsider its holding after *Leegin* was decided.[135]

[128] *Id.* at 208.

[129] *Id.*

[130] As noted below, this definition could apply to the very concept of private property, as governments enforce property rights over the goods a retailer prices. This extreme example suggests the overbreadth of the Fourth Circuit's definition.

[131] *TFWS*, 242 F.3d at 208–09. This applies active supervision rather than regulatory power, and misunderstands regulatory power, as the Ninth Circuit does.

[132] *Id.* at 209. This ignores the fact that a state price freeze is different from a private agreement.

[133] *Id.* Removing a potential barrier to cartels is different from actually fixing prices, and would not be per se illegal.

[134] *Id.* at 211.

[135] TFWS, Inc. v. Franchot, 572 F.3d 186, 188, 191–92 (4th Cir. 2009).

III. WHY THE SECOND CIRCUIT IS (MOSTLY) RIGHT

A. Rice *Application: Post-and-Hold is not a Per Se Violation*

1. *Post*

In determining if post-and-hold should be analyzed under the per se standard or the rule of reason, it is helpful to consider the post and hold elements separately. The post element entails firms sending price lists to the state, which, in turn, shares each price list with all other firms and clearly falls under the rule of reason. No court has ever found this sort of information exchange to be a per se violation.[136] Information exchange can run afoul of the rule of reason, but as such it is protected under *Rice*.[137] Developments since *Rice*, if anything, support applying the rule of reason, since firms have far more data regarding prices now than they had in the 1980s and, as seen, the per se standard has been narrowed.[138] Nor is the opportunity to match competitor's prices a per se violation because it seems analogous to a competitive bidding process. Price matching could be an unreasonable restraint of trade, but it is not a per se violation.

2. *Hold*

The hold element is more complex. Two circuits have found that it was a per se violation, and one found otherwise. Judge Winter was undeniably correct in asserting that private agreements between horizontal competitors to hold and set prices for a set time is a per se violation.[139] However, states are not private firms. A conceptual way to consider post-and-hold is to imagine if the state were a private firm issuing a similar restriction. If the sole manufacturer of a special type of widget decided to distribute that widget via wholesalers, rather than distributing and retailing it itself, could that

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[136] *See, e.g.*, Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[137] Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982).

[138] *See supra* Part I.A.

[139] *See* Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 180 (1984) (Winter, J., dissenting).

manufacturer impose a similar restraint? Could it mandate its distributors to only change their prices once a month? After *Leegin*, the answer appears to be "it depends". Such a restraint is a vertical restraint. A producer–the party that holds the ultimate right as to how or if a product will be distributed–imposes a restraint on its customers. This is a classic vertical price restraint which *Leegin* held falls under the rule of reason.[140] The state holds the coordination rights regarding alcohol importation, distribution, and sale. Under the Twenty-First Amendment's broad grant, some states choose to retain their monopoly while others allow a role for distributors and retailers.[141] In this sense, a state is quite like our hypothetical widget manufacturer. If such an agreement imposed by a private party would fall under the rule of reason, it certainly would not be a per se violation if imposed by a state. RPM may be a useful analogy as well. In such a scheme, a distributor contractually binds retailers to adhere to a minimum (or maximum) price or markup.[142] While the effect may reduce price competition among retailers, it is distinct from a horizontal agreement between retailers. Such a vertical restraint is analyzed under the rule of reason. Post-and-hold similarly involves a vertical relationship; a "higher" party, which, like a manufacturer, could forbid the commerce altogether, imposes a restraint on "lower" parties, the distributors. Both look horizontal in some regards, but are imposed by a vertical, not a horizontal, party. Judge Winter (and the Fourth and Ninth Circuits) was correct about horizontal competitors, but this restraint is not horizonal.

However, state law is not a private agreement. In this regard, the Second Circuit was correct in finding the hold element does not compel any private agreement.[143] Even if such a restraint were horizontal, the state is not mandating firms to agree not to change prices: it is barring firms from unilaterally changing prices. In this sense, the "purely negative" element of post-and-hold is the antithesis of the agreement necessary for a per se violation (or for

[140] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

[141] *See*, *e.g.*, Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020).

[142] *Id.*

[143] Connecticut Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 38 (2019).

any section 1 violation).[144] To bar an actor from taking an action may facilitate a conspiracy, but the violation in such a case is not the ban, rather it is the conspiracy itself. If wholesalers noticed that post-and-hold schemes make it easier to raise prices, and as such, made an agreement to do so, the agreement would clearly be a per se violation. Yet the mere fact that an external factor lowered the barrier to such an agreement does not make that external factor a per se violation.[145]

Conceptually, there is an additional reason why the hold is not a per se violation. The hold regulates the change in price level, rather than the price level itself. That is, the state is agnostic as to the actual prices charged but rather mandates that the change be zero for a fixed period. This appears analogous to price gouging laws, in which a state mandates a limit on the change in price level over time.[146] In both cases, the restraint bars distributors from changing their prices in certain ways. These laws, which restrict the action of private parties, are not per se violations.

In sum, the hold element is a vertical restraint and a negative restraint that does not compel any actual agreement. As such, it should be analyzed under the rule of reason. The development of the per se standard after *Rice* reinforced this. While the Supreme Court found vertical non-price restraints to be judged under the rule of reason prior to *Rice* in *GTE Sylvania*, two subsequent cases, *State Oil v. Khan* and *Leegin* found the same for all vertical price restraints.[147] This gradual narrowing of the per se standard further suggests that Judge Friendly's approach to the hold element would today predominate over Judge Winter's approach.

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[144] *Id.*

[145] *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (1955) (where the external factor was a regulatory scheme and a particular economic arraignment).

[146] *See, e.g., Attorney General James Leads Multistate Coalition Backing National Ban on Price Gouging*, OFF. OF THE N. Y. STATE ATT'Y GEN. (Oct. 30, 2024) https://ag.ny.gov/press-release/2024/attorney-general-james-leads-multistate-coalition-backing-national-ban-price [https://perma.cc/HX9M-DVEP].

[147] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 907 (2007).

B. Fisher *Analysis: A Unilateral Restraint*

1. *The Proper Standard*

A hybrid restraint, introduced by Justice Stevens in *Rice*, is a restraint in which an actor makes a "private market decision but [the state] provides a nonmarket mechanism for enforcing the decision."[148] That is, the state law serves as a "club" one party can use to enforce its will on competitors, customers, or suppliers.[149] This concept applies to the three Supreme Court cases commonly cited as hybrid restraints.[150] All of these cases involved retail price maintenance, where a party mandates the price at which its customers can resell its goods.[151] The choice to impose RPM is a private marketing decision that a seller makes to maximize long-term profits. However, instead of only being able to enforce RPM by contractual means, state law makes it illegal to charge less than the given multiple of the wholesaler's chosen price.[152] The First Circuit appeared to recognize the distinction between a state-RPM scheme in which the private regulatory power enabled a firm to "set the resale price to be charged by purchasers at the next level" and a restraint that barred firms from engaging in a form of unilateral conduct.[153] The restraint in *Rice* may fit this pattern too, as Justice

[148] Rice v. Norman Williams Co., 458 U.S. 654, 665 (1982) (Stevens, J., concurring).

[149] *Id.* at 667.

[150] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 338-40 (1987); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 103–04 (1980).

[151] *Schwegmann*, 341 U.S. at 395; *324 Liquor*, 479 U.S. at 338-340; *Midcal*, 445 U.S. at 103–04.

[152] *See, e.g.*, Hertz Corp. v. City of New York 1 F.3d 121, 127 (2d Cir. 1993) ("Each [*Schwegmann*, *Midcal*, and *324 Liquor*] involved classic price-setting that was delegated by statute or regulation to private industry but was left unsupervised by the state legislature. The Hertz law, in contrast, does not purport to authorize price-setting by private industry; it simply eliminates an element of price competition among industry members."). Note, authorizing price setting by private parties must refer to allowing private parties to set prices binding on others, like in an RPM scheme. A state would not need to authorize a firm to set its own price, the core function of firms.

[153] Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 565 (1st Cir. 1999). (contrasting RPM schemes with a state law barring ownership of more than three liquor retailers).

Stevens noted: the restraint allowed producers to determine which importers may import their products.[154] This is a marketing decision, given force of law by the state. A producer would normally have to rely on breach of contract or refusing to sell to avoid certain importers, but the law in question instead made it illegal for disfavored importers to import that producer's goods.[155] When the Supreme Court fully adopted the unilateral/hybrid distinction in *Fisher*, it did so by describing hybrid restraints as the state conferring a degree of regulatory power on private parties, using similar logic and examples as Justice Stevens did.[156]

2. *Application*

Using the standard as articulated by Justice Stevens and the *Fisher* court, post-and-hold is viewed as a unilateral restraint, since the state does not grant any party the power to regulate other parties. While private parties have slightly more latitude than they did in *Fisher*, distributors do not have a club to wield against other parties to enforce their private marketing decisions. Under post-and-hold, the only power left to the wholesalers is the ability to set their own prices and choose to decrease them when they see what competitors are charging. This is quite like *Fisher*, where landlords were empowered to set their own prices below a certain threshold. In both cases, firms set prices, subject to constraints. They are restrained, not empowered. In neither case is a firm given the power to regulate other parties. The critical distinction is that post-and-hold does not allow a distributor to set the prices (which would then be legally enforceable) for retailers. The power to set one's own prices is not private regulatory power of the sort anticipated by *Fisher*, as such regulatory power is the ability to regulate the behavior of other parties, not one's own prices. In *Rice*, a producer's choice of who would be allowed to import its products was legally enforceable,[157] and in the RPM cases, a wholesaler's ability to set

[154] Rice v. Norman Williams Co., 458 U.S. 654, 668 (1982) (Stevens., J., concurring).

[155] *Id.*

[156] Fisher v. Berkeley, 475 U.S. 260, 268–69 (1986).

[157] *Rice,* 458 U.S. at 656.

prices set a legal minimum for retailers.[158] The challenged laws in these cases allowed one party to regulate other parties. No such regulation occurs here. While the forbidden act in the RPM cases and in post-and-hold appears the same–a firm setting its own prices–in the RPM cases, those prices became binding on retailers, whereas in a post-and-hold system, a firms' prices are only binding on the firm itself.

Opponents of post-and-hold may argue that distributors' price setting is enforceable on other parties. In some instances, post-and-hold is coupled with an RPM-like law.[159] In such cases, a distributor's price creates a legally binding price minimum for a retailer, but the hybrid element here is the RPM law, not post-and-hold. The circuits analyzed post-and-hold in isolation, and such a scenario is not relevant.[160] Additionally, one may argue setting prices constrains buyers for a month. While this is true, the restriction is on the wholesaler not to change their prices. This is not giving wholesalers a club to wield against retailers but forbidding wholesalers from wielding a club by changing their prices. Furthermore, it strains the definition of regulatory power to argue that a firm setting its own prices (which does not legally set prices at any other level) constitutes regulatory power. To condemn a statutory scheme under the antitrust laws, simply because it lets firms set their own prices, is contrary to current antitrust doctrine.[161] Finally, the strongest objection may be that wholesalers' price setting is private regulatory power in practice. Competitors will match the lowest price, effectively giving a wholesaler the unilateral ability to force competitors to meet their prices. This objection misunderstands both the scheme and the law. First, the ability to entice competitors to match one's prices is not regulatory power, but the proper functioning of markets. If a firm chooses to lower its prices, its competitors will either match or not. This is true in a post-

[158] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 338-40 (1987); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 103–04 (1980).

[159] *See, e.g.*, Connecticut Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 32 (2d Cir. 2019).

[160] *See, e.g.*, *id.*; Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 896-8 (9th Cir. 2008).

[161] *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

and-hold system as well. Firms may choose to match a price, or they may not. A post-and-hold system still allows a firm with the lowest marginal cost to price its wares lower than its competitors, low enough that they cannot profitably match. There is no element of compulsion, only a competitive pricing mechanism, which antitrust law encourages. Even if competitors always did match the lowest price on the market, this still would not be private regulatory power. A price cut would not be legally enforceable: it would merely show conscious parallelism. The state would not be conferring some new ability to force competitors to lower their prices–this is an ability that firms already had, by lowering their own prices.

While all three circuits which have considered the question found post-and-hold to be a hybrid restraint, a proper analysis of the Supreme Court precedent would find it to be unilateral. Such a scheme does not give wholesalers a club with which it can enforce its marketing decisions through legal means, and it does not allow private firms regulatory power over others.

C. Midcal *Analysis*

The Second Circuit declined to decide if post-and-hold would receive state action immunity under *Parker* and *Midcal*, but Judge Friendly suggested active supervision depends on the nature of the restraint.[162] The Fourth and Ninth Circuits found that the scheme failed *Midcal's* two part test.[163] While there is a reasonable argument in favor of applying *Parker/Midcal* immunity, the Fourth and Ninth Circuits are likely correct. Post-and-hold likely fails the active supervision prong of *Midcal*, as the state's role in the scheme is definitionally passive once the scheme is established. Distributors submit their prices, the state shares them, and subsequently enforces the ban on price changes, which appears far from actively supervising the scheme. However, there may be more latitude under *Midcal* than the Fourth and Ninth circuits believe. *Midcal* only held the state must review the reasonableness of prices or monitor

[162] Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 177 (2d Cir. 1984).

[163] TFWS, Inc. v. Schaefer, 242 F.3d 198, 211 (4th Cir. 2001); *Maleng*, 522 F.3d at 894.

market conditions.[164] Thus, the bar for active supervision is not necessarily reviewing prices, but periodically monitoring market conditions to ensure the scheme is working as desired. As there is not sufficient evidence that any state does so, post-and-hold schemes likely fail the second prong of *Midcal*, but adding such monitoring would likely be a straightforward statutory and regulatory tweak.

Judge Friendly in *Battipaglia* noted New York's scheme was aimed only at orderly market conditions, unlike that in *Midcal*.[165] He suggested that under the *Midcal* scheme, the policy was aimed at the price level, so active supervision required reviewing prices.[166] Post-and-hold, on the contrary, only requires passive action, merely enforcing the laws as written. Thus, the second prong would indeed be met by ensuring conditions are orderly. Judge Friendly declined to endorse or reject this argument,[167] but it merits consideration. Active supervision seems to imply that passive restraints can never receive *Parker*/*Midcal* immunity, and as such, it may make sense for the degree of supervision to vary with the restraint's nature. Further, one could argue the state actively monitors the main thing being regulated: the change in price. That is, the state sets that change at zero for all but twelve instances a year. However, this view has not been adopted, and the doctrine supports the contention that post-and-hold fails the second prong of *Midcal*.

D. *Summation*

Post-and-hold laws should be upheld under *Rice*, as they are a vertical restraint and thus would be analyzed under the rule of reason. They should also be upheld under *Fisher* as they are a hybrid restraint and they do not grant any party regulatory power over other players in the market. It is unlikely they would receive immunity under *Midcal*, as they fail the "active supervision" prong.

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[164] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).

[165] *Battipaglia*, 745 F.2d at 176.

[166] *Id.*

[167] *Id.*

E. *How the Fourth and Ninth Circuits Misapplied* Fisher

1. *The Ninth Circuit*

In *Costco*, the Ninth Circuit's determination that post-and-hold constitutes a hybrid restraint is flawed for three reasons. First, it held the state's failure to review prices makes the restraint hybrid.[168] This is a reason why it would fail *Midcal*, but state review of prices is not an element of the hybrid inquiry, which hinges on if private parties can use state mechanisms to enforce their private marketing decisions. Second, the opinion noted that what is forbidden is "state licensing of arrangements between private parties that suppress competition–not state directives that by themselves limit or reduce competition."[169] However, the court's reasoning hinged on the competitive effects of the law, rather than actual agreement.[170] The court explained that by removing the ability to unilaterally change prices, the law removes an incentive for distributors to compete, allowing outcomes that would have been barred had there been an agreement instead of a state law.[171] This is not the proper inquiry, as the court itself noted.[172] There is no arrangement between private parties here. Third, critically, the court mistakes the standard for hybrid restraints as noted above.[173] Merely allowing firms to set their own prices, which do not force other firms to set prices, is not conferring regulatory power on that firm. The court read the RPM cases to mean that a firm's ability to set its own price makes a restraint hybrid.[174] However, it elided the fact that

[168] Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 894 (9th Cir. 2008).

[169] *Id.* at 889 (citing Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 566 (1st Cir. 1999)).

[170] *Id.* at 894–95. Note that other courts, namely the First Circuit, have rejected the argument that a statute should be preempted because it would have same effects as a per se violation without authorizing actual agreement. Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 564–65 (1999).

[171] *Maleng*, 522 F.3d at 894–95. Note the Court's reasoning is not bulletproof. While post-and-hold makes a price cut costlier as a wholesaler must maintain it for a month, it also makes market share one gains from a price cut more durable.

[172] *Id.* at 889.

[173] *See supra* Part III.B.1.

[174] Costco Wholesale Corp. v. Maleng, 522 F.3d at 894.

what made the RPM cases hybrid was the fact that a firm's price created a binding floor for retailers. This is not true of post-and-hold, and without the RPM element, it makes little sense to argue that a firm's price setting under post-and-hold is private regulatory power.

2. *The Fourth Circuit*

Like the Ninth Circuit, the Fourth Circuit's reasoning is questionable as it applies an incorrect standard to the hybrid inquiry. The court correctly notes, regarding the RPM cases, that distributors' ability to set retail prices made it impossible to say the state acted unilaterally, thus those restraints were hybrid.[175] The court concludes that what makes a restraint hybrid is that private parties set prices that are enforced by government mechanisms.[176] This definition seems reasonable on its face, but as applied to post-and-hold it collapses the hybrid/unilateral distinction. According to *Fisher* and *Rice*, what makes a restraint hybrid is its giving a private party means to enforce its private marketing decisions against other parties.[177] This cannot mean just the ability to set one's own prices. If it did, any regulatory scheme in which a market is allowed to function would be hybrid, as firms setting their own prices is the core of market activity. In the RPM context, setting one's own prices is enforced against other parties. In the absence of RPM, however, a firm's decision to set a price does not grant it any regulatory power over others. By the Fourth Circuit's reasoning, the restraint in *Fisher* would have been hybrid, as private parties still set prices below an upper bound defined by the government. The Fourth Circuit seems to have applied the concept of government enforcement of prices to any instance in which the state allows private parties to set their own prices. However, from the RPM cases government enforcement means enforcing those prices against other parties.

In the extreme, all pricing decisions are enforced by government means insofar as private property is protected. If a retailer chose to accept goods and refused to pay, the state would intervene. If a customer decided not to accept the price posted by a

[175] TFWS, Inc. v. Schaefer, 242 F.3d 198, 208 (4th Cir. 2001).

[176] *Id.*

[177] *See supra* Part III.B.1.

retailer and took thousands of dollars of alcohol and paid only a hundred dollars, the state would enforce the listed prices by arresting the customer. Prices are only binding because of the threat of government enforcement. Post-and-hold does not confer additional power on a distributor when it chooses to set prices that it would not have had in the absence of the scheme. In such a scheme, prices are only enforced by government mechanisms in the loosest sense, in that all prices are enforced by government mechanisms. While it is true that the law bars price changes, this is not the government enforcing a firm's pricing decisions against other parties, but rather against the firm itself.

The Fourth Circuit also applies the *Midcal* active supervision inquiry as to whether the state reviews the reasonableness of prices as part of its hybrid analysis.[178] The court categorizes the restraint as a horizontal per se violation, much like the Ninth Circuit, which as explained above, is contestable.

F. *The Second Circuit*

In *Battipaglia,* Judge Winter's reasoning rests on the claim that the hold element is a per se violation.[179] As noted above, this is contestable for two reasons. First, it ignores the lack of agreement, and second, it characterizes the restraint as horizontal when it may be better analyzed as a vertical restraint.

In *Connecticut Fine Wine*, the Second Circuit did not disturb the District Court's finding that the restraint is hybrid.[180] The reasoning of the District Court, however, is questionable. It held post-and-hold was nearly identical to the scheme in *324 Liquor* but ignored the fact *324 Liquor* covered an RPM scheme.[181] In the latter, private price decisions are enforced against other parties, unlike in a post-and-hold scheme. The latter compels no such decision or action by a party other than the wholesaler and thus lacks the

[178] *Id.* at 209.

[179] *See* Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 179 (1984) (Winter, J., dissenting).

[180] Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 38–39 (2d Cir. 2019).

[181] Conn. Fine Wine & Spirits, LLC v. Harris, 255 F. Supp. 3d 355, 368–69 (D. Conn 2017).

element that makes a restraint hybrid. The District Court merely concluded that since they both have the same private action, they both are hybrid,[182] but did not consider that what makes a restraint hybrid is the government enforcing private decisions on other parties. This is the same reasoning that the Fourth and Ninth Circuits applied.

In his dissent from the denial of rehearing of *Connecticut Fine Wine* en banc, Judge Sullivan notes the Second Circuit opinion equivocated on the question of concerted action by agreeing the restraint was hybrid but finding no concerted action.[183] This is a valid critique. There is a tension between upholding the lower court's finding that the restraint is hybrid yet finding a lack of concerted agreement. However, under a proper analysis of the hybrid/unilateral distinction, the restraint is unilateral.[184] Instead Judge Sullivan rather argues that concerted agreement is not a prerequisite.[185] This misreads *Fisher*, as the hybrid/unilateral distinction serves the purpose of the concerted action inquiry. It is the framework by which one understands if state laws involve concerted action. The statement that the guiding principle is to preempt state laws that authorize or compel private parties to violate the antitrust laws does not necessarily mean one should read out the concerted action requirement out of the antitrust laws.

G. *Conclusion*

In *Fisher*, *Rice*, and the RPM cases, the courts clarified that regulatory power is additional power over the market enforced by the state that a firm would not have otherwise had. That is, a firm is empowered to act in a way that usually would be reserved for the state. In the RPM cases, firms acted as rate setters. In *Rice*, producers enacted *de jure* import controls. The state's grant of regulatory power, which would serve as a form of market power, is what makes a restraint hybrid. Post-and-hold involves no such grant. It does not enable a wholesaler to set a legally binding price floor for its retailers.

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[182] *Id.*

[183] Conn. Fine Wine & Spirits, LLC v. Seagull, 936 F.3d 119, 122 (2d Cir. 2019).

[184] *See supra* Part III.B.1.

[185] *Conn. Fine Wine*, 936 F.3d at 122.

It does not legally bar certain importers from importing its goods. While there is legal compulsion in post-and-hold, that compulsion is enforced only against the firm itself. Post-and-hold constrains the power of the parties it regulates, the wholesalers, rather than expanding it. The state remains the regulator, even if it does not actively set the price level. The Fourth and Ninth Circuits and the *Connecticut Fine Wine* district court misapplied the hybrid/unilateral distinction. They read the definition of regulatory power to include a firm's setting of its own prices. This was true in the RPM cases, but only because a firm's prices set a legal floor for distributors. Without the RPM element, post-and-hold involves no such regulatory power, and is thus a unilateral restraint.

IV. ADDITIONAL REASONS TO UPHOLD POST-AND-HOLD

A. *Twenty-First Amendment*

There is a significant body of Twenty-First Amendment jurisprudence regarding the Twenty-First Amendment's broad grand of regulatory authority over alcohol to the states.[186] It reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[187] While the two Circuits which considered the issue held post-and-hold is not protected, the issue appears contestable. This Note does not attempt to wade into that discussion, but merely notes a textualist approach to the Twenty-First Amendment may find a different result. The broad grant of state authority textually would appear to include antitrust immunity, and while the preemption inquiry may override it for constitutional concerns (e.g., the *Midcal* restraint could plausibly raise dormant commerce clause issues), it may supersede a statutory provision like the Sherman Act.

[186] *See e.g.*, TFWS, Inc. v. Schaefer, 242 F.3d 198, 211–13 (4th Cir. 2001); *see also* Lindsey Champlin, *Inebriated and Unbalanced:* TFWS, Inc. v. Schaefer's *Misguided Reconciliation of The Twenty-First Amendment With The Sherman Act*, 17 GEO. MASON L. REV. 1195, 1196 (2010).

[187] U.S. CONST. amend. XXI, § 2.

B. *Normative Concerns*

If post-and-hold laws aim to achieve several goals (e.g., avoiding price wars, ensuring transparency, ensuring orderly market conditions, and impacting market structure), the degree to which federal antitrust law should interfere with these goals is contestable.[188] Protection of the competitive process is the primary goal of contemporary antitrust doctrine, and arguments that competition itself is harmful are exceedingly unlikely to succeed when brought by a private party.[189] However, state and federal laws regularly impede the competitive process in areas where legislatures determine that maximal competition is undesirable. Rent caps, minimum wage laws (price floors for labor), anti-price gouging laws all suspend competition in a certain arena on the grounds of public good. If a goal is to deter overconsumption while still allowing people to make their own decisions, minimizing price wars or heavy discounting helps meet these goals.

At a higher level of generality, state-action doctrine constrains the set of acceptable forms of state regulation. That is, it limits the choices that a state legislature can make by enforcing competition as the default. A state can in some instances completely remove certain markets or parts of the market from competition, such as a state liquor monopoly, a regulated utility, or a rent cap. However, state action doctrine limits how states can regulate sectors by partially withdrawing them from competitive pressures, or allowing forms of coordination that are not sanctioned by current antitrust doctrine. A state, unlike the federal government, cannot legislate its way around the default of competition,[190] except by following the constrictive tests of *Midcal*, *Rice*, and *Fisher*. In markets with clear externalities where a perfectly competitive market may lead to a socially suboptimal outcome, state action doctrine can hinder the ability of states to constrain those externalities through normal democratic means.

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[188] *See, e.g.*, ASIL, *supra* note 3, at 46-49 (showing a positive correlation between post-and-hold laws and the number of total retail stores, and the number of independent retailers).

[189] Nat'l Soc. of Pro. Eng'rs v. United States, 435 U. S. 679 (1978).

[190] *See, e.g.*, 15 U.S.C. § 1291 (creating an antitrust exemption for sports broadcasting and for certain types of sports league mergers).

Opponents of post-and-hold would likely retort that the state itself can achieve its goals by actively regulating price levels (akin to the Fourth and Ninth Circuits' readings of *Midcal*), or by retaining the monopoly on liquor sales for itself. The issue, they may claim, is that the state is deputizing private actors to reach those goals, yet those private actors are private firms acting in their profit maximizing capacity. While this is at least partly true, this does not necessarily mean that states should lose their ability to allocate coordination rights in the liquor market if they choose not to retain them all for themselves. A state may find it more efficient to allow private firms to operate in some capacity than to run a monopoly. A state may prefer not to operate liquor stores out of moral concerns. Regardless of its precise rationale, if a state could eliminate or monopolize a market if it chose to do so, forcing it to submit that market to competitive pressures if it chooses not to eliminates a middle ground that federal lawmakers can consider, but state lawmakers are barred from.

C. *Empirical Evidence and Competitive Effects*

What of the competitive effects? The empirical evidence on post-and-hold's impact appears mixed from the academic literature.[191] Regardless, evidence strongly suggests consumer demand for alcohol in general is price elastic, meaning if post-and-hold (or other regulation) raises prices, consumers will buy and drink less alcohol, a reasonable policy goal for a state.[192] Conceptually, if a wholesaler with the lowest marginal cost aims to compete be lowering prices, post-and-hold could actually be advantageous for them. The hold element would make it more costly for a competitor to match a price decrease and sustain it for a month, meaning the

[191] *Compare* Christopher Conlon & Nirupama Rao, *The Cost of Curbing Externalities with Market Power: Alcohol Regulations and Tax Alternatives* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30,896, 2023) (finding post-and-hold laws reduce consumption and increase price), *with* Henry Saffer & Markus Gehrsitz, *The effect of post-and-hold laws on alcohol consumption* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21,376, 2015) (finding no significant impact of post-and-hold on price or consumption).

[192] *See, e.g.*, Frank J. Chaloupka, Michael Grossman & Henry Saffer, *The effects of price on alcohol consumption and alcohol-related problems*, 26 ALCOHOL RSCH. & HEALTH. 22, 23 (2002).

initial wholesaler could gain market share profitably. At a conceptual level it is not clear that post-and-hold hinders competition on the merits.

D. *The Robinson-Patman Act*

While there appears to be tension between the Sherman Act and post-and-hold schemes, the Sherman Act is not the only relevant antitrust statute. To be preempted, a state scheme must be facially inconsistent with the antitrust laws. While it is not enough to save a scheme from a clear facial conflict with the Sherman Act, it is worth noting that post-and-hold has elements quite similar to the Robinson-Patman Act (RPA).[193] The RPA bars price discrimination in the wholesale sale of goods, although it does allow for bona fide volume discounts insofar as they reflect efficiencies in delivery and transportation.[194] Post-and-hold schemes usually operate in conjunction with similar provision but bar even bona fide volume discounts. The RPA was likely intended to protect smaller retailers from larger rivals, a different goal than post-and-hold but they share a concern with ensuring similar access for consumers across geographies, barring conduct that could lower consumer prices, but involve other potential competition-related injuries.

[193] 15 U.S.C. § 13.
[194] *Id.* § 13(a).